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The cover photo has been taken in Gdansk by Emeline Ogereau, a Mário Soares Promotion student.

The "Monument to the Defenders of the Polish Post Office" in Gdansk commemorates the resistance of Poles to the Nazi invasion of 1939. Years later, Gdansk would have become a symbol of resistance and the home of the Solidarity movement - Solidarność, a forerunner to the end of Communism. Nothing more than disruptive actions can recall both the spirit of our first issue and the one of the Mário Soares Promotion, whose patron has been a source of continuous inspiration during the academic year. Actions that in the past have represented the defence of democracy and resistance to authoritarianism of all kinds. The Future of Europe has to represent the energies of the past to free itself from the destructive forces that put it at risk.

Contact the Executive Committee
duodecimastra@coleurope.eu

College of Europe, Natolin campus
Nowoursynowska 84, 02-797 Warszawa
Poland
contactnatolin@coleurope.eu

College of Europe, Bruges campus
Dijver 11, 8000 Brugge
Belgium
info@coleurope.eu



LIST OF VOLUNTEERS

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The Executive Committee would like to thank all the peer reviewers and the Scientific committee who believed in this project and supported it with their contributions.

Dear readers,

Welcome to the first issue of Duodecim Astra! We are an interdisciplinary, peer-reviewed journal of European studies run by College of Europe students. Launched by students of the 2020/21 Mário Soares promotion, the journal offers an opportunity for students and graduates to gain their first experiences from academic publishing.

Duodecim Astra welcomes submissions not only from College of Europe students and alumni, but also from writers from other universities. In this way, the journal helps strengthen the College's position as a leading arena for exchanging ideas on European integration. Just as the student body of the College consists of talented and motivated graduates from all over Europe and beyond, Duodecim Astra is a platform for a wide, international community of students to share their work.

Published during the Conference on the Future of Europe, the first issue bears the title "Future of Europe". The introductory contribution of the issue places the Conference in a historical context. Subsequently, other contributions discuss European integration and EU policies in various fields. The issue thus reflects the need for debate on practical policy issues facing Europe, while simultaneously reminding actors engaged in specific policy debates to bear in mind the big picture of the European project.

Launching an academic journal whilst completing an intensive Master's degree programme was a major undertaking for the students involved. As the student-run journal committee, we would like to thank the numerous volunteers from the College and beyond who have contributed to publishing the journal, including our editors, peer reviewers and copy editors. Moreover, we would like to thank College of Europe faculty members and Academic Assistants for their support and advice, and for the recognition they have given to the team's work. Finally, we would like to thank the authors who volunteered to contribute to this issue, and persistently work with our team throughout the multiple stages of the publishing process. Our collective work has enriched the academic life of the College and brought a new entry-level platform into the scholarly field of European studies.

We would like to specifically address students of the 2021/22 Éliane Vogel-Polsky promotion of the College. In the name of l'esprit du Collège, we encourage you to further develop Duodecim Astra, and to take this valuable initiative forward to future generations of College students!

Warm regards,

Duodecim Astra Committee, Mário Soares promotion.

TABLE OF CONTENTS

- 2 EUROPE'S OBSESSION WITH ITS FUTURE**
Robert Chaouad
- 12 LE SYSTÈME DES SPITZENKANDIDATEN: UNE INNOVATION POUR RENDRE L'UE PLUS DÉMOCRATIQUE?**
Alexander Kloth
- 26 ANALYSING THE EU'S MIGRATION-DEVELOPMENT NEXUS THROUGH THE LENS OF COMPETING POLICY FRAMES**
Marlies Humpelstetter
- 57 MORE EUROPEAN AFTER BREXIT? THE IMPACT OF THE UK'S LEAVE VOTE ON THE EUROPEAN IDENTITY OF THE REMAINING MEMBER STATES**
Lara Breitmoser
- 79 A NEW EUROPEAN NEIGHBOURHOOD WITHOUT THE EU'S NEIGHBOURHOOD CLAUSE: THE (POTENTIAL) SPECIAL RELATIONSHIP IN EU-UK RELATIONS UNDER ARTICLE 8 TEU**
Brendan Rooney
- 98 RUSSIA'S (UN)CONTROLLED DISINFORMATION**
Adriano Rodari
- 121 LA PROTECTION ENVIRONNEMENTALE DANS LES ACCORDS RÉGIONAUX DE LIBRE-ÉCHANGE : UNE ÉTUDE COMPARÉE**
Luis Galiano Bastarrica
- 142 HOW THE 'BRUSSELS EFFECT' COULD SHAPE THE FUTURE REGULATION OF ALGORITHMIC DISCRIMINATION**
Fabian Lütz
- 164 FROM BURDEN-SHARING JUSTICE TO HARM-AVOIDANCE JUSTICE: REIMAGINING THE EU'S APPROACH TO CLIMATE JUSTICE**
Kevin Le Merle
- 179 LE CAS CURIEUX DU MÉDIATEUR PARTIAL: PERCEPTIONS DE L'UE EN TANT QUE MÉDIATEUR DANS LE CONFLIT ISRAËLO-PALESTINIEN**
Julia Vassileva



Europe's Obsession With Its Future

*Robert Chaouad*¹

Abstract: Since the beginning of the 2000s, European Union institutions have launched several initiatives to reflect on and shape the future of the European project. Among them, we can mention the Convention on the Future of Europe in 2001; the Reflection Group on the Future of the EU 2030, created in 2007; the initiative of the European Commission concerning the future of Europe in September 2016; and more recently, the Conference on the Future of Europe, officially launched in May 2021. What I will argue in this article is the fact that all these initiatives on the future of Europe and the omnipresence of the future in EU rhetoric and on the European agenda these past two decades tell us more about the present state of the EU than of its future. These initiatives reveal the state of uncertainties in which the European project has entered since the 2000s, while the constant and explicit reference to the future of the EU in the public sphere also suggests a new articulation between the time-categories of the past, the present and the future in the European integration project.

Keywords: Initiatives on Europe's future, regime of historicity, European Union, legitimacy, European project

While some European nation-states are looking at their past with nostalgia for their glorious power and their sovereignty, real or fantasied,² or with the will to confront openly their tragic

¹ Robert Chaouad is an adjunct assistant professor of political science at the City University of New York (CUNY). He holds a Ph.D. in political science from the European Studies Institute of the University Paris 8. He edited several issues of *La Revue internationale et stratégique* (including "National Interest," 2017; "Forgiveness and Reconciliation in IR," 2013).

² See Robert Saunders, "Brexit and Empire: 'Global Britain' and the Myth of Imperial Nostalgia", *The Journal of Imperial and Commonwealth History* 48, no. 6 (2020): 1140-1174; and Anne Deighton, "The Past is the Present: British Imperial

experiences,³ or even with amnesia for the darkest time of their history, the European Union (EU) seems mainly preoccupied, today, by its future. Indeed, the EU, and before it, the European Economic Community (EEC), has always been concerned by its future. However, the way the EEC/EU has considered its future has been changing. The reference to the future was even implicitly present in the foundation of the European Communities, without requiring to be acknowledged and expressed *per se*. On May 9, 1950, the declaration of the French foreign affairs minister, Robert Schuman, often defined as one of the founding speeches of European integration, laid the groundwork to how European pioneers conceived the future. He pronounced the now well-known words, “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity,” prefiguring the creation of the European Coal and Steel Community (ECSC) in 1952, but also the fact that the European integration was a long-term project.

In 1957, the preamble of the Treaty of Rome, establishing the EEC, adopted a similar perspective. While the word “future” or other words directly associated with this semantic field were not explicitly mentioned, the goal of laying “the foundations of ‘an ever-closer union among the peoples of Europe’” also suggested that the quest for a united Europe will require time. By framing European integration in terms of process and steps, the European pioneers identified immediately the “regime of historicity” of the European integration as turned towards the future. By “regime of historicity”, I refer here to the notion coined by the French historian, François Hartog⁴, who defined it as the experience of time lived by a society and the way a community perceives and articulates the past, the present and the future. European integration was, since the beginning of the European project, a phenomenon ontologically oriented towards its future. Each accomplishment was only seen as a step prefiguring another one and the *telos* of Europe⁵, if it exists, was associated with always more integration. Even though the political forms that European integration should take were not clear and predetermined, the project established a “horizon of expectation,” to use the expression of the German historian Reinhart Koselleck⁶, that made the future the engine of European integration.

Memories and the European Question”, in *Memory and Power in Post-War Europe: Studies in the Presence of the Past*, ed. Jan-Werner Muller (Cambridge: Cambridge University Press, 2002), 100-120.

³ As is, for example, the case for some Eastern European countries confronted with the memory of communism since the 1990 but also, more recently, for a country like France vis-a-vis the colonial period in Algeria or even the genocide in Rwanda. See Georges Mink and Laure Neumayer (ed.), *L'Europe et ses passés douloureux* (Paris: La Découverte: 2007).

⁴ François Hartog, *Regimes of Historicity. Presentism and Experiences of Time*, Translated by Saskia Brown (New York: Columbia University Press, 2016).

⁵ On the notion of European *telos* (or rather the lack of European *telos*), the undetermined future political forms of the European Union and the “lack of explicit *political ends*”, see Kalypto Nicolaïdis, “Europe’s Ends”, in *The Meanings of Europe. Changes and Exchanges of a Contested Concept*, ed. Claudia Wiesner and Meike Schmidt-Gleim (London: Routledge/Taylor and Francis, 2014).

⁶ Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time*, Translated and with an Introduction by Keith Tribe (New York: Columbia University Press, 2004).

The institutional evolution of the EU offers a perfect example of the fact that, as the political scientist Kalypso Nicolaïdis describes it, the “European project is an open-ended process rather than a frozen structure”.⁷ The call for institutional transformations of the EEC/EU has always been a key issue in the history of the EU and a part of the European process. All the European treaties signed since the 1980s have brought some institutional changes and often initiated the next change by scheduling a new Intergovernmental Conference (IGC) in charge of reforming the current treaties. From Maastricht to Amsterdam, Nice and subsequent treaty reforms, the EU has always been engaged in a permanent transformational process, running after its future.

Paradoxically, from the 1950s to the 1990s, the reference to the past of European nations – their wars, their divisions, their confrontations – was never absent from European discourses and rhetoric. Indeed, the European past has served as a symbolic resource used by European pioneers to promote European integration. The European narrative that emerged after the 1950s and that predominated among the supporters of European integration was based on the idea that the future of the European states’ relationship should not resemble its contentious and violent past.⁸

In a way, if, implicitly, the future was the engine of European integration, the reference to the past was the fuel of this project. Since the 1950s, European institutions have tried to provide an historical background to European integration and to build a common narrative about the European past.⁹ For the historian Oriane Calligaro, the European politics of remembrance has led to the multiplication of references to European memory and heritage.¹⁰ If that illustrates how the past was mobilised in service of a political ambition, she also identified, in all those initiatives and strategies of remembrance, a shift in the time-category of European integration around the mid-1970s. For Calligaro, the European attempts to shape a common narrative about the European past have led to a new regime of historicity, called “presentism”, in reference to the notion coined by Francois Hartog to describe what happened when the future is no longer the time-horizon of societies and when present-time becomes its own horizon of time.

The past and the future have always been interlinked in the history of European integration, and these two time-categories have often been used to serve the present time of the European project, either to justify it or to legitimate it. However, it seems that these past two decades, the future of

⁷ Nicolaïdis, *op. cit.*, p. 237.

⁸ See Fabrice Larat, “Present-ing the Past: Political Narratives on European History and the Justification of European Integration”, *German Law Review* 6, no. 2 (2005): 263-278.

⁹ See Annabelle Littoz-Monnet, “The EU Politics of Commemoration. Can Europeans Remember Together?”, *West European Politics* 35, no. 5 (2012): 1182-1202.

¹⁰ Oriane Calligaro “Legitimation Through Remembrance? The Changing Regimes of Historicity of European Integration”, *Journal of Contemporary European Studies* 23, no. 3 (2015): 330-343. See also Oriane Calligaro, *Negotiating Europe. EU Promotion of Europeanness since the 1950s* (New York: Palgrave MacMillan, 2013); Oriane Calligaro and François Foret, “La mémoire européenne en action. Acteurs, enjeux et modalités de la mobilisation du passé comme ressource politique pour l’Union européenne”, *Politique européenne* 37, no. 2 (2012): 18-43.

Europe became a direct issue for several European actors. It does not mean that the problematic of the past has disappeared from the European agenda – at the national level or the EU level –; nevertheless, the future became a constant object of reflection for the EU, to the point that EU institutions launched several initiatives to think and shape their future. While this editorial doesn't pretend to produce definitive research outcomes, what I formulate here is more a hypothesis or even a perspective to feed the debate over the future of Europe and over what this time-category tells us about European integration today.

What I will argue in this editorial is that the state of uncertainty which the EU has dived into since the beginning of 2000 and the resurgence of conflicts of memory among and within the EU nations after the end of the Cold War has led the EU institutions to mobilise, consciously or not, the time-category of the future to emphasise what was at stake with the future of European integration and to potentially re-energise, or even re-legitimate, the European project.

To do so, I will describe briefly, using official documents, the emergence, at the beginning of 2000, of the different official European initiatives launched to reflect on the future of Europe and I will identify the main trends around which scholars, pundits, activists of the European cause, think tanks, and experts have addressed the topic. In this editorial, I will not emphasise the strategy of actors to use the future as a political resource for political goals, and neither will I focus on the potential competition between European institutions to control Europe's future initiatives. Even though the EU should not be considered as a monolithic bloc, and the fact that these initiatives over the future of Europe are the product of all the major European institutions (European Council, European Commission and recently the European Parliament) illustrate it, what matters here it is the fact that in these past two decades the question of Europe's future has been mentioned constantly in the European Union arena, and numerous initiatives about the future of Europe have been conducted by EU institutions and other European organisations. As a result, the idea of the future of Europe became part of the European public sphere and a legitimate problem requiring to be addressed. I will consider here the future of Europe not as a problem requiring some solutions, but as an existing discourse produced by different institutional actors and political entrepreneurs, and incorporated in the European agenda.

1. The EU's New Obsession With Its Future

At the end of the Cold War, traumas of the past came back to haunt several European nations – among them the memory of communism, but also conflicting memories among European states for events that happened during World War II or after 1945.¹¹ However, for the EU itself, the situation was different. It is mainly at the beginning of the 2000s and around the time of the enlargement of

¹¹ See Mink and Neumayer, *op. cit.*; and Marie-Claude Maurel and Françoise Mayer, *L'Europe et ses représentations du passé – les tourments de la mémoire* (Paris: L'Harmattan, 2008).

the EU to include several Central and Eastern European countries in 2004 that the way the EU articulated past and future had changed. Not only was the continent finally unified, but certain events such as the division concerning the military intervention in Iraq in 2003, and the French and Dutch rejection of the European constitution in 2005, propelled the European project into an era of uncertainties and of intense questioning. The implicit reference to the future contained in the European initiative ceased to be obvious, and so did the future of European integration. The idea of a mechanical progress of Europe towards more integration was challenged.¹² As a result, since the beginning of the 2000s, the EU changed how it envisioned its future, and nowadays the EU seems obsessed with its future. Since then, not only did European institutions, the member states, and the network of organisations promoting European integration, start to refer explicitly to the future of Europe, suggesting that the future was at stake, but also the issue became omnipresent in the EU's political initiatives, communication, and reflections.

Since 2000, the nature of the engine force of European integration has changed, as has the way the EU refers to the future. The "future" has become a political category explicitly mobilised by the EU and its member states in the public sphere, to address the crises the European project was facing.¹³ The multiple European initiatives that have been initiated since then to reflect and question the future of Europe attest to it.

These past 20 years, several European initiatives to reflect and act on the future of Europe have been launched. Among those initiatives, we can mention the Convention on the Future of Europe initiated by the declaration of Laeken (European Council) in December 2001, that ended in 2003 with the Treaty establishing a Constitution for Europe. If the Philadelphia Convention that led to the United States Constitution in 1787 was clearly the reference for the European Convention, it did not end in the same way: the European Convention lasted a few years, instead of a few months, and the outcome of this process was different. The European Constitution was rejected by two founding states (France and the Netherlands) in May 2005.

In 2004, the European Commission, presided by Romano Prodi, launched a new initiative: The publication of the report "Building a political Europe. 50 proposals for tomorrow's Europe"¹⁴ followed the roundtable "A sustainable project for tomorrow's Europe," presided by the former French economic minister Dominique Strauss-Kahn. This report identified three crises that the EU was facing – institutions, project, territory – and some solutions to remedy them.

¹² See, for example, the debates that occurred after the rejection of the European Constitution in 2005 and that can be illustrated by publication referring to the end of Europe. See, in French, Renaud Dehousse, *La fin de l'Europe* (Paris: Flammarion, 2005); even though the title was more provocative than really affirming the end of the European project.

¹³ Andrew Moravcsik, "The Future of Europe: Coping with Crisis", *Great Decisions* (2017): 15-28.

¹⁴ European Commission, *Building a political Europe. 50 proposals for tomorrow's Europe. The Strauss-Kahn report*. 2005.

In 2007, on the initiative of the European Council this time, a Reflection Group on the Future of the EU 2030, presided by the former Spanish Prime Minister, Felipe González, was created. The group released its report, “Project Europe 2030. Challenges and opportunities”¹⁵, in May 2010. In 2012, eleven foreign affairs ministers of EU member states created an informal reflection group on the future of Europe – they released their report in September of the same year.

After the British referendum on Brexit, in June 2016, the European Council, started a reflection on the future of the EU, followed, in September 2016, by a new initiative of the European Commission concerning the future of Europe, that released a “White Paper on the Future of Europe”¹⁶ in March 2017. The triple crisis diagnosed in 2004 became a “polycrisis,” to use the expression of the European Commission President, Jean-Claude Juncker. The White Paper described the issues the EU was confronted with (euro crisis, Brexit, migration, Euroscepticism, etc.), but also the drivers of Europe’s future, and identified five scenarios on the horizon of 2025.

In 2019–2020 came a new initiative concerning a Conference on the Future of Europe. Such an initiative was evoked in 2019¹⁷, initiated in January 2020 by the European Parliament and the European Commission, and, after having been delayed because of the COVID-19 crisis, officially launched on Europe Day, 9 May 2021. On 10 March 2021, the European Parliament President David Sassoli, Prime Minister of Portugal António Costa, representing the Presidency of the Council, and Commission President Ursula von der Leyen, who compose the Joint Presidency of the Conference, signed the Joint Declaration on the Conference on the Future of Europe. The goal of the conference is to allow European citizens to express their ideas on what they want for Europe. The conference is a part of an already long list of EU initiatives adopted in the past to close the gap between the European institutions and its citizens, to re-legitimize a project that is presented as disconnected from European peoples. The Commission President, Ursula von der Leyen, justified the project of the Conference on the Future of Europe by arguing that “People need to be at the very center of all our policies. My wish is therefore that all Europeans will actively contribute to the Conference on the Future of Europe and play a leading role in setting the European Union’s priorities. It is only together that we can build our Union of tomorrow.”¹⁸

¹⁵ Reflection Group on the Future of the EU 2030 (presided by Felipe González), “Project Europe 2030. Challenges and opportunities”, A report to the European Council, May 2010.

¹⁶ European Commission, *White Paper on the Future of Europe*, March 2017.

¹⁷ The French President, Emmanuel Macron, mentioned, in March 2019, in an open letter to European citizens published in different European newspapers, the idea of a Conference for Europe. In July, Ursula von der Leyen, advanced the idea of a Conference on the Future of Europe in the political guidelines for her mandate as President of the European Commission. In November, a “Franco-German non-paper on key questions and guidelines” concerning the Conference on the Future of Europe was unofficially made public; and during the European Council of 12 December, the idea of the Conference was endorsed.

¹⁸ European Commission, “Conference on the Future of Europe”, https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en.

This democracy initiative, supposed to last for a year, takes the form of debates, panel discussions and online forums “that will enable people from every corner of Europe to share their ideas to help shape Europe’s future.”¹⁹ On April 19, 2021, a multilingual digital platform (available in 24 EU official languages) was launched, on which citizens would be able to post their comments, share ideas and interact with each other about the future they want for Europe. In a sense, the conference is also seen as a response to growing Euroscepticism, or at least a certain form of disinterest towards the EU.

2. The Future of Europe as a Research Object

Indeed, all the initiatives on the future of Europe and the omnipresence of the future in EU rhetoric and on the European agenda these past two decades tell us more about the present state of the EU than of its future. These reflections reveal the state of uncertainties in which the European project is. It is because Europe’s past has exhausted a large part of its power as a symbolic resource aimed to justify European integration after World War II, and its present is confused, that the future is so overwhelmingly present in the European mindset.

This situation has led to the publication of numerous types of work trying to address the problems that the EU is facing.²⁰ Some of them are descriptive, while others are deliberately normative. The exercise consisting of thinking of EU’s future has often taken the form of analysis arguing in favour of more integration and offering some ways to achieve those goals. Despite the variety of the actors producing these analyses about the future of Europe (academics, think tanks, national and European official institutions, non-profit organisations), we can identify some general trends concerning the treatment of the topic.

There are different ways to study the future of Europe. While philosophical perspectives about the meanings of Europe²¹ and the ends of the European integration are rare²², traditional academic research in political science, think tanks policy papers and institutional reports are more likely to embrace perspectives that will emphasise the role of the EU in the world or internal development issues. International comparative perspectives evaluate quantitatively, through the use of economic

¹⁹ European Parliament, “Conference on the Future of Europe: Engaging with citizens to build a more resilient Europe”, 10 March 2021, <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99242/future-of-europe-engaging-with-citizens-to-build-a-more-resilient-europe>

²⁰ I should also mention the existence of publications arguing openly against European integration or predicting the end of the EU. They don’t represent the majority of publications and I will not focus on them in the next paragraphs.

²¹ See Claudia Wiesner and Mieke Schmidt-Gleim (ed.), *The Meanings of Europe. Changes and Exchanges of a Contested Concept* (London: Routledge/Taylor and Francis, 2014).

²² See Nicolaidis, *op. cit.*

and demographic data, the global place of the EU in the future in comparison to other countries and continents. This description drives us generally to the conclusion that, in 2050, the EU will represent only a small part of the world population, while its share of the world economy – defined in terms of GDP – will decrease relatively to the rise of emerging economies such as China, India and Brazil.²³ This comparative approach can also be doubled with an evaluation of the future international role of the EU.²⁴ Traditionally, such an approach takes the form of the study of the conditions under which the EU can become a global player and offers some analysis about the potential role of the EU in specific foreign policy issues (Mediterranean region, Eastern Europe, etc.). Nevertheless, when it comes to the future of Europe, the internal evolutions of the EU often represent the main centre of interest of studies. In this case, the future of European integration focuses on the internal political and institutional evolutions of the EU by offering different scenarios over what the EU will look like in the mid- and long terms, following a spectrum going from a more federal to a more intergovernmental union, and including some variations over the notion of differentiation. This institutional and political focus is often associated with a more normative approach describing what the EU should become in the future and provides an institutional and political agenda of reforms on how to reach this goal. This approach often relies on public policy case studies to illustrate their ambition.

This issue of the journal begins from an institutional internal approach, with Alexander Kloth's assessment of the capacity of the 'Spitzenkandidaten' process to democratise the EU. However, the issue goes beyond a purely institution-focused approach. Various contributions address the future of Europe through political and policy lenses, often closing the gap between external and internal EU challenges. For instance, Marlies Humpelstetter's article analyses the connections between the EU's development and migration policies, while Lara Breitmoser connects the British departure from the EU to the internal issue of the development of European identity. Meanwhile, Brendan Rooney's contribution addresses the EU's external relations with the UK, all the while approaching the question through the possibilities offered by the EU's internal legal framework. Similarly, Adriano Rodari's article sheds light on how Russian disinformation campaigns during the COVID-19 pandemic have been constituted, whilst pointing out that disinformation represents a challenge for the EU.

This issue also addresses global challenges that define our time, and so being, the future of Europe. While those global challenges affect the future of the EU, in return, the actions adopted by the EU to deal with them are expected to impact the world and make the EU a transformative player at the international level. In this vein, Fabian Lütz argues that regulatory action from the EU can combat the threat of algorithmic discrimination globally. Luis Galiano Bastarrica's discussion on environmental protection clauses in free trade agreements considers the EU's influence on the

²³ See Robert Chaouad, "Les fins possibles de l'Europe", *La revue internationale et stratégique* 80, no. 4 (2010): 127-137.

²⁴ As an example, see the contribution by the former German foreign minister, Joschka Fischer, "Europe 2030: Global Power or Hamster on a Wheel?", in *Europe 2030*, ed. Daniel Benjamin (Washington: Brookings Institution Press, 2010).

environmental action taken by partner regions. Meanwhile, Kevin Le Merle's contribution approaches climate change from a philosophical viewpoint, addressing the normative question of what responsibility each actor, including the EU, has for responding to the climate emergency. Finally, the issue turns to the EU's neighbourhood, with Julia Vassileva's article about the EU's capacity to mediate the Israeli-Palestinian conflict.

Overall, from democratic challenges to global issues such as migration and climate, the issue addresses questions facing not only the European continent, but the entire international community – demonstrating the French historian Lucien Febvre's idea that “the problem of Europe, it's the problem of the world”.²⁵

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²⁵ Course given at the Collège de France by Lucien Febvre in 1944-1945 and published in 1999. Lucien Febvre, *L'Europe. Genèse d'une civilisation. Cours professé au Collège de France en 1944-1945* (Paris: Librairie académique Perrin, 1999), 305.

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Le système des Spitzenkandidaten: Une innovation pour rendre l'UE plus démocratique?

Alexander Kloth¹

Résumé : L'échec du système des *Spitzenkandidaten* lors des élections européennes de 2019 a soulevé la question de savoir s'il s'agissait d'une innovation capable de rendre l'UE plus démocratique et devant donc être à nouveau appliquée lors de futures élections. C'est dans ce contexte qu'intervient cet article, en retraçant d'abord le débat juridique autour du système, puis en formulant des propositions pour son avenir. Il y est conclu que le système des *Spitzenkandidaten* peut effectivement être qualifié d'une innovation démocratique, mais qu'il doit être combiné à d'autres mesures afin de devenir un succès pour la démocratie de l'UE.

Mots-clés : Spitzenkandidaten, légitimité, listes transnationales, accord interinstitutionnel, élections

Introduction

La frustration, en particulier au sein du Parlement européen, a été grande lorsque l'ancienne ministre allemande de la défense Ursula von der Leyen a été proposée comme nouvelle présidente de la Commission par le Conseil européen le 2 juillet 2019². La raison d'une telle déception tient au fait que cette élection met en évidence l'échec du projet de réappliquer le soi-disant « système des *Spitzenkandidaten* » (chefs de file). Auparavant, beaucoup espéraient pérenniser ladite procédure afin de rendre l'Union européenne (UE) plus démocratique à long

¹ Alexander Kloth, LL.M., est un ancien du Collège d'Europe (promotion Hannah Arendt, 2019/20). Il a étudié le droit avec une spécialisation en droit européen et droit public international à la Freie Universität Berlin, où il obtient son diplôme (Erstes juristisches Staatsexamen) en 2019. Il est doctorant à la Freie Universität Berlin et assistant de recherche à la chaire du Prof. Christian Calliess en droit public et européen.

² Jon Stone, "This is not democracy : European Parliament unites to condemn selection of new EU Commission president behind closed doors", *Independent*, 4 juillet 2019, <https://www.independent.co.uk/news/world/europe/european-commission-president-ursula-von-der-leyen-juncker-eu-parliament-a8987841.html>.

terme.³ Cependant, la nomination inattendue et la désignation ultérieure de Mme. von der Leyen (qui n'a à aucun moment été l'une des *Spitzenkandidaten*) au poste de présidente de la Commission a considérablement freiné ces espoirs. Bien que le système des *Spitzenkandidaten* semble donc avoir échoué pour l'instant⁴, les membres du Parlement continuent d'insister sur son application lors des prochaines élections⁵ et la Présidente von der Leyen elle-même a également annoncé qu'elle avait l'intention d'en faire l'un des principaux thèmes de la Conférence sur l'avenir de l'Europe.⁶

Étant donné que le débat sur les *Spitzenkandidaten* est donc loin d'être clos, la question se pose de savoir si le système est une innovation capable de rendre l'UE plus démocratique ou si, comme certains le critiquent, il ne produit pas les effets souhaités et devrait donc être abandonné (du moins sous sa forme actuelle). Ainsi, nous expliquerons d'abord le concept de « Spitzenkandidaten » et son contexte (I.) et analyserons ensuite les arguments en faveur et contre cette dénomination (II.). Nous arriverons à la conclusion que le système des *Spitzenkandidaten* a, en principe, le potentiel de rendre l'UE plus démocratique, mais que dans sa forme présente, certains ajustements sont encore nécessaires (III.). Nous présenterons donc quelques propositions visant à améliorer le système des *Spitzenkandidaten* en tenant compte de l'occasion offerte par la Conférence sur l'avenir d'Europe (IV.).

1. Le système des Spitzenkandidaten : le contexte

1.1. Démocratie et légitimité dans l'UE

Selon l'article 10 du traité sur l'Union européenne (TUE), l'UE est une démocratie représentative fondée sur un concept de double légitimité.⁷ Cela signifie que l'UE tire sa légitimité démocratique d'une part des gouvernements des États membres et d'autre part directement des citoyens de l'Union.⁸ Sur le plan institutionnel, cette double légitimité est incarnée par le Conseil européen et le Conseil de l'Union européenne, au sein desquels les gouvernements des États membres sont représentés, et le Parlement, où siègent les députés européens directement élus par les

³ Décision du Parlement européen du 7 février 2018 sur la révision de l'accord-cadre sur les relations entre le Parlement européen et la Commission européenne, P8 TA(2018)0030, p. 4, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0030_FR.pdf.

⁴ Dave Keating, "Von der Leyen's in and the Spitzenkandidat's Dead", *Berlin Policy Journal*, 17 juillet 2019, <https://berlinpolicyjournal.com/von-der-leyens-in-and-the-spitzenkandidats-dead/>.

⁵ Beatriz Rios, "Parliament kicks off debate on the Future of Europe Conference," *Euractiv*, 16 janvier 2020, <https://www.euractiv.com/section/future-eu/news/parliament-kicks-off-debate-on-the-future-of-europe-conference/>.

⁶ Commission européenne, Donner forme à la conférence sur l'avenir de l'Europe, Communiqué de presse, 22 janvier 2020, https://ec.europa.eu/commission/presscorner/detail/fr/ip_20_89.

⁷ Thomas Holzner, "Das Europäische Parlament im Institutionsgefüge der EU – Verschiebung der Kräfteverhältnisse infolge der Durchsetzung eines Spitzenkandidaten als Kommissionspräsident?", *Europarecht (EuR)* 50, no. 5 (2015): 535-536.

⁸ *Ibid.*

citoyens.⁹ Cela démontre la nature de l'UE, qui est avant tout « une Union d'États et de citoyens »¹⁰. Cette logique se reflète également dans les dispositions du traité relatives à l'élection du président de la Commission.¹¹ L'article 17 (7) TUE prévoit que le futur président de la Commission soit élu par le Parlement sur proposition du Conseil européen. Dans sa proposition, le Conseil européen doit également « tenir compte des élections au Parlement ». L'élection du président de la Commission est donc basée sur un mélange des éléments de la légitimité étatique et de la légitimité civique.¹²

1.2. Le concept des *Spitzenkandidaten* et son histoire

L'application du système des *Spitzenkandidaten*, familier des démocraties parlementaires nationales, au niveau de l'UE remonte à une initiative des partis politiques à l'approche des élections européennes de 2014 et visait principalement à contrecarrer la tendance à la baisse constante de la participation aux élections européennes.¹³ Le concept des *Spitzenkandidaten* est – du moins à première vue – relativement simple : avant les élections, chaque parti politique doit proposer un candidat pour le poste de président de la Commission.¹⁴ Le candidat du parti qui, après les élections, obtient le plus grand nombre de sièges au Parlement et qui, par conséquent, mène la majorité parlementaire, deviendrait ainsi (automatiquement) président de la Commission.¹⁵ De cette manière, les citoyens auraient la possibilité d'influencer l'élection du nouveau président, au moins indirectement, par leur vote.¹⁶ Bien que le concept des *Spitzenkandidaten* ne soit donc pas comparable aux élections présidentielles directes, comme en France par exemple, il est basé sur la pratique des démocraties parlementaires de nombreux États membres, où le chef du gouvernement est aussi le leader de la majorité parlementaire, comme c'est le cas en Allemagne.¹⁷

⁹ Thierry Chopin et Yves Bertoncini, "Le choix des gouvernants de l'Union, pour un meilleur équilibre entre démocratie et *diplocratie*", *Le Grand Continent*, 20 novembre 2019, <https://legrandcontinent.eu/fr/2019/11/20/le-choix-des-gouvernants-de-lunion-pour-un-meilleur-equilibre-entre-democratie-et-diplocratie/>.

¹⁰ Jim Cloos, "Spitzenkandidaten : A debate about power and about the future development of the EU", *European Policy Brief* n° 56, 2019, p. 2. ; Thomas Holzner, op. cit., p. 535.

¹¹ Thomas Holzner, op. cit., p. 537.

¹² Cf. Thierry Chopin et Yves Bertoncini, loc. cit.

¹³ Thomas Christiansen et Karin Göldner, "EU-Spitzenkandidaten – neue Impulse und ihre Folgen für das politische System der EU", *integration* 38, no. 1 (2015): 26.

¹⁴ Cf. la définition du : European Parliamentary Research Service (EPRS), Election of the President of the Commission – Understanding the Spitzenkandidaten process, Briefing, PE 630.264, avril 2014, p. 1.

¹⁵ Ibid.; Notez toutefois, que le fonctionnement précis du système n'est pas entièrement clair : Juuso Järviemi, "If 'Spitzenkandidaten' are to work in 2024, we'll need clarity over what the system actually means", *The New Federalist*, 8 novembre 2020, <https://www.thenewfederalist.eu/if-spitzenkandidaten-are-to-work-in-2024-we-ll-need-clarity-over-what-the>.

¹⁶ Sophia Russack, "EU Parliamentary Democracy : How Representative ?", dans *Representative Democracy in the EU: Recovering Legitimacy*, ed. Steven Blockmans et Sophia Russack (Bruxelles/Londres : CEPS/Rowman & Littlefield International, 2019), 56.

¹⁷ European Political Strategy Centre (EPSC), Building on the Spitzenkandidaten Model – Bolstering Europe's Democratic Dimension, Issue 1, 2018, p. 4.

La base du traité pour le système des *Spitzenkandidaten* se trouve, comme préalablement mentionné, à l'article 17 (7) TUE. À première vue, cette disposition suggère que la nomination du président de la Commission relève essentiellement du Conseil européen, alors que le Parlement n'a que la possibilité de confirmer ou de rejeter le candidat proposé. Le rôle du Parlement, et donc en définitive l'influence des citoyens sur la composition de la nouvelle Commission, semble plutôt limitée par rapport aux États membres.

C'est là qu'intervient le système des *Spitzenkandidaten*, qui tente d'établir un lien plus fort entre la volonté de l'électorat et les institutions de l'UE, comblant ainsi le fossé existant entre les décideurs et les citoyens de l'UE.¹⁸ Le système des *Spitzenkandidaten* témoigne d'une volonté d'insuffler une nouvelle énergie et une nouvelle vitalité politique au processus de légitimité de l'UE et peut donc être considéré comme une réponse au déficit démocratique (supposé)¹⁹ de longue date dans l'Union.²⁰

Toutefois, l'émergence du système des *Spitzenkandidaten* n'est en aucun cas « un événement ponctuel, mais reflète plutôt une tendance à long terme dans le développement institutionnel de l'UE »²¹. Dans le prolongement du traité de Lisbonne, c'est le dernier maillon d'une chaîne de développements qui a renforcé le lien entre le Parlement européen et la nomination du président de la Commission.²² Depuis le traité de Maastricht en 1992, l'influence du Parlement à cet égard n'a cessé de croître.²³ Si le droit de participation du Parlement était initialement limité à la consultation et, depuis le traité d'Amsterdam, à l'avis conforme, son rôle a été considérablement renforcé par le traité de Lisbonne, notamment par l'article 17 (7) TUE, selon lequel le président de la Commission est « élu » par le Parlement.²⁴ En stipulant, en outre à l'article 17 (7), que le Conseil européen, lorsqu'il propose un candidat au poste de président de la Commission, doit tenir compte des élections au Parlement, l'article 17 (7) TUE, établit également pour la première fois un lien clair entre la nomination du président de la Commission et les élections européennes. « Sur la base d'une interprétation très offensive »²⁵ de ce libellé, le système des *Spitzenkandidaten* signifie que le Parlement aura un rôle beaucoup plus actif dans le choix des futurs dirigeants de la Commission.²⁶

¹⁸ Cf. European Parliamentary Research Service (EPRS), op. cit., p. 5.

¹⁹ La littérature académique n'est pas unanime sur l'existence d'un déficit démocratique dans l'UE, cf. Andrew Moravcsik, "Le mythe du déficit démocratique européen", *Raisons politiques* 10, no. 2 (2003): 87-105.

²⁰ European Political Strategy Centre (EPSC), op. cit., p. 2.

²¹ Ibid. p. 2., voir aussi Martin Westlake, "Chronicle of an Election Foretold: The Longer-Term Trends leading to the 'Spitzenkandidaten' procedure and the Election of Jean-Claude Juncker as European Commission President", *LEQS Paper* no. 102/2016.

²² European Parliamentary Research Service (EPRS), op. cit., p. 3.

²³ Cf. Simon Hix, "Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam", *British Journal of Political Science* 32, no. 2 (2002): 259-280.

²⁴ Cf. ibid., pp. 3-4 ; Johannes Müller Gómez et Wulf Reiners, "Rivalität mit System ? Zehn Jahre institutioneller Wettbewerb zwischen Europäischem Parlament und Europäischem Rat", *integration* 42, no. 4 (2019): 262-279.

²⁵ Thierry Chopin et Yves Bertoncini, loc. cit.

²⁶ En ce qui concerne le développement du rôle de Parlement : European Parliamentary Research Service (EPRS), op. cit., p. 3-4.

Le système des *Spitzenkandidaten* a été appliqué pour la première fois lors des élections européennes de 2014. Sous le slogan « this time it's different », cinq des groupes politiques ont alors présenté un candidat à la présidence de la Commission.²⁷ En fin de compte, c'était Jean-Claude Juncker, candidat du PPE et ancien Premier ministre du Luxembourg, qui a été proposé par le Conseil européen comme président de la Commission et finalement élu par le Parlement.²⁸ Cette première application du système des *Spitzenkandidaten*, qui a été perçue comme un succès par le Parlement²⁹, mais également très critiquée³⁰, devait être répétée lors des élections européennes de 2019. Déjà à l'approche des élections de 2019, le Parlement et la Commission étaient favorables à sa nouvelle application, l'établissant ainsi comme une procédure permanente.³¹ Le fait que cela ne se soit pas produit a déjà été expliqué dans l'introduction. Cela est dû en grande partie à la résistance du Conseil européen, qui a opposé son veto au système des *Spitzenkandidaten*, principalement pour des raisons de compétence.³² En outre, le changement de l'équilibre des pouvoirs au sein du Parlement européen est également susceptible d'avoir joué un rôle décisif.³³

Malgré l'échec de 2019, la discussion sur le système des *Spitzenkandidaten* n'est pas encore terminée. La question se pose donc de savoir s'il s'agit réellement d'une innovation démocratique qui mérite d'être poursuivie, ou si les critiques dont il fait l'objet sont justifiées.

2. Une innovation démocratique ?

Dans la section suivante, nous allons comparer les arguments des partisans du système des *Spitzenkandidaten* avec ceux de ses critiques. Ceux-ci seront ensuite évalués à la lumière de la question posée.

2.1. L'effet escompté

Aux yeux des partisans du système des *Spitzenkandidaten*, « un principe démocratique fondamental, qui s'appliquerait tant au niveau national qu'eupéen, veut que les partis politiques désignent des candidats, ce qui donne aux électeurs la possibilité de décider quelles politiques et quels dirigeants ils soutiennent »³⁴. En appliquant le système des *Spitzenkandidaten*, ce principe serait également pris en compte au niveau de l'UE.

²⁷ European Political Strategy Centre (EPSC), op. cit., p. 3

²⁸ Ibid., pp. 3-4.

²⁹ Décision du Parlement européen du 7 février 2018, P8_TA (2018)0030, p. 4.

³⁰ Cf. European Parliamentary Research Service (EPRS), op. cit., p. 6.

³¹ Parlement européen, op. cit., p. 4., cf. aussi : European Parliamentary Research Service (EPRS), op. cit., p. 7.

³² European Parliamentary Research Service (EPRS), op. cit., p. 7.

³³ Jim Cloos, op. cit., p. 4.

³⁴ Parti populaire européen, *Poll: Citizens want the Council to respect the Spitzenkandidat process*, 24 juin 2019, <https://www.epp.eu/press-releases/poll-citizens-want-the-council-to-respect-the-spitzenkandidat-process/>.

Pendant longtemps, les élections au Parlement européen ont été traitées comme des élections de second ordre³⁵ et principalement dominées par des questions nationales plutôt qu'européennes.³⁶ Grâce à la personnalisation associée au système des *Spitzenkandidaten*, les élections, en tant qu'acte central de la prise de décision démocratique dans l'UE, attireraient une fois encore davantage l'attention du public. Le système des *Spitzenkandidaten* serait ainsi le moyen idéal de rendre les élections européennes plus attrayantes et plus compréhensibles pour les électeurs grâce à la personnalisation, ce qui permettrait d'augmenter la participation électorale.³⁷ Cela contribuerait en fin de compte à renforcer la légitimité démocratique (plus particulièrement la *légitimité entrante*) de l'UE³⁸ et donc à contrecarrer le déficit démocratique³⁹ dans l'Union.⁴⁰

Selon ses partisans, le système des *Spitzenkandidaten* permettrait également de renforcer le lien, jusqu'ici faible, entre la volonté des électeurs et les dirigeants de l'UE.⁴¹ Cela ferait suite, entre autres, à un sondage du Parlement, d'après lequel 61 % des personnes interrogées sont d'accord avec l'affirmation selon laquelle « le lien plus fort entre les élections et la nomination du président de la Commission représente un progrès significatif pour la démocratie dans l'UE »⁴². En outre, le système des *Spitzenkandidaten* contribuerait à rendre le processus d'élection du président de la Commission plus transparent.⁴³ Jusqu'à présent, la nomination d'un candidat par le Conseil européen a souvent été le résultat de négociations opaques à huis clos.⁴⁴ Pour la première fois, le système des *Spitzenkandidaten* donne aux citoyens la possibilité d'élire le chef de l'exécutif (au moins indirectement, car ils ne peuvent voter que les partis politiques), renforçant ainsi la démocratie représentative.⁴⁵

Cela serait également conforme à la formulation modifiée de l'article 17 (7) TUE, selon laquelle le président de la Commission est « élu » par le Parlement et non plus simplement « confirmé » par ce dernier. Cependant, la formulation « élu » présuppose qu'il y a effectivement un choix entre plusieurs candidats, à savoir les *Spitzenkandidaten*.⁴⁶ Le fait que la procédure de la

³⁵ Voir Karlheinz Reif et Hermann Schmitt, "Nine Second-Order National Elections – A Conceptual Framework for the Analysis of European Results", *European Journal of Political Research* 8 (1980): 3-44.

³⁶ European Parliamentary Research Service (EPRS), op. cit., p. 5.

³⁷ Cf. Sara Hobolt, "A vote for the President? The role of Spitzenkandidaten in the 2014 European Parliament elections", *Journal of European Public Policy* 21, no. 10 (2014), 1521; Sophia Russack, "The problem with the Spitzenkandidaten system", *Centre for European Policy Studies*, 21 février 2018, <https://www.ceps.eu/ceps-publications/problem-spitzenkandidaten-system/>.

³⁸ Ibid.

³⁹ Voir supra n° 18.

⁴⁰ Julien Navarro, Giulia Sandri et Felix von Nostitz, "The Spitzenkandidaten System : Democratic Innovation or Window Dressing?", *Reconnect Blog*, 27 décembre 2018, <https://reconnect-europe.eu/blog/spitzenkandidaten-system/>.

⁴¹ European Parliamentary Research Service (EPRS), op. cit., p. 5; Hussein Kassim, "What's new? A first appraisal of the Juncker Commission", *European Political Science* 16 (2017): 16.

⁴² European Political Strategy Centre (EPSC), op. cit., p. 2.

⁴³ Parlement européen, op. cit., pp. 3-4.

⁴⁴ Cf. European Parliamentary Research Service (EPRS), op. cit., p. 6.

⁴⁵ Cf. ibid., p. 5.

⁴⁶ Ibid., p. 4.

nomination des *Spitzenkandidaten* ne soit pas explicitement réglementée dans le traité ne constituerait pas un obstacle, même si ledit article est ambigu dans une certaine mesure.⁴⁷ Les développements des dernières décennies ont démontré que le Parlement a toujours eu une longueur d'avance sur les traités dans sa recherche d'une plus grande influence sur la nomination de l'exécutif de l'UE.⁴⁸ La tendance du système des *Spitzenkandidaten* à mettre davantage l'accent sur l'aspect de la démocratie parlementaire dans l'UE fait partie de cette évolution qui a donné au Parlement un rôle croissant dans la nomination de la Commission.⁴⁹

2.2. Critiques du système des *Spitzenkandidaten*

Les opposants au système des *Spitzenkandidaten* – notamment le Conseil européen – rétorquent, qu'il ne produirait nullement les effets escomptés et en outre qu'il ne serait pas compatible avec l'équilibre institutionnel prévu par les traités.

Un sondage Eurobaromètre a notamment démontré que la satisfaction des citoyens quant au fonctionnement de la démocratie dans l'UE n'a que très peu augmenté entre 2014 et 2018 (de 40 % à 45 %).⁵⁰ À cela s'ajoute la difficulté de mener de véritables campagnes électorales européennes.⁵¹ En vertu de la loi électorale actuelle, les électeurs ne pouvaient voter directement pour un des *Spitzenkandidaten* que si l'un d'entre eux venait de leur propre pays.⁵² Par exemple, M. Frans Timmermans et M. Manfred Weber (respectivement les *Spitzenkandidaten* du S&D et du PPE aux élections 2019) étaient pratiquement inconnus de nombreux électeurs en dehors des Pays-Bas et de l'Allemagne.⁵³ De plus, il est presque impossible de faire campagne dans 27 pays et en 24 langues en même temps.⁵⁴ L'expérience a montré que les campagnes étaient concentrées seulement dans quelques grands États membres, car la taille d'un État membre est un facteur décisif en termes de nombre de sièges au Parlement.⁵⁵ L'effet escompté du système des *Spitzenkandidaten*, à savoir créer un lien durable entre les citoyens et l'UE, ne s'est donc pas concrétisé.⁵⁶ Il en va de même pour l'effet escompté sur la participation électorale. Bien que le taux de participation ait augmenté en 2019 pour la première fois depuis des décennies, cette hausse ne peut être que faiblement attribuée à l'application du système des *Spitzenkandidaten*, car il a beaucoup varié entre les États

⁴⁷ Cf. Thierry Chopin et Lukás Macek, "Réformer l'Union européenne : un impératif politique et démocratique", Policy Paper *Fondation Robert Schuman*, n°463, (2018), 3.

⁴⁸ European Parliamentary Research Service (EPRS), op. cit., p. 3.

⁴⁹ Cf. European Political Strategy Centre (EPSC), op. cit., p. 2.

⁵⁰ Cf. Julien Navarro, Giulia Sandri et Felix von Nostitz, op. cit.

⁵¹ Ibid.; Cf. aussi: Sara Hobolt, op. cit., pp. 1533-1537.

⁵² Jim Cloos, op. cit., p. 5.

⁵³ Ibid.

⁵⁴ Cf. Julien Navarro, Giulia Sandri et Felix von Nostitz, op. cit.

⁵⁵ Sophia Russack, "EU Parliamentary Democracy: How Representative", op. cit., p. 59.

⁵⁶ Ibid., p. 60.

membres.⁵⁷ En 2014, le taux de participation a même baissé⁵⁸ - malgré la nomination des *Spitzenkandidaten*. Par conséquent, le système des *Spitzenkandidaten* ne pourrait être décrit comme un « succès démocratique »⁵⁹.

Le seul effet que le système des *Spitzenkandidaten* a eu, est de nature institutionnelle, car il a considérablement accru l'influence du Parlement sur l'élection du président de la Commission. Il s'inscrit ainsi dans le processus du déplacement de la dynamique interinstitutionnelle de l'UE en faveur du Parlement.⁶⁰ Ce faisant, cependant, le système des *Spitzenkandidaten*, dans sa forme actuelle, ne tient pas compte de l'équilibre interinstitutionnel entre le Parlement et le Conseil européen prévu par les traités et donc de la nature hybride particulière de l'UE. Comme déjà mentionné auparavant, l'UE est basée sur un concept de double légitimité qui combine des éléments de parlementarisme et d'intergouvernementalisme. Le système des *Spitzenkandidaten* vise cependant à établir un système « quasi-parlementaire » en mettant l'accent sur la légitimité civique.⁶¹ Selon Cloos, « cela n'est pas compatible avec la philosophie qui sous-tend la structure institutionnelle de l'UE, qui repose sur deux volets de légitimité »⁶². L'UE n'est pas une véritable démocratie parlementaire, mais un « regimen mixtum »⁶³ dans lequel certaines décisions essentielles restent entre les mains des États membres en tant qu'auteurs des traités.⁶⁴

Dans ce contexte, il convient également de rappeler que la Commission ne correspond pas au gouvernement de l'UE.⁶⁵ Bien qu'elle tire sa légitimité à la fois des États membres et du Parlement, elle est, selon les traités, une institution totalement indépendante dont la mission est de défendre l'intérêt général.⁶⁶ En particulier, la Commission ne doit pas être dépendante d'une majorité politique au Parlement, sans quoi elle ne pourrait plus remplir son rôle de gardienne indépendante des traités.⁶⁷ La volonté d'appliquer à l'UE, par l'introduction du système des *Spitzenkandidaten*, les modèles de démocratie parlementaire traditionnels des États membres serait ainsi incompatible avec le caractère hybride particulier de l'UE en tant qu'entité composée d'États et de citoyens.⁶⁸

⁵⁷ Cf. Kenneth Armstrong, "Has the Spitzenkandidaten System Failed and Should We Care?", *Verfassungsblog*, 4 juillet 2019, <https://verfassungsblog.de/has-the-spitzenkandidaten-system-failed-and-should-we-care/>.

⁵⁸ Parlement européen, "Participation par année", 2019, <https://www.europarl.europa.eu/election-results-2019/fr/participation/>.

⁵⁹ Sophia Russack, "EU Parliamentary Democracy: How Representative", op. cit., p. 59.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Jim Cloos, op. cit., p. 4.

⁶³ Jan-Herman Reestman et Leonard Besselink, "Spitzenkandidaten and the European Union's System of Government", *European Constitutional Law Review* 15, no. 4 (2019), 609.

⁶⁴ Sophia Russack, *EU Parliamentary Democracy : How Representative*, op. cit., pp. 59-60.

⁶⁵ Jim Cloos, op. cit., p. 4.

⁶⁶ Cf. article 17 (1) et (3) TUE.

⁶⁷ Cf. European Parliamentary Research Service (EPRS), op. cit., p. 6. ; Mark Dawson, "Should the EU think twice before dumping its Spitzenkandidaten?", *Verfassungsblog*, 30 mai 2019, <https://verfassungsblog.de/should-the-eu-think-twice-before-dumping-its-spitzenkandidaten/>.

⁶⁸ Cf. Sophia Russack, "EU Parliamentary Democracy: How Representative", op. cit., p. 61.

3. Un projet prometteur...

A la lumière de la question posée dans l'introduction et des arguments préalablement présentés dans les deux parties précédentes, nous pouvons faire les remarques suivantes : à titre préliminaire, il convient de noter que ni les arguments des partisans ni ceux des critiques ne peuvent être complètement rejetés. Il est donc nécessaire de les peser soigneusement.

Quant aux inquiétudes institutionnelles soulevées, notamment par le Conseil européen, la compatibilité du système des *Spitzenkandidaten* dans sa forme actuelle avec les traités apparaît en effet douteuse.⁶⁹ La raison en est que le renforcement du rôle du Parlement dans l'investiture du président de la Commission, qui est l'objectif du système des *Spitzenkandidaten*, se fait inévitablement au détriment de la légitimité conférée par les gouvernements des États membres.⁷⁰ Toutefois, le principe de double légitimité exprimé à l'article 17 (7) TUE est l'une des caractéristiques structurelles essentielles de l'UE et nécessite une coopération entre le Parlement et le Conseil européen.⁷¹ L'automatisme créé par l'application du modèle des *Spitzenkandidaten* entre le résultat des élections au Parlement et la désignation d'un candidat au poste de président de la Commission menace de priver le Conseil européen de sa compétence et de sa marge de manœuvre, comme le prévoient les traités, et semble donc incompatible avec l'équilibre institutionnel de l'Union.⁷² Dans ce contexte, le caractère hybride de l'UE conduit donc à une situation paradoxale dans laquelle l'augmentation du parlementarisme, ne se traduirait pas nécessairement par une augmentation de la légitimité démocratique, mais plutôt par une diminution de celle-ci.⁷³ À l'avenir, il ne pourra donc subsister que si la nomination du président de la Commission n'est pas le résultat d'un automatisme et que le Conseil européen dispose d'une marge de manœuvre suffisante.

Mises à part ces préoccupations juridiques, en ce qui concerne le concept de base du système des *Spitzenkandidaten*, nous pouvons toutefois affirmer qu'il s'agit effectivement d'un projet prometteur qui a le potentiel de rendre l'UE plus démocratique. En améliorant la transparence du processus de nomination du président de la Commission et en augmentant la visibilité des élections européennes en général, le système des *Spitzenkandidaten* permet de renforcer la légitimité démocratique de l'UE (plus précisément, le volet civique de la double légitimité). Il s'ensuit qu'il ne doit pas être abandonné⁷⁴, mais que « l'expérience soit poursuivie »⁷⁵. De même,

⁶⁹ Cf. Thomas Holzner, op. cit., pp. 530-538.

⁷⁰ Ibid., pp. 536-537.

⁷¹ Cf. la déclaration n° 11 ad article 17, paragraphes 6 et 7, du traité sur l'Union européenne.

⁷² Cf. Jim Cloos, op. cit., p. 4. ; Voir aussi la déclaration de Donald Tusk : Conseil européen, "Réunion informelle des 27 chefs d'État ou de gouvernement, 23 février 2018", 23 février 2018, <https://www.consilium.europa.eu/en/meetings/european-council/2018/02/23/>.

⁷³ Thomas Holzner, op. cit., p. 537.

⁷⁴ Johanna Edthofer et Paul Schmidt, "The future of the EU's Spitzenkandidaten procedure", *ÖGfE Policy Brief*, 5 avril 2021, p. 9.

⁷⁵ Commission européenne, "Président Jean-Claude Juncker : Discours sur l'état de l'Union 2017", 13 septembre 2017, https://ec.europa.eu/commission/presscorner/detail/fr/SPEECH_17_3165.

il est clair que le système des *Spitzenkandidaten* n'est pas une panacée, mais que, afin de conduire à un renforcement durable de la démocratie dans l'UE et d'exploiter pleinement ce potentiel, il doit nécessairement être accompagné par d'autres mesures.⁷⁶

4. Le système des *Spitzenkandidaten* à l'avenir

L'échec du système des *Spitzenkandidaten* lors des élections de 2019 a montré qu'il n'est pas viable sous sa forme actuelle. Dans son premier discours au Parlement européen⁷⁷, Mme von der Leyen avait donc exprimé sa volonté d'améliorer le système des *Spitzenkandidaten* et en plus annoncé la tenue d'une Conférence sur l'avenir de l'Europe, qui devait commencer en 2020. En raison de la pandémie, son début a toutefois dû être reporté. La conférence a finalement été lancée le 9 mai 2021 à l'occasion de la Journée de l'Europe à Strasbourg.

Notamment en vue des prochaines élections de 2024, la Conférence offre une occasion unique de tenir un débat sur l'avenir du système de *Spitzenkandidaten*. C'est dans ce contexte que s'inscrivent les deux propositions suivantes qui visent à améliorer le système dans le cadre des traités existants. Cela ne nécessite pas une modification des traités qui altérerait l'équilibre institutionnel au sein de l'UE.⁷⁸ Les traités existants offrent des options suffisantes pour les ajustements nécessaires.⁷⁹ Par ailleurs, il n'existe actuellement aucune volonté politique de modifier les traités (du moins de la part des États membres).⁸⁰

4.1. Listes transnationales

En ce qui concerne les faiblesses du système des *Spitzenkandidaten* en termes de visibilité et de légitimité, l'introduction de listes transnationales, qui a déjà fait l'objet de nombreuses discussions⁸¹, doit être considérée⁸². Les élections de 2019 ont montré que le système des *Spitzenkandidaten*, combiné à une campagne électorale dominée par les questions européennes, peut conduire à une participation électorale plus élevée et donc à une plus grande légitimité.

⁷⁶ European Parliamentary Research Service (EPRS), op. cit., p. 5.

⁷⁷ Commission européenne, "Discours d'ouverture de la session plénière du Parlement européen, Ursula von der Leyen, Candidate à la présidence de la Commission européenne", 16 juillet 2019, https://ec.europa.eu/commission/presscorner/detail/fr/speech_19_4230.

⁷⁸ Sophia Russack, "How to appoint a Commission President" dans *Deliberative Democracy in the EU: Countering Populism with Participation and Debate*, ed. Steven Blockmans et Sophia Russack (Brussels/London, CEPS/Rowman & Littlefield International, 2020), 144.

⁷⁹ Johanna Edthofer et Paul Schmidt, op. cit., p. 9; Sophia Russack, "How to appoint a Commission President", op. cit., p. 144.

⁸⁰ Maia de la Baume, "What is the Conference on the Future of Europe?", *Politico Europe*, 4 mars 2021, <https://www.politico.eu/article/what-is-the-conference-on-the-future-of-europe/>; Yvonne Nasshoven, "'To be or not to be' – Das Spitzenkandidatenprinzip in der Europawahl 2019 und zukünftige Szenarien", *integration* 42, no. 4 (2019), p. 294.

⁸¹ Cf. Déclaration de Meseberg – Renouveler les promesses de l'Europe en matière de sécurité et de prospérité, 19 juin 2018, <https://www.elysee.fr/emmanuel-macron/2018/06/19/declaration-de-meseberg-renouveler-les-promesses-de-l-europe-en-matiere-de-securite-et-de-prosperite>.

⁸² Cf. Jim Cloos, op. cit., p. 6 ; Yvonne Nasshoven, op. cit., p. 295.

Toutefois, cet effet demeure limité tant que les *Spitzenkandidaten* restent des candidats nationaux sur la base de la loi électorale en vigueur. Actuellement, ils ne peuvent être élus que par les citoyens de l'État membre sur la liste nationale duquel ils figurent. Les listes transnationales, en revanche, permettraient à tous les électeurs européens de voter pour l'un des *Spitzenkandidaten*⁸³, ce qui pourrait se traduire par une visibilité augmentée de ceux-ci. Ainsi les *Spitzenkandidaten* deviendraient des candidats éligibles pour tous les citoyens de l'UE. À long terme, cela pourrait contribuer à l'émergence d'un *demos* européen et faire des élections au Parlement européen de véritables élections européennes. L'introduction de listes transnationales, mise en œuvre par une réforme de la loi électorale en vertu de l'article 223 TFUE⁸⁴, serait donc un moyen de lever les réserves existantes sur le système des *Spitzenkandidaten*, tout en préservant ses avantages pour la démocratie dans l'UE. Bien que le système des *Spitzenkandidaten* puisse probablement être mis en place effectivement sans des listes transnationales, celles-ci constitueraient une contrepartie importante pour soutenir la légitimité du processus.⁸⁵ Toutefois, il faut noter que cela ne résoudrait pas les difficultés liées à la conduite des campagnes électorales dans toute l'UE. Il incomberait donc aux partis politiques de développer des stratégies appropriées.⁸⁶

4.2. Accord interinstitutionnel

Les difficultés liées à l'équilibre institutionnel pourraient être résolues par la conclusion d'un accord interinstitutionnel entre le Parlement et le Conseil européen sur la base de l'article 295 TFUE.⁸⁷ Ainsi, le système des *Spitzenkandidaten* ne ferait pas l'objet de réserves juridiques et recevrait le soutien du Conseil européen. Dans le cas contraire, l'influence positive du système des *Spitzenkandidaten* sur le processus de légitimité dans l'UE pourrait être remise en question. En ce qui concerne le contenu d'un tel accord, Russack a récemment fait des propositions intéressantes⁸⁸, dont l'objectif principal est d'assurer aux deux institutions un rôle égal dans la nomination du président de la Commission, conformément à l'article 17 (7) TUE. Selon elle, un tel accord pourrait inclure, entre autres, des règles pour la désignation conjointe de *Spitzenkandidaten* ainsi que pour les cas où – comme en 2019 – il n'y aurait pas de majorité pour un candidat au parlement après l'élection.⁸⁹

Conclusion

⁸³ Jim Cloos, *Ibid.*

⁸⁴ Sophia Russack, "How to appoint a Commission President", *op. cit.*, p. 144; Johanna Edthofer et Paul Schmidt, *op. cit.*, p. 4.

⁸⁵ Sophia Russack, "How to appoint a Commission President", *op. cit.*, p. 139.

⁸⁶ Cf. les propositions du : European Political Strategy Centre (EPSC), *op. cit.*, p. 9.

⁸⁷ Cf. Holzner, *op. cit.*, pp. 538-540. ; dans la même ligne : Daniel Gros et Sophia Russack, "The Nomination of von der Leyen – Towards institutional balance in a reformed lead candidate process", *Centre for European Policy Studies*, 12 juillet 2019, <https://www.ceps.eu/the-nomination-of-von-der-leyen/>.

⁸⁸ Sophia Russack, *How to appoint a Commission President*, *op. cit.*, pp. 139-145.

⁸⁹ *Ibid.*, pp. 142-144.

L'objectif de cet article était d'examiner si le modèle *Spitzenkandidaten* peut être qualifié à juste titre d'innovation qui rend l'UE plus démocratique. Dans ce but, nous avons d'abord examiné son contexte juridique, son histoire, ainsi que les arguments de ses partisans et de ses opposants, afin de soumettre ensuite ces derniers à une évaluation critique. En conclusion de cette analyse, nous pouvons tout d'abord affirmer que le système des *Spitzenkandidaten* est effectivement une innovation, tant d'un point de vue juridique que politique, car la procédure n'est pas prévue dans les traités (l'article 17 (7) TUE). Toutefois, la question de savoir s'il s'agit également d'une innovation qui contribue à rendre l'UE plus démocratique mérite une réponse différenciée.

D'une part, il faut garder à l'esprit que le principe de la double légitimité de l'UE exige que la désignation du président de la Commission incombe à parts égales au Parlement et au Conseil européen. La procédure prévue à l'article 17 (7) TUE ne doit donc pas être réduite à un automatisme en faveur du Parlement, qui rendrait superflue la participation du Conseil à ladite procédure, affaiblissant ainsi l'élément étatique de la double légitimité.

D'autre part, le système des *Spitzenkandidaten* contribue à augmenter la visibilité des élections européennes et à rendre la désignation du président de la Commission plus transparente, ce qui renforce son volet civique. Même s'il n'est pas encore clair que l'application du système des *Spitzenkandidaten* entraînera également une augmentation de la participation électorale comme espéré, il a tout à fait le potentiel de rendre l'UE plus démocratique à long terme.

Il s'ensuit que le système des *Spitzenkandidaten*, bien qu'il ne soit pas parfait en soi, peut être qualifié d'innovation pour rendre l'UE plus démocratique. Toutefois, il ne sera un succès pour la démocratie de l'UE qu'en combinaison avec d'autres mesures⁹⁰ comme l'introduction des listes transnationales ou un accord interinstitutionnel entre le Parlement et le Conseil européen. L'UE devrait donc saisir l'occasion offerte par la Conférence sur l'avenir de l'Europe pour tenir un débat ouvert et constructif sur le système des *Spitzenkandidaten*, qui pourrait conduire à un renforcement de la démocratie en Europe. Il serait regrettable que l'UE décide d'abandonner un projet démocratique aussi important et prometteur que le système des *Spitzenkandidaten*.⁹¹

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⁹⁰ Cf. les propositions de : Thierry Chopin et Lukás Macek, op. cit., pp. 3-8.

⁹¹ Cf. aussi: Mark Dawson, op. cit.

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Analysing the EU's Migration-Development Nexus Through the Lens of Competing Policy Frames

Marlies Humpelstetter¹

Abstract: The relationship between migration and development is a contentious subject and has generated diametrically opposed conceptualisations of its causal link. Some scholars regard migration primarily as a symptom and even aggravator of underdevelopment in the global South, while others instead tout the potential development benefits of migration. These wildly different views are reflected in the contradictory and at times empirically flawed paradigms that define the EU's discourse on the migration-development nexus. This article uses policy frames as its main conceptual tool to identify and analyse the two competing paradigms of the migration-development nexus in the EU's discourse. For this purpose, content analysis will be applied to the EU's agenda-setting documents from the years 2011 to 2020. The main finding is that the 2015 migration 'crisis' constitutes a significant turning point for the EU's framing of the migration and development relationship. It has prompted a shift of policymakers' focus from maximising the development potential of migrants towards addressing the root causes of migration flows to Europe through development aid. However, the present research shows that despite the diminished importance of the migration-for-development paradigm, some of the frame's key concepts, like the facilitation of remittances, have become constant features of the EU's migration governance and continue to influence policymaking.

Keywords: Migration, development, EU, policy frames, crisis

Introduction

Questions about the relationship between migration and development have generated fierce debate, extensive research but little consensus. In a world that is marked by dramatic differences of wealth and economic development between regions, countries and continents, migration has

¹ Marlies Humpelstetter is from Austria and studied Politics and Philosophy at the University of Glasgow. She is currently undertaking a master's degree programme in EU Political and Governance Studies at the College of Europe. Her academic interests include public policy, migration and European neighbourhood policy.

been interpreted as both the result of and a potential solution for such inequalities.² Faced with these complicated geo-political realities, EU policy-makers have increasingly sought to link migration and development policies in an attempt to create more comprehensive, long-term solutions.

The present article sets out to analyse the discourse on the migration and development nexus in the EU's external relations policy. For this purpose, policy frames will be employed as the main conceptual tool. This will be useful for understanding the migration-development linkage in the EU, since this policy field has experienced significant external shocks in recent years. The influx of migrant arrivals, particularly in 2015/16, has been commonly referred to as a 'migration crisis'.³ It should be noted that this characterisation is contentious among scholars; however, the common perception of the event as a crisis is relevant for this analysis.

Considering that even comparatively minor shocks have been shown to prompt the internal renegotiation of policy frames⁴, it is expected that the far-reaching consequences of the 2015 migration 'crisis' also manifest themselves in the shifts and changes of narratives within the EU's policy discourse. By applying qualitative content analysis methodology to agenda-setting policy documents, I will identify and map the defining policy frames in order to answer the following research question:

How (if at all) has the EU's discourse on the migration-development nexus changed in response to the 2015 migration 'crisis'?

When reviewing the existing literature on the migration-development nexus, the first important insight is that broadly speaking two separate, yet intersecting discourses exist: an academic and a policy discourse.⁵ In order to build a conceptual framework, I will first review the literature on the academic debate. I will outline different historical phases characterised by either migration optimism⁶ or migration pessimism⁷. This means that the link between migration and

² Robert E. B. Lucas, "Migration and economic development: an introduction and synopsis", in *International Handbook on Migration and Economic Development*, ed. Robert E. B. Lucas (Cheltenham: Edward Elgar Publishing, 2014), 1-8; Ronald Skeldon, *Migration and Development: A Global Perspective* (Harlow: Addison Wesley Longman, 1997).

³ Anna Knoll, "The EU's Approach to African Migration During Crisis: Reinforcement and Changes", in *Migration Conundrums, Regional Integration and Development. Africa's Global Engagement: Perspectives from Emerging Countries*, ed. Inocent Moyo, Christopher Changwe Nshimbi and Jussi Laine (Singapore: Palgrave Macmillan, 2020).

⁴ Sandra Lavenex and Rahel Kunz, "The Migration-Development Nexus in EU External Relations", *European Integration* 30, no. 3 (2008): 439-457.

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⁶ Ninna Nyberg-Sørensen, Nicholas Van Hear and Poul Engberg-Pedersen, "The Migration-Development Nexus: Evidence and Policy Options", *International Migration* 40, no. 5 (2002): 49-71; Nicola Piper, "The Complex Interconnections of the Migration-Development Nexus", *Population, Space and Place* 15, no. 2 (2009): 93-101; Alan Gamlen, "The New Migration and Development Optimism: A Review of the 2009 Human Development Report", *Global Governance* 16, no. 3 (2010): 415-422; Martin Geiger and Antoine Pécoud, "Migration, development and the 'migration and development nexus'", *Population, Space and Place* 19, no. 4 (2013): 369-374.

⁷ see Hein de Haas, "Migration and Development: A Theoretical Perspective", *International Migration Review* 44 (2010): 227-264; Hein de Haas, "The Migration and Development Pendulum: A Critical View on Research and Policy", *International Migration* 50, no. 3 (2012): 8-25; Thomas Faist, "Migrants as Transnational Development Agents:

development is either conceptualised as a positive relationship, i.e. more migration leads to more economic development, or as a negative relationship, i.e. increasing development abroad will effectively reduce migration⁸ (see Figure 1 and 2 for a schematic representation).

It is important to note that especially more recent scholarship has attempted to overcome this dichotomy by uncovering the more nuanced and complex ways in which migration and development are interlinked. However, the purpose of this article is not to research the actual connection between migration and development, but rather to analyse how the EU conceptualises the nexus and how this in turn informs its policies. I find that the EU's discourse is defined by two competing conceptualisations, which reflect (in a largely simplified form) the migration pessimism or migration optimism from the academic discourse. They give rise to two opposing policy approaches with different priorities, aims and strategies.⁹ To demonstrate this, I will review the literature on the "root causes approach"¹⁰, which unpacks and problematises the idea that development aid can be instrumentalised to drastically reduce migratory flows to the EU. Subsequently, I will trace the emergence of a positive migration-development nexus in EU policy¹¹ and describe how the corresponding "development policy approach" aims to harness the development potential of migrants but is in practice frequently secondary to the EU's security concerns¹².

Most of the literature analyses the EU's migration-development nexus through the lens of either a positive or a negative conceptualisation. Some scholars have pointed out the existence of two contradictory paradigms within the EU's migration-development policy field¹³; however, an analysis of these approaches over time has yet to be conducted. I suggest that we can fill this gap and gain a more comprehensive understanding of the EU's discourse on the migration-development nexus by framing and operationalising the root causes approach and the development approach as two competing policy frames. For this reason, the final section of the literature review

An Inquiry Into the Newest Round of the Migration-Development Nexus", *Population, Space and Place* 14, no. 1 (2008): 21-42; Thomas Faist and Margit Fauser, "The Migration-Development Nexus: Toward a Transnational Perspective", in *The Migration-Development Nexus – A Transnational Perspective*, ed. Thomas Faist, Margit Fauser and Peter Kivisto (London: Palgrave Macmillan, 2011), 1-26.

⁸ de Haas, "The Migration and Development Pendulum", *op. cit.*

⁹ Ferruccio Pastore, "Europe, Migration and Development: Critical Remarks on an Emerging Policy Field", *Development* 50 (2007): 56-62.

¹⁰ Saskia Gent, "The Root Causes of Migration: Criticising the Approach and Finding a Way Forward", *Sussex Migration Working Paper* 11 (September 2002); Hein de Haas "Turning the Tide? Why 'Development Instead of Migration' Policies are Bound to Fail", *International Migration Institute Working Paper* 2 (2006); Marco Caselli, "'Let Us Help Them at Home': Policies and Misunderstandings on Migrant Flows Across the Mediterranean Border", *Journal of International Migration and Integration* 20, no. 4 (2019): 983-993; Susi Dennison, Shoshana Fine and Richard Gowan, "False Moves: Migration and Development Aid", *European Council on Foreign Relations*, 2019.

¹¹ Lavenex and Kunz, *op. cit.*; Elizabeth Collette, "The 'Global Approach to Migration': Rhetoric or Reality?", *European Policy Centre*, 2007; Natasja Reslow, "Migration and Development? An Assessment of Recent EU Initiatives", *Journal of Contemporary European Research* 6, no. 1 (2010): 3-21; Pastore, *op. cit.*

¹² Meng-Hsuan Chou, "EU and the Migration-Development Nexus: What Prospects for EU-Wide Policies?", *Centre on Migration, Policy and Society Working Paper* 37 (2006).

¹³ see for example Pastore, *op. cit.*; Knoll, *op. cit.*; Anna Knoll and Frauke de Weijer, "Understanding African and European Perspectives on Migration: Towards a Better Partnership for Regional Migration Governance?", *European Centre for Development Policy Management Discussion Paper* 203 (2016).

is dedicated to defining policy frames as conceptual tools for policy analysis and establishing their usefulness within a crisis context.¹⁴

Finally, in the empirical chapter, content analysis will be applied to key policy documents between 2011 and 2020 in an effort to map the evolution and relative emphasis of these competing policy frames over time. By contextualising and situating the findings within existing literature, this article will draw conclusions about the effects of the 2015 migration crisis on the EU's migration and development discourse.

1. The Migration-Development Relationship: A Conceptual Framework

1.1 *The Academic Debate*

Research into the mechanisms of migration-development interaction has historically swung back and forth between optimistic and pessimistic perspectives about the possible harm or benefit of emigration for the economic development of sending countries. The last two decades have seen a “renaissance in optimism”¹⁵, evidenced by a proliferation of research into the potential of migrants, diasporas and transnational communities to generate economic development in their countries of origin.¹⁶ The following section will outline the different phases of the debate, each characterised by either a positive or a negative framing of the relationship between migration and development. On this basis, it will then be argued that for a comprehensive analysis of migration and development linkages in the EU, it is necessary to go beyond the currently dominant positive conceptualisation.

1.1.1. *From Optimism to Pessimism and Back to Optimism*

The relationship between migration and development has been a subject of academic inquiry since the emergence of migration studies as an area of research.¹⁷ It has gone through different phases which tended to mirror the views of social and development theories that were contemporaneously dominant.¹⁸ The first major surge in interest took place in the 1960s and was underpinned by neo-classical and developmentalist assumptions. The idea was that in a free market environment, surplus labour from developing countries would fill the labour gaps in the

¹⁴ Martin Rein and Donald Schön, “Frame-Reflective Policy Discourse”, in *Social Sciences and Modern State National Experiences and Theoretical Crossroads*, ed. Peter Wagner, Carol Hirschon Weiss, Björn Wittrock and Helmut Wollman (Cambridge: Cambridge University Press, 1996); David A. Snow et al., “Frame Alignment Processes, Micromobilization, and Movement Participation”, *The American Sociological Review* 51, no. 4 (1986): 464-481; John Rawls, “Lecture 2: Power of citizens and their representation”, in *Political Liberalism* (New York: Columbia University Press, 1993).

¹⁵ de Haas, *Migration and Development: A Theoretical Perspective*, *op. cit.*, p. 227.

¹⁶ Faist, *op. cit.*; Faist and Fauser, *op. cit.*; Piper, *op. cit.*; Geiger and Pécoud, *op. cit.*

¹⁷ Ronald Skeldon, “International Migration as a Tool in Development Policy: A passing Phase?”, *Population and Development Review* 34, no. 1 (2008): 1.

¹⁸ de Haas, *Migration and Development: A Theoretical Perspective*, *op. cit.*, p. 229; Faist, *op. cit.*

developed North, which would enable migrants to generate capital in the form of remittances and allow their countries of origin to enter a process of rapid modernisation following the stages of economic development, as proposed by Rostow¹⁹. The role of the return migrant in particular was seen as crucial for propelling industrialisation by bringing back “new ideas, knowledge, and entrepreneurial attitudes”²⁰. Based on these assumptions, the link between migration and development was conceptualised as a positive relationship, wherein more migration would naturally and necessarily lead to more development. For a schematic representation of the positive migration-development relationship, see Figure 1.

However, such unabashed optimism was not only followed by a sharp swing of the pendulum towards pessimism, but also by an apparent reversal of the proposed causal relationship between migration and development.²¹ In the 1970s and 1980s, the discourse on development was dominated by post-development theory, based on the seminal work of scholars such as Arturo Escobar²² and Immanuel Wallerstein²³. Rejecting the possibility of win-win development that would benefit both sending and receiving countries, migration was no longer perceived as a motor for economic development, but rather was seen as both a symptom and a potential aggravator of underdevelopment. This informed the perception of the migration-development relationship as a vicious circle: Underdevelopment would lead to migration, causing brain drain and increased dependency of developing countries in the process, while also aggravating the income gap between the global South and the global North, which in turn was expected to prompt even more emigration.²⁴ On this account, migration is often implicitly framed as an undesirable phenomenon, which needs to be reduced and mitigated, both for sending and receiving countries. Figure 2 displays a schematic graph of a negative migration-development relationship.

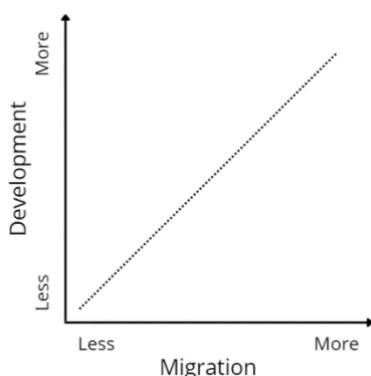


Figure 1: Positive relationship between migration and development

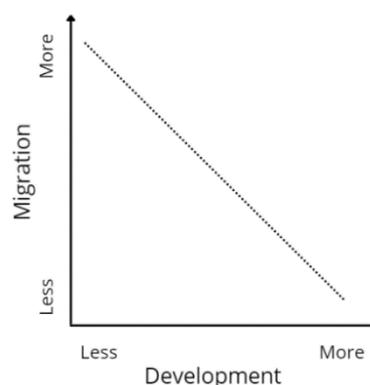


Figure 2: Negative relationship between migration and development

¹⁹ Walt Whitman Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (New York: Cambridge University Press, 1960).

²⁰ de Haas, *Migration and Development: A Theoretical Perspective*, *op. cit.*, p. 231.

²¹ Faist, *op. cit.*

²² Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995).

²³ Immanuel Wallerstein, *The Modern World System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974).

²⁴ Castles, *op. cit.*, p. 446.

Finally, the contemporary paradigm, which emerged in the early 2000s, reversed this pessimist outlook and embraces once again a decidedly positive conceptualisation of the migration-development linkage.²⁵ According to Gamlen, this new “international policy orthodoxy”²⁶ is not exactly the same as the aforementioned 1960s neo-classical optimism, but rather represents a “Third Way between markets and states”.²⁷ In other words, on this account, migration, particularly circular and labour migration²⁸, has the potential to create a “win-win-win” situation, benefiting developing countries, receiving countries and migrants themselves²⁹, but only if it is well-managed. Additionally, the focus has shifted from return migrants to transnational networks and diaspora communities as the bringers of development.^{30 31}

To summarise, broadly speaking two opposing conceptualisations of the migration-development relationship exist within academia. The pessimistic or negative framing sees migration as a result of underdevelopment and, conversely, development cooperation and aid as a policy avenue for reducing migratory flows. The optimistic or positive framing, on the other hand, emphasises the potential of well-managed migration to improve development outcomes in sending countries, i.e. framing migration policies as tool for reducing underdevelopment abroad. Alongside them, there are also more nuanced approaches, which are less concerned with establishing an overarching link, but tend to instead focus on shedding light on specific aspects of the migration-development relationship and processes (e.g. new economics of labour migration ‘NELM’, migrant network theory, transnational theory).³² For the purposes of this paper, it will be sufficient to focus on the negative/positive nexus and how they inform EU policy.

1.1.2. *Moving Beyond the Positive Migration-Development Nexus*

The current dominance of the positive conceptualisation is reflected in the literature on the “migration-development nexus”. The coinage of this term itself is frequently attributed to a paper by Sørensen et al.³³, which explicitly only discusses the “*positive* dimensions and possibilities in the migration-development nexus”. While “nexus” implies the existence of complex linkages and interdependencies, there has been a clear emphasis within recent literature on researching the effects of migration on the development of sending countries, i.e. the positive conceptualisation of the link.³⁴

²⁵ Skeldon, *A Passing Phase*, *op. cit.*; Faist, *op. cit.*; Piper, *op. cit.*

²⁶ Gamlen, *op. cit.*, p. 415.

²⁷ *Ibid.*, p. 418.

²⁸ Faist and Fauser, *op. cit.*

²⁹ Piper, *op. cit.*, p. 94.

³⁰ Faist, *op. cit.*; de Haas, *Migration and Development: A Theoretical Perspective*, *op. cit.*; Castles, *op. cit.*

³¹ For a detailed review of the literature on economic, social and cultural effects of diaspora networks on development see Hillel Rapoport, “Migration and Development: The Diaspora Externality”, *Revue d'économie du développement* 1, no. 1 (2017): 31-61.

³² Castles, *op. cit.*, p. 447.

³³ Nyberg-Sørensen et al., *The Migration-Development Nexus: Evidence and Policy Options*, *op. cit.*, p. 50.

³⁴ Nina Glick Schiller, “Migration and Development - Theorising Changing Conditions and Ongoing Silences”, in *Routledge Handbook of Migration and Development*, ed. Tanja Bastia and Ronald Skeldon (London: Routledge Handbooks Online, 2020).

This is potentially problematic for two reasons. Firstly, it lends support to Skeldon's³⁵ claim that resurgences of the migration-development debate often display a lack of familiarity with past framings and arguments.³⁶ Secondly, it is not conducive for the analysis of the linkage of migration and development in the EU's policy discourse to focus only on the positive dimension of the relationship. In fact, analysing the EU's policy discourse exclusively through the lens of a positive migration-development nexus risks obscuring the existence of different conceptualisations, which continue to influence EU policy.³⁷

Castles³⁸ observes that flawed assumptions about the migration-development relationship persist among politicians and decision-makers, even when they are challenged by scientific consensus. The existence of such glaring divergences suggests that the political and academic discourses about the migration-development nexus are fundamentally distinct, despite the fact that they tend to influence each other. According to Castles³⁹, this explains how notions of migration as a consequence of poverty and low development (and conversely the idea that development aid can be used to reduce migratory flows) are still influential in the contemporary policy debate, even though the academic debate has moved on from negative conceptualisations of the nexus.⁴⁰ In order to account for these divergences, it will therefore be necessary to go beyond the prevailing positive paradigm and employ a framework that can accommodate both the positive and the negative conceptualisations of the nexus, which co-exist, compete with and influence EU policy.

1.2 The EU Policy Debate

In the following section, I will make the case that the positive and the negative conceptualisation of the migration-development nexus have corresponding policy approaches which feature in the EU's policy discourse. I will outline some of the historical trends that gave rise to a migration-development policy field defined by competing and even contradictory paradigms.⁴¹ For this purpose, I will describe the root causes and the development policy approach and how they are underpinned by a positive or negative conceptualisation of the nexus respectively. Finally, I will argue that conceptualising these approaches as competing policy frames can provide a useful framework for analysing the EU's changing policy discourse.

1.2.1 Externalisation and Securitisation

Since the early stages of its external migration policy, the EU's response to migration has been defined by its restrictive nature, which stands in contrast to the abolition of the EU's internal

³⁵ Skeldon, *A Passing Phase*, *op. cit.*

³⁶ see also Glick Schiller, *op. cit.*

³⁷ Pastore, *op. cit.*

³⁸ Castles, *op. cit.*

³⁹ *Ibid.*

⁴⁰ Geiger and Pécoud, *op. cit.*; Dennison et al., *op. cit.*

⁴¹ Pastore, *op. cit.*

borders.⁴² Starting in the 1990s, after the end of the Cold War, a temporary uptick in migration flows from Eastern Europe prompted the initial politicisation of migration issues, giving way to a cooperation between the EU and its member states that focused on restricting access to the EU's territory. This shift away from bilateralism to a common European approach to migration reflected not only the wish to deal with migration in a comprehensive manner, but also generated "an external projection of European migration policies, [which was] essentially driven by control and security logics and priorities".⁴³ In other words, the externalisation⁴⁴ and securitisation⁴⁵ of the EU's immigration agenda can be identified as two defining trends, which have influenced the conception of the migration and development policy field. Accordingly, policy measures that focused on strengthening external border controls, tightened visa requirements, and adopting stricter regulations for asylum applications and family reunifications were introduced.⁴⁶

1.2.2 *The Root Causes Approach*

The initial linking of migration and development policy was characterised by the overarching aim of controlling migration flows to Europe and the desire to "handle" migration outside of the Union's territory. The idea – which remains influential to this day – was that migration can be reduced by using development aid to address the underlying drivers of migration, such as poverty, conflict and a general lack of economic development in sending and transit countries. In the literature, this policy approach is usually referred to as "root causes approach"⁴⁷ or alternatively as "development instead of migration"⁴⁸ or "let us help them at home" policies⁴⁹.

This policy is firmly rooted in a negative conceptualisation of the migration-development nexus, i.e. the notion that migration is first and foremost an undesirable consequence of underdevelopment. It can also be understood as part of a more general attempt to integrate migration and asylum matters into the EU's external relations framework.⁵⁰ The root causes approach is therefore also frequently presented by policymakers as part of a "comprehensive"⁵¹ or "smart"⁵²

⁴² Lavenex and Kunz, *op. cit.*; Franziska Zanker, "Managing or Restricting Movement? Diverging Approaches of African and European Migration Governance", *Comparative Migration Studies* 7, no. 1 (2019).

⁴³ Pastore, *op. cit.*, p. 2.

⁴⁴ Sandra Lavenex, "Shifting Up and Out: The Foreign Policy of European Immigration Control", *West European Politics* 29, no. 2 (2006): 329-350.

⁴⁵ Riina Isotalo, "Politicizing The Transnational: On Implications for Migrants, Refugees, and Scholarship", *Social Analysis* 53, no. 3 (2009): 60-84; Ninna Nyberg-Sørensen, "Revisiting the Migration-Development Nexus: From Social Networks and Remittances to Markets for Migration Control", *International Migration* 50, no. 3 (2012): 61-76; Chou, *op. cit.*

⁴⁶ Lavenex and Kunz, *op. cit.*; Castles, *op. cit.*

⁴⁷ Gent, *op. cit.*; Dennison et al., *op. cit.*; Pastore, *op. cit.*; Heliodoro Temprano Arroyo, *Using EU Aid to Address The Root Causes of Migration and Refugee Flows* (Florence: European University Institute, 2019).

⁴⁸ de Haas, *Turning the Tide?*, *op. cit.*

⁴⁹ Caselli, *op. cit.*

⁵⁰ Lavenex, *op. cit.*, p. 333.

⁵¹ Joanne Thorburn, "Root Causes Approaches to Forced Migration: Part of A Comprehensive Strategy? A European Perspective", *Journal of Refugee Studies* 9, no. 2 (1996): 120; Gent, *op. cit.*

⁵² de Haas, *Turning the Tide?*, *op. cit.*, p. 4.

solution to control and reduce migration. Corresponding policy measures include the diversion of development funding towards migration initiatives, capacity building, programmes to create job opportunities abroad, etc.⁵³

More critical voices have argued that the focus on “development at home” is just the extension of the EU’s securitisation and externalisation of migration issues. While policies that “address the root causes” appear more benevolent compared to overt control measures, the objective remains the same: to stop or at least drastically reduce international migration.⁵⁴ In this sense, addressing the root causes can be seen as merely a “pretext to justify security practices in the context of mobility”, which constitute “pre-emptive self-defence” on the part of the destination countries.⁵⁵

The rationale behind the root causes approach is, however, directly contradicted by empirical research findings. It has been shown that as a country’s level of economic development increases, migration does not subside, but the population’s mobility actually goes up. Particularly in the beginning of the industrialisation process, emigration movements usually intensify and thereby create a statistical phenomenon, which is called the “migration hump”.⁵⁶ This fact is so well-established that “it is now one of the few things that virtually all migration scholars agree with”.⁵⁷ For a recent empirical analysis that confirms the existence of the “migration hump”, see Berthiaume et al.⁵⁸

Despite this fundamental flaw and being difficult to operationalise⁵⁹, the root causes approach has continued to influence EU policymaking. It has even experienced a resurgence in relevance over the last couple years,⁶⁰ as will be shown in the empirical chapter.

1.2.3 The Development Approach

The combination of the aforementioned renaissance of migration optimism in the academic community, an increase of international discourse on the development potential of migrants, as well as a number of high-profile policy failures created the conditions in the 2000s for a second

⁵³ Maud Martens, Ilke Adam and Florian Trauner, “The Migration-Development Nexus in Selected African States: Is the Implementation of EU Migration Policies Development-Friendly?” in *Regional Integration and Migration Governance in the Global South*, ed. Glenn Raup, Ilse Ruysen and Katrin Marchand (Cham: Springer, 2020), 201-215.

⁵⁴ Jean-Pierre Guengent, “Migrations internationales et développement : les nouveaux paradigmes”, *Revue Européenne des Migrations Internationales* 12, no. 2 (1996) : 117.

⁵⁵ Isotalo, *op. cit.*, p. 64.

⁵⁶ Philip L. Martin and Taylor, J. Edward, “The Anatomy of a Migration Hump”, in *Development Strategy, Employment, and Migration: Insights from Models*, ed. J. Edward Taylor (Paris: OECD, Development Centre, 1996), quoted in de Haas, *Migration and Development: A Theoretical Perspective*, *op. cit.*

⁵⁷ Castles, *op. cit.*, p. 442.

⁵⁸ Nicolas Berthiaume et al., “A Reappraisal of the Migration-Development Nexus : Testing the Robustness of the Migration Transition Hypothesis”, *World Bank Policy Research Working Paper* 9518 (2021).

⁵⁹ Pastore, *op. cit.*

⁶⁰ Berthiaume et al., *op. cit.*, p. 2, Temprano Arroyo, *op. cit.*; Dennison et al., *op. cit.*

policy approach to emerge.⁶¹ In particular, when in 2005 more than a dozen migrants died while attempting to cross the Ceuta and Melilla border fence, the EU was directly confronted with the limits of an exclusively repressive approach to migration. Such developments sparked calls for policy change and were crucial for initiating what some have dubbed a “developmentalisation” of migration.⁶² Instead of seeing development cooperation and aid as a tool to control and restrict migratory flows, the focus now shifted to understanding and utilising the potential of migrants as promoters of development in their countries of origin.⁶³ The new paradigm therefore constituted a radical reversal of the prior conceptualisation of migration-development interactions.

The adoption of this new paradigm can be found in the EU’s 2005 “Global Approach to Migration”, which was heralded by the Council as “a balanced, global and coherent approach, covering policies to combat illegal immigration and, in cooperation with third countries, harnessing the benefits of legal migration”.⁶⁴ It was followed by an effort to integrate this positive link into the external relations aspect of the Union’s migration agenda. The EU consequently reaffirmed its intention to implement policy measures that would support development abroad by facilitating the transfer of migrant remittances and the creation of legal opportunities for circular and labour migration.

Despite this, many scholars have pointed out that the EU’s commitment to improving development through migration is superficial at best, since its development objectives are usually overshadowed by security concerns. There appears to be broad consensus within the literature that the EU’s aim to control and contain migration flows, as well as more recently, to prevent a second rendition of the 2015 migration ‘crisis’⁶⁵ remains paramount.⁶⁶

When reviewing the literature on the linkage of migration and development in the EU, I find that it is possible to distinguish between two paradigms, each giving rise to a different policy approach. Broadly speaking, the two approaches are underpinned by opposing conceptualisations of the connection between migration and development, that each stem from different phases of the academic debate. The root causes approach is based on the assumption that migration is primarily a symptom of low development in sending countries and that development cooperation is an effective tool for reducing migrant flows to Europe, thereby framing migration and development as a negative relationship. The development approach, on the other hand, is grounded in ‘migration optimism’, which is currently the dominant paradigm in academia (cf. section “The Academic Debate”). This approach frames migration and development as a positive

⁶¹ Pastore, *op. cit.*; Lavenex and Kunz, *op. cit.*

⁶² Isotalo, *op. cit.*; Nyberg-Sørensen, *op. cit.*

⁶³ Castles, *op. cit.*

⁶⁴ European Council, “European Council Brussels 15 & 16 December 2005: Presidency Conclusions”, 2005. Also quoted in Collette, *op. cit.*

⁶⁵ Elizabeth Collette and Camille Le Coz, “After The Storm: Learning From the EU Response to the Migration Crisis”, *Migration Policy Institute*, 2018.

⁶⁶ Reslow, *op. cit.*; Lavenex and Kunz, *op. cit.*; Chou, *op. cit.*; Zanker, *op. cit.*

relationship, where more migration and more mobility will generate more development in origin countries.

Finally, it is worth briefly discussing why there are two competing paradigms guiding the EU's actions on migration and development in the first place. One reason is simply that the root causes approach and the development approach originate in different policy fields that have developed different strategies and are guided by different ambitions. The root causes approach reflects the priorities of an externalised European migration policy, focused on controlling and ultimately reducing migrant flows to the Union. The development approach on the other hand aligns with development policy-makers, whose main objective is to promote economic development and stability in other countries. Pastore argues that these distinct origins and competing priorities are the reason why "[migration and development] policies in Europe are marked [...] by a certain strategic fuzziness, intrinsic political ambiguities, overlapping of competency including policy incoherencies".⁶⁷

1.3 Policy Frames As Tool for Policy Analysis

Having outlined the existing paradigms within the EU's policy discourse, I will now argue that we should conceptualise the two policy approaches as competing policy frames in order to analyse the shifting discourse surrounding the migration-development nexus. The following section will define policy frames and explain how they matter for policymaking. For this purpose, I am drawing on the detailed description of policy frames by Rein and Schön⁶⁸ and Boräng et al.⁶⁹, and their usage in EU policy analyses⁷⁰. Finally, I will operationalise the two frames, thereby laying the groundwork for the upcoming content analysis.

1.3.1 Defining Frames and Understanding Their Impact

Policy frames are essentially "packages of policy ideas".⁷¹ They are a way of selecting certain information (while omitting other facts), interpreting it and rendering it meaningful for a particular worldview.⁷² Frames can also be understood as the underlying, implicit structure made of empirical assumptions and value judgements that are "hidden" behind the explicit policy statements and actions. Perhaps most importantly, they constitute narratives or stories about policy issues that answer the questions "What is the problem?" and "How can the problem be

⁶⁷ Pastore, *op. cit.*, p. 57.

⁶⁸ Rein and Schön, *op. cit.*

⁶⁹ Frida Boräng et al., "Identifying Frames: A Comparison of Research Methods", *Interest Groups & Advocacy* 3, no. 2 (2014): 188-201.

⁷⁰ Knoll and de Weijer, *op. cit.*; Martens et al., *op. cit.*

⁷¹ Andrea Lenschow and Anthony R. Zito, "Blurring or Shifting of Policy Frames? Institutionalization of the Economic-Environmental Policy Linkage in the European Community", *Governance* 11, no. 4 (1998): 415.

⁷² Robert M. Entman, "Framing: Toward Clarification of a Fractured Paradigm", *Journal of Communication* 43, no. 4 (1993), quoted in Boräng et al., *op. cit.*

solved?”. In other words, policy frames provide the connective tissue between the explanation and the policy action, enabling the move from the descriptive to the prescriptive.⁷³

This allows frames to shape attitudes, influence the perception of particular events and impact what policy aims are pursued and through which strategies. They are consequently a powerful tool for policymaking⁷⁴ and this is especially true in moments of a perceived crisis. Events that are seen as threats to the established order are often also moments that lend themselves to the emergence of new narratives and the shifting of frames.⁷⁵ Such crises can therefore be understood as “framing contests”.⁷⁶ This is even true for comparatively minor external shocks. For example, Lavenex and Kunz have identified that the aforementioned violent events that ensued in 2005 in Ceuta and Melilla were “a major impulse for a reconsideration of the original policy frame within the EU”.⁷⁷ However, a similar analysis of the migration-development nexus has yet to be conducted with regard to the 2015 migration crisis.

Frames frequently coexist within the same institution or organisation⁷⁸, especially when they concern a heavily contested issue. In fact, Rawls⁷⁹ contends that the existence of different “reasonable views” in public policy discourse is a necessary feature of democratic pluralism. I therefore suggest that this is how we should understand the co-existence of the root causes approach and the development approach within the EU’s discourse on the migration-development nexus: as two competing interpretations of the same policy issue, which prescribe different actions and whose relative influence on policymaking is expected to be at least to some extent responsive to external factors.

1.4 The Case for Policy Frames

Upon reviewing the literature on the migration-development linkage within the EU, it is clear that most scholars have focused on analysing and critiquing one out of these two policy approaches. They have, for this purpose, employed either a positive⁸⁰ or a negative⁸¹ conceptualisation of the nexus. A significant decline of literature on the EU’s migration-development nexus can be observed after the year 2010, with most of the recent work focusing exclusively on the root causes approach.⁸² Some have already discussed the fragmented nature of the migration

⁷³ Rein and Schön, *op. cit.*

⁷⁴ Boräng et al., *op. cit.*

⁷⁵ Knoll, *op. cit.*; Lavenex and Kunz, *op. cit.*

⁷⁶ Knoll, *op. cit.*, p. 73.

⁷⁷ Lavenex and Kunz, *op. cit.*, p. 450.

⁷⁸ Knoll and de Weijer, *op. cit.*

⁷⁹ Rawls, *op. cit.*, quoted in Rein and Schön, *op. cit.*;

⁸⁰ see Lavenex and Kunz, *op. cit.*; Nyberg-Sørensen et al., *The Migration–Development Nexus: Evidence and Policy Options*, *op. cit.*

⁸¹ see Alexandra Berger, “The Nexus between Migration and Development in EU External Action: No Quick Fix”, *Vrije Universiteit Brussel Institute for European Studies Policy Brief*, Issue 19/08 (2019).

⁸² Dennison et al., *op. cit.*; Temprano Arroyo, *op. cit.*

and development policy field⁸³ and identified the contradictory paradigms⁸⁴. However, a comprehensive analysis has yet to be conducted of both the negative and the positive conceptualisation of the nexus, the corresponding policy approaches and their relative emphasis within EU policy over time. This article aims to fill this gap. By analysing the EU's migration and development policy discourse between the years 2011 and 2020, I also seek to assess the effects of the 2015 migration 'crisis'.

Understanding the root causes approach and the development approach as distinct, competing policy frames will provide two advantages. Firstly, as the previous section showed, policy frames are well-suited for making sense of the different narratives that coexist in a policy field and their evolution within a crisis context.⁸⁵ Secondly, policy frames are useful for linking the interpretation of an issue (in this case, the conceptualisation of the migration-development relationship as either positive or negative) with corresponding policy objectives and prescriptions for concrete actions. This enables the deduction of variables and indicators, which can be identified in EU policy documents through content analysis methodology. The following section will describe this process in more detail.

1.4.1 Operationalising the Competing Policy Frames

In order to further define and operationalise the two policy frames, it will be necessary to assign variables and corresponding indicators that can be identified in EU policy documents.⁸⁶ Based on the previous description of policy frames, it is expected that the root causes approach and the development approach manifest their influence through descriptive claims that frame the link between migration and development as either a positive or a negative relationship, prescriptive claims about what the broad objective of policymaking in this field should be, and concrete policy measures that are the logical consequence of the descriptive and the prescriptive assertions.

It is therefore possible to create three variables: (1) interpretation of the migration-development link, (2) broad aims and strategies, and (3) concrete policy actions. For example, for the development policy frame, a broad aim would be to harness the development potential of migrants, and a possible strategy for this end could be to improve circular migration. Regarding the root causes frame, a corresponding interpretation of the nexus could be that in sending countries more development will lead to fewer migrants coming to Europe. Such concepts are understood as indicators that can be found in policy documents and used to identify, map and trace frames over time. For a non-exhaustive list of possible indicators, see Table 1 and 2.

Table 1: Root Causes Policy Frame

⁸³ Knoll, *op. cit.*; Knoll and de Weijer, *op. cit.*

⁸⁴ Pastore, *op. cit.*

⁸⁵ Knoll, *op. cit.*

⁸⁶ Wendy Olsen, "Operationalisation", in *Data Collection: Key Debates and Methods in Social Research* (London: SAGE Publications Ltd, 2012).

(1) Interpretation of the migration-development link
<ul style="list-style-type: none"> - negative, linear link, i.e. more development will lead to less migration - migration flows from the South to the North are symptoms of economic underdevelopment, insecurity and instability in developing countries - migration can be curbed by addressing underlying push-factors - development aid can be used to reduce migration pressure
(2) Broad aims and strategies
<ul style="list-style-type: none"> - improve economic opportunities and security in sending (and sometimes transit) countries to reduce the number of migrants coming to Europe
(3) Concrete policy actions
<ul style="list-style-type: none"> - diversion of development funding towards origin countries - capacity building programmes - programmes to create economic opportunities in sending countries - encourage private and public investment in countries of origin - building resilience in origin and transit countries

Table 2: Development Policy Frame

(1) Interpretation of the migration-development link
<ul style="list-style-type: none"> - positive link, i.e. more migration will lead to more development - migrants are actors/heroes of development - migration policies can be instrumentalised to improve development outcomes in sending countries - migration needs to be well-managed to achieve development objectives and create a “win-win-win” situation
(2) Broad aims and strategies
<ul style="list-style-type: none"> - harness the development potential of migrants to improve economic development in countries of origin
(3) Concrete policy actions
<ul style="list-style-type: none"> - ethical recruitment schemes - facilitating and reducing the cost of remittances transfers - creation of legal migration channels

- visa facilitation agreements
- promoting diaspora engagement

2. Methodology

In the previous section, I reviewed the existing academic literature on the migration-development nexus and found that the role of the 2015 migration ‘crisis’ as a potential cause for a re-framing of this linkage in EU policy has not yet been sufficiently explored. In this section, I will briefly describe how I applied content analysis methodology to selected EU policy document as my primary research method.

2.1 Qualitative Content Analysis as Method

The empirical chapter of this project applies qualitative content analysis methodology to six major policy documents that were published between the years 2011 and 2020. When choosing which policy documents to analyse, I employed the following criteria: The documents needed to be global in their approach, i.e. not geographically limited to a specific country or region; they had to impact the EU’s governance of migration or development; and they had to fall within the specified time frame. The rationale behind only analysing global documents was that this would allow me to assess only the overarching, guiding principles of EU migration and development governance, largely independent from the particular interests of partner countries, destination and transit countries. Additionally, I chose to limit my analysis to publications by the European Commission in order to ensure the comparability of the documents.⁸⁷ Out of all the documents that fulfilled these criteria, I chose to analyse six that constituted important milestones for defining the EU’s agenda on migration and development. The full list can be found in Table 3.

Based on the literature review, I had already defined and operationalised two categories – the root causes and the development policy frames – which allowed me to use a deductive approach for my content analysis.⁸⁸ Accordingly, my first step was to generate more codes based on the overarching themes and concepts of each policy frame, so-called indicators. Subsequently, I read the selected policy documents thoroughly, highlighted and categorised all sections pertaining to the intersection of migration and development. Throughout this process, I continued to inductively revise and adapt my codes.

Table 3: List of policy documents used for content analysis

⁸⁷ With the exception of EUGS, which was drafted under the authority of High Representative Frederica Mogherini and adopted by the European Council.

⁸⁸ Satu Elo and Helvi Kyngäs, “The Qualitative Content Analysis Process”, *Journal of Advanced Nursing* 62, no. 1 (2008): 107-115.

Full Name of Document	Abbreviation	Date
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: The Global Approach to Migration and Mobility	GAMM	2011
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A European Agenda on Migration	EAM	2015
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL AND THE EUROPEAN INVESTMENT BANK on establishing a new Partnership Framework with third countries under the European Agenda on Migration	MPF	2016
“Shared Visions, Common Actions: A Stronger Europe”: A Global Strategy for the European Union’s Foreign And Security Policy	EUGS	2016
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Proposal for a new European Consensus on Development: Our World, our Dignity, our Future	NECD	2016
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum	NPMA	2020

2.2 Limitations

While the six documents that were analysed constitute the major agenda-setting publications of the EU’s migration and development governance between the years 2011 to 2020 and are as such bound to guide any further communication that is issued by the Union on this topic, the depth, nuance and empirical strength of this paper could have been improved by including more primary sources, e.g. follow-up documents, implementation assessments, mobility partnerships, publications regarding the EU’s Trust Fund for Africa, etc. However, the limited scope of this

project made it necessary to focus on a small selection of only the most important publications. The upside of this choice, however, was that I was able to discuss each policy document in great depth in the empirical section of this paper.

Furthermore, engaging a second researcher to replicate the steps of the qualitative content analysis that were outlined above would have allowed me to test for intercoder reliability and thereby potentially improve the robustness of the inferred results. This was however, beyond the scope of this project.

3. Empirical Findings

3.1 Reporting Content Analysis Findings

The following empirical chapter will present the findings of the content analysis and contextualise them with relevant background information and insights from the academic literature. Keeping in mind the aforementioned research question, this section aims to go beyond comparing the frequency of each policy frame based on counting its associated concepts. The aim is instead to enable a deeper understanding of the nature and function of these frames within the analysed policy document that were put forward by the EU between 2011 and 2020. I will trace the relative prevalence of the root causes approach and the development approach over time and attempt to identify any changing priorities or concepts within the individual frames.

3.1.1 The GAMM's Development Approach

The Global Approach to Migration and Mobility (GAMM) strongly favours the development policy frame. It was launched in 2011 with the stated purpose of regulating the external migration affairs of all member states and thereby enabling the Union to “speak with one voice” on the issue of migration.⁸⁹ Compared to its predecessor, the 2005 Global Approach to Migration (GAM), this new strategic framework placed more emphasis on circular and labour mobility (e.g. facilitated through short-stay visas) and stressed the importance of migration for development.⁹⁰ In fact, “Maximising the development impact of migration and mobility” is named as one of the four pillars outlined in the GAMM and is given, at least rhetorically, the same weight as the fight against irregular migration and the protection of migrants and displaced persons.

When applying content analysis to identify the prevailing conceptualisation of the migration-development nexus in the GAMM, it is easily apparent that the overwhelming emphasis is on the positive linkage corresponding to the development policy frame. The root causes approach on

⁸⁹ James Hampshire, “Speaking With One Voice? The European Union's Global Approach to Migration and Mobility and the Limits of International Migration Cooperation”, *Journal of Ethnic and Migration Studies* 42, no. 4 (2016): 572.

⁹⁰ *Ibid.*

the other hand is almost entirely absent from this document. This means that the concept of low development as a migration driver or the idea that irregular migratory flows could be reduced through successful development initiatives do not appear in the GAMM. To the extent that development cooperation in countries of origin and transit is mentioned at all, it is only in the context of supporting and protecting internally displaced persons. The implication is that improved economic development will create better living conditions for the vast majority of migrants that move to other developing countries. The key notion that such development cooperation can ultimately reduce migratory flows to Europe is not mentioned. Overall, the concepts associated with the root causes policy frame barely feature in the GAMM.

Instead, the GAMM exhibits a detailed conception of the positive migration-development nexus.⁹¹ This is not only apparent in the section on the development pillar, but also throughout the document. The key idea that migration can lead to improved development outcomes for sending countries is affirmed several times, e.g. “[g]ood governance of migration and mobility of third countries nationals can create value on a daily basis for the development of millions of people”.⁹² The need to mitigate brain drain, facilitate the transfer of remittances and engage diaspora communities in development initiatives should be highlighted as the most important recurring key concepts. However, the concrete measures that were formulated for achieving these ends are not binding and largely up to the member states to implement⁹³, which detracts from the EU’s stated commitment to development cooperation.

The GAMM additionally affirms the importance of circular mobility and encourages the monitoring of “bona fide recruiters”⁹⁴, as well as improved portability of social rights as a potential “facilitator for mobility and circular migration”⁹⁵. The creation of legal migration opportunities is, however, almost exclusively addressed in the context of serving the EU’s labour market needs.⁹⁶

Perhaps the most interesting finding is that cooperation of partner countries on border management and combatting irregular migration is framed as a prerequisite for the creation of legal migration opportunities. This is especially interesting and potentially revealing, since the document also acknowledges that a lack of legal migration opportunities can be a factor in driving people to seek out illegal channels. Considering that the GAMM stresses several times the necessity of orderly movement to realise the development potential of migration, the conditionality attached to the creation of legal migration routes is indicative of a subordination of development objectives to security concerns.⁹⁷

⁹¹ Knoll and de Weijer, *op. cit.*

⁹² European Commission, COM(2011)743, p. 5.

⁹³ Tineke Strik, “The Global Approach to Migration and Mobility”, *International Law: Open Issue* 5 no. 2 (2017): 321.

⁹⁴ European Commission, COM (2011)743, p. 4.

⁹⁵ European Commission, COM (2011)743, p. 7.

⁹⁶ see also Strik, *op. cit.*

⁹⁷ Hampshire, *op. cit.*

Overall, out of the documents that were analysed, the GAMM most strongly commits to the development approach, framing the migration-development nexus almost exclusively as a positive link. This rhetorically strong stance is, however, somewhat undermined by the EU's non-binding proposals and the conditionality attached to development cooperation. It will become apparent over the course of this analysis that even within the development frame, the EU clearly prefers policy measures that do not directly increase the number of migrant arrivals. The GAMM also displays this tendency through its focus on remittance transfers and diaspora engagement over the creation of legal migratory routes.

3.1.2 *Responding to a Crisis*

Following the analysis of the GAMM, this next section will discuss how the EU's framing of migration and development issues shifted in response to the 2015 migration 'crisis'. Compared to the GAMM's decidedly positive, "migration-for-development" framing, it is perhaps surprising that less than five years later the EU's next major policy document on migration completely reverses course on the Union's understanding of the migration-development nexus. In fact, "one of the cardinal objectives"⁹⁸ of the 2015 European Agenda on Migration (EAM) is addressing the root causes of irregular migration through development cooperation. While the EAM mirrors the GAMM's four-pillar structure and repeats some of its key ideas, it is exemplary of a clear departure from the EU's migration optimism. Instead, "reducing the incentives for irregular migration"⁹⁹ has become a priority.

However, this shift is perhaps less surprising when understood as part of the EU's response to what is now known as the 2015-16 migration 'crisis'. The EAM was issued in 2015 with the aim of formulating a common European response to the influx of more than one million refugees¹⁰⁰, providing tools, a strategy and funding to tackle the associated political and humanitarian challenges. By applying content analysis to this document as well as to the corresponding 2016 Migration Partnership Framework (MPF), it is possible to demonstrate that the migration 'crisis' constitutes a turning point in the EU's discourse on the migration-development nexus.

This analysis finds that the need to address "root causes" of migration is mentioned eight and thirteen times respectively in the EAM and the MPF. Such causes are primarily identified to be poverty, unemployment and a general lack of economic opportunities in sending countries, as well as insecurity caused by conflict and civil war. Additionally, the EU's ambition to tackle migration "upstream" in cooperation with third countries is framed as a long-term and mutually beneficial engagement: "it is in the interests of all to address the root causes which cause people

⁹⁸ Daria Davitti and Annamaria La Chimia, "A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control", *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper 07/17* (2017): 1.

⁹⁹ European Commission, COM(2015)240, p. 7 (pillar 1).

¹⁰⁰ Fabian Willermain, "The European Agenda on Migration, One Year On: The EU Response to the Crisis Has Produced Some Results, but Will Hardly Pass Another Solidarity Test", *EGMONT: The Royal Institute of International Relations*, 2016.

to seek a life elsewhere”.¹⁰¹ The EU does not shy away from proposing concrete ways of implementing such a cooperation either. Notable examples are the diversion of additional development funding towards countries of origin and the creation of an External Investment Fund.

Despite the importance of the root causes approach, the development policy frame does feature in the EAM under the “Legal Migration” pillar too, although its importance is significantly diminished compared to the GAMM. In this section, the EAM reaffirms the development potential of migrants as well as the EU’s commitment to facilitate the transfer of remittances. The EU states its intention to “actively support migration-related targets [...] and to emphasise the importance of harnessing the positive effects of migration [...] for the post-2015 development agenda”.¹⁰²

The development approach is, however, not only significantly less prevalent in this document, but its framing has shifted too. The EAM suggests that “encouraging South-South mobility can bring an important contribution to local development”.¹⁰³ It is therefore implied that the development benefits of migration can also be harnessed by increasing regional mobility, making onward migration to Europe not necessary to achieve development objectives. Additionally, the creation of legal migration pathways – a key element of the development approach – is increasingly framed as just another way of reducing the number of irregular arrivals to the EU.

It should be highlighted that both the EAM and the MPF further develop and promote the kind of aid conditionality that was already present in the GAMM. The “more-for-more” approach suggests using development funding as reward for third countries’ cooperation in migration management: “Standing ready to provide greater support to those partner countries which make the greatest efforts, but without shying away from negative incentives, EU assistance and policies should be tailored to produce concrete results in stemming the flow of irregular migrants”.¹⁰⁴ The implication is clear: development cooperation is a tool in the EU’s external relations toolbox that can be leveraged with the overarching aim of reducing migratory flows to Europe.¹⁰⁵

The key takeaway from the analysis of the EAM and the MPF is that in response to the migrant ‘crisis’, the need to drastically reduce the number of migrants coming to Europe has risen to the top of the EU’s political agenda. This has also affected the discussion surrounding the migration-development nexus, as the framing has decidedly shifted to the root causes approach. The EU continues to allude at several points to the development benefits of migration, but considers how this can be achieved without further increasing the migratory pressure on European countries.

3.1.3 Migration in the EU’s Development Agenda

¹⁰¹ European Commission, COM(2015)240, p. 7.

¹⁰² *Ibid.*, p. 17.

¹⁰³ *Ibid.*, p. 17.

¹⁰⁴ European Commission, COM(2016)385, p. 2.

¹⁰⁵ Davitti, and La Chimia, *op. cit.*

Having thus far looked at policy documents on the EU's migration governance, the paper will next apply content analysis to the 2016 EU Global Strategy (EUGS) and the 2017 New European Consensus on Development (NECD). The aim is to determine how the migration-development nexus is discussed in the EU's external relation and development agenda and which policy frames are the most prevalent.

There is no doubt that considerations regarding the migration crisis heavily influenced both documents. Both the EUGS and the NECD reference and problematise migration more frequently than previous documents on the EU's foreign policy and development cooperation.¹⁰⁶ Since the EUGS is presented as the overarching framework for the Union's external action¹⁰⁷, it provides valuable context for the NECD and its discussion of migration and development will be analysed first.

The rise of migration to the top of the EU's agenda and its externalisation is also reflected in the EUGS. While previous strategic documents did not treat the topic as a priority¹⁰⁸, the EU Global Strategy mentions migration 26 times throughout its 60 pages. Despite this reinforced focus, the connection between migration and development remains rather underdeveloped. The idea that migration could lead to economic development in sending countries does not feature at all, and while I was able to identify one key concept from the development policy approach – namely the need to create legal migration pathways – this was, as in the MPF, framed as a way to reduce irregular migration, rather than an opportunity to generate development benefits.

On the other hand, the EUGS makes several references to the idea that development assistance (usually combined with a number of other foreign policy tools) can effectively address the long-term drivers and root causes of irregular migration. It also introduces the concept of “resilience, which, in the context of migration, is defined as a country's capacity to “enable migrants and refugees to stay close to home and avoid taking dangerous journeys”.¹⁰⁹ Building resilience therefore implies addressing the structural drivers of migration in countries of origin and transit and thus corresponds to the root causes policy frame. All in all, while the EUGS employs several competing narratives of migration¹¹⁰, the link between migration and development is exclusively framed as a negative relationship.

Thus far, it appears that the migration crisis has sparked (or rather reignited) the EU's sustained interest in eliminating the drivers of migration through development cooperation. This has the added effect of largely side-lining the Union's past ambition to harness the development benefits of migrants, as proposed in the GAMM in 2011. Such a prioritisation of migration reduction

¹⁰⁶ Raphaëlle Faure and Simon Maxwell, “The Proposed New European Consensus on Development: Has the European Commission Got It Right?” *Overseas Development Institute*, 2017; Michaela Ceccorulli and Sonia Lucarelli “Migration and the EU Global Strategy: Narratives and Dilemmas”, *The International Spectator* 52, no. 3 (2017): 83-102.

¹⁰⁷ Faure and Maxwell, *op. cit.*; Thomas Henökl and Niels Keijzer, “The Future of the European Consensus on Development”, *Deutsches Institut für Entwicklungspolitik (DIE) Briefing Paper* 5/2016 (2016).

¹⁰⁸ Ceccorulli and Lucarelli, *op. cit.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

objectives pervades even the New European Consensus on Development. Migration plays a significant role in the NECD, being mentioned 30 times, and is almost exclusively framed as a symptom of underdevelopment rather than an opportunity for development.¹¹¹

However, the development policy frame is not entirely absent from this document. The NECD evokes the “transformative potential” and the ability of well-managed migration to create a win-win-win situation for migrants, host and sending countries. The need to manage migration well is emphasised, alongside a renewed commitment to facilitate the transfer of remittances. Compared to the GAMM’s conception of a positive migration-development nexus, however, the link is still rather weak.

This is especially true when compared to the root causes policy frame, which is significantly more prevalent in the NECD. Development cooperation is presented as a sustained response to migratory pressures and a way to “build long-term resilience”, which will allow potential migrants to remain in their home countries. Additionally, the idea that the achievement of the Sustainable Development Goals as set out by the United Nations 2030 Agenda will also necessarily tackle the root causes of migration is implied throughout the document. This also means that the empirically problematic assumption that economic development in sending countries can reliably reduce migration to the EU continues to underpin the NECD’s understanding of the migration-development nexus.

This analysis has shown that migration reduction objectives continue to dominate, even in policy documents that do not directly concern migration, but instead lay out the Union’s more general extern relations or development cooperation agenda. Especially the NECD’s framing of migration as primarily a symptom of underdevelopment should be seen as indicative for the development approach’s loss of influence on policymaking, which has not recovered since the end of the immediate migration ‘crisis’. The next section will explore if this can be expected to change in the future, by analysing the latest EU policy document on the governance of migration, the 2020 New Pact on Migration and Asylum (NPMA).

3.1.4 *The Future of the Migration-Development Nexus in the EU*

In 2019, the global context differed significantly from 2015. The number of unauthorised crossings of the EU border was recorded as only 142,000, compared to 1.82 million irregular arrivals at the height of the European migration ‘crisis’.¹¹² The former emergency situation has mostly subsided, and the public discourse has shifted to new topics, notably the COVID-19 pandemic. However, migration issues continue to loom large in the EU’s negotiation with its partner countries. Previous frameworks and the MPF in particular have been blamed for undermining the EU’s commitment to established development principles, while at the same time producing little

¹¹¹ Faure and Maxwell, *op. cit.*

¹¹² European Commission, COM(2020)609.

progress in attaining migration management objectives.¹¹³ The European Commission's 2020 proposal for a New Pact on Migration and Asylum (NPMA) promises to contend with some of these issues and to provide a "fresh start" and a "sustainable solution on migration"¹¹⁴, which will guide the Union's treatment of migration issues for the coming years.

Regarding the framing of the migration-development nexus, however, this latest document continues the EU's familiar prioritisation of migration control and reduction objectives.¹¹⁵ While there is some mention of the potential "positive impacts" and "mutual benefits" of migration, the Pact asserts that such a win-win-win cooperation can only be realised within a well-managed partnership. Besides this, the NPMA also reaffirms the importance of harnessing the development benefits of remittances and makes a commitment to reducing transfer costs. Similar to the MPF and the EUGS, the need to create legal migration pathways is only framed as a means to protect displaced persons and "attract talent to the EU", instead of an opportunity to stimulate development.

The root causes frame, however, plays a significant role in the Pact. A recurring key concept is the creation of "economic opportunity" in sending countries to counteract migratory pressure. Additionally, addressing root causes like underdevelopment, environmental degradation and political instability are considered to be in the interest of "the EU and its citizens, partner countries, migrants and refugees themselves"¹¹⁶, thereby mirroring the "win-win-win" concept of the development frame. The Pact also proposes the diversion of funding towards countries with a "significant migration dimension" – a move that had been criticised in the past for undermining development principles.¹¹⁷ In general, the Pact tones down its rhetoric on aid conditionality, but fundamentally the EU's linking of migration and development does not differ significantly from the policy documents that were conceived in response to the crisis.

All in all, the root causes policy approach has remained the dominant framing of the migration-development nexus in the EU's policy agenda since the 2015 'crisis' and the NPMA gives no indication that this is about to change in the coming years.

Conclusion

After presenting the findings of the content analysis, this final section will provide a discussion and synthesis of the results. I aim to answer the research question by drawing conclusions from

¹¹³ Clare Castillejo, "EU Engagement with Africa on Migration: A Change of Approach Required", *Deutsches Institut für Entwicklungspolitik (DIE) Briefing Paper* 9/2018 (2018).

¹¹⁴ Ursula von der Leyen, "Press statement by President von der Leyen on the New Pact on Migration and Asylum", 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1727, accessed 17 March 2021.

¹¹⁵ Eleni Karageorgiou, "The New Pact on Migration and Asylum: Why Pragmatism Cannot Engender Solidarity", *Nordic Journal of European Law* 3, no. 2 (2020).

¹¹⁶ European Commission, COM(2020)609.

¹¹⁷ Castillejo, *op. cit.*; Berger, *op. cit.*

my findings about the effects of the 2015 migration ‘crisis’ on the EU’s migration and development discourse. Additionally, I will also outline potential avenues for future research.

In 2008, Ronald Skeldon asked whether the framing of migration as a tool for international development was likely to be of sustained importance or just “a passing phase in development thinking”.¹¹⁸ Considering that the EU’s initial approach to the intersection of migration and development utilises the root causes policy frame and the fact that its post-crisis handling of this issue reverts back to the ideas that were dominant in the 1990s and early 2000s, should we view the optimistic development policy frame as just an inconsequential blip in the EU’s governance of the migration-development nexus? With the benefit of hindsight and based on the results of the content analysis, it is possible to answer this question and draw conclusions about the evolution of the development frame in the EU’s policy discourse.

As was previously established, crises and external shocks create the conditions for a renegotiation of policy frames and provoke at times significant shifts in policy positions. This observation aligns with my empirical findings: the most dramatic change within the 2011–2020 time period in the EU’s discourse on the migration-development nexus occurred in response to the 2015 migration ‘crisis’. While maximising the development benefits of migration constitutes one of the key ambitions of the 2011 GAMM, this positive framing barely features in the 2015 EAM or the corresponding 2016 MPF. Instead, the EU has decidedly returned to the root causes policy frame, viewing migration primarily as a symptom of underdevelopment and development cooperation as a potential remedy. My findings also show that the dominance of the root causes frame in the EU policy discourse has persisted to this day, even as the original crisis context has largely disappeared.

Based on these results, it is possible to conclude that the migration ‘crisis’ has provoked a significant and lasting shift in the EU’s discourse on migration and development. Does this mean that migration-for-development was just a passing phase? The importance of the development policy frame has been considerably diminished since the crisis, which appears to confirm this idea. Even the NECD, which primarily aims to achieve “sustainable development and poverty eradication”¹¹⁹, clearly prioritises the root causes policy frame.

Furthermore, there is reason to question more generally the impact of the development policy frame. As can be seen throughout the “Empirical Findings” section, the EU has a persistent tendency to use development funding as a ‘carrot and a stick’ to incentivise partner countries’ participation in attaining migration management objectives.¹²⁰ Such a conditionality seems to be a favourite tool, regardless of whether the migration-development link is framed as a positive or a negative relationship. It suggests that at least in the policy documents that were analysed for this article, development objectives have always ranked lower than the need to control and

¹¹⁸ Skeldon, *A Passing Phase*, *op. cit.*, p. 2.

¹¹⁹ European Commission, COM(2016)385, p. 3.

¹²⁰ Berger, *op. cit.*

externalise migration, even when the EU primarily employed the development policy frame. Naturally, this raises the question whether 'harnessing the development potential of migration' was ever a serious or even feasible policy commitment to begin with.

However, the discursive shift that occurred in response to the migration 'crisis' did not result in a complete discarding of the development policy frame. A few key concepts have continued to influence EU policymaking. For example, the development potential of remittances and the EU's commitment to reduce transfer costs have been a constant feature of the Union's discourse on migration and development matters. Combined with, most recently, the NPMA's acknowledgment that migration can have positive effects on sending and host countries, it seems that the insights of a positive migration-development nexus have not been entirely forgotten and are poised to continue to influence EU policymaking in the future.

Future research into the migration-development nexus should therefore bear in mind the continued existence of both paradigms within the EU's discourse. Furthermore, examining the effects of the EU's discursive shift towards a root causes policy frame on its negotiation process and ability to create mutually beneficial partnerships with origin and transit countries is a possible research avenue that has the potential to produce interesting and valuable insights.

In conclusion, my research has aimed to provide a comprehensive overview of the migration and development linkage in the EU's discourse between the years 2011 and 2020 by employing the lens of competing policy frames. I found that the 2015 migration 'crisis' constitutes a turning point for the EU's discourse on the migration-development nexus, prompting a lasting shift from the development to the root causes policy frame. Despite this discursive shift, some key concepts of the development frame continue to influence EU policymaking. Therefore, it will be useful for future research to consider the continued impact of a positive migration-development nexus on the EU's discourse.

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More European after Brexit? The impact of the UK's Leave vote on the European identity of the remaining Member States

*Lara Breitmoser*¹

Abstract: The outcome of the Brexit referendum shocked not only Britain but also the remaining EU Member States. Even before the referendum, the future of the Union was unclear in so far as the convergence of the different Member States and the existence of a European identity was doubted. The question persists whether such a feeling of belonging to Europe, if it even exists, can persist under such challenging circumstances or whether the critical situation indeed inspires European cohesion. To address the gap in the literature, this paper analyses to what extent the Brexit referendum has affected the European identity in the remaining EU Member States. The paper argues that the feeling of being European has increased in the other Member States since the referendum as the self-perception of the states is endangered by Brexit. Therefore, the ideational cohesion strengthens in such an important turning point, which also reflects in the remaining citizens' identity. Statistical methods such as a t-test, linear regression, and descriptive analysis of Standard Eurobarometer data are used to verify this hypothesis. The results of the assessment demonstrate an increase in the number of people admitting to having a European identity before and after the Brexit referendum while findings are less clear for people reporting a more national identity.

Keywords: Brexit, European identity, European integration, European Union, identity change

¹ Lara Breitmoser is a Master's student in International Relations at the Central European University in Vienna. She has previously studied Political Science at LMU Munich and spent a term abroad at the University of New South Wales in Australia. Her research interests lie mainly in international cooperation and organisations, with a particular focus on the European Union and the United Nations. Lara is the co-founder and co-editor-in-chief of the Young Journal of European Affairs.

Introduction

“Brexit means Brexit!” stated former British Prime Minister Theresa May in her speech to the British people in June 2017. This quote likely represents all that many people in the United Kingdom (UK) as well as elsewhere could have said about the implications of the referendum. The missing capability even of the Prime Minister to clarify the consequences of Brexit stands symbolically for the general lack of clarity on what would happen after the referendum. This might be due to the fact that not only the rest of the continent, but also broad parts of the British population seemed confident about a pro-European outcome prior to the vote on the 23rd of June 2016. Possible consequences of leaving the EU were not sufficiently examined, and therefore the surprising leave vote hit the Union even harder. The question of what Brexit really meant both for the UK and the remaining EU Member States remained unclear for a long time. While many scenarios including different economic and political consequences for the UK have been debated so far, the implications for the rest of the EU seem less apparent.

Even before the referendum, it was unclear whether the future of the Union would involve more cohesion or less. Since the foundation of the EU, the debate has been ongoing as to whether the Member States have grown together and have, as a consequence, created a common public sphere among their citizens. The same applies to the emergence of a European identity, where there is no consensus. Even if such a feeling of belonging to Europe exists, can it persist under such challenging circumstances? Does the critical situation indeed inspire cohesion across the EU? In order to address the gap in research, this paper analyses to what extent the Brexit referendum has affected the European identity in the remaining EU Member States.

This paper draws on the constructivist approach on identity and argues that the feeling of being European has increased in the other EU Member States since the referendum. This is due to the fact that the majority of the members construct their identity on a strong and united Europe. Their identity is endangered by Brexit as the event may turn the wind against European integration. As a counterreaction, the states stand closer together and their identification with Europe is strengthened. As the citizens observe and support their country’s reaction, it consequently affects their feeling of belonging.

This research aims to contribute to the literature as it widens the field of results concerning the post-Brexit EU and its internal perception. The majority of studies focus on the implications of Brexit for the UK. This is why previous findings remain limited on how the remaining EU states and their citizens are influenced by the UK’s withdrawal from the Union. Accordingly, this paper adds to the side of Brexit that remains rather neglected by scholars.

This article addresses the research question on how the Brexit referendum changed the European identity in the remaining Member States of the EU. The next section focuses on the definition of

collective as well as European identity. It also reviews the existing theoretical approaches which explain the transition of identity. They are then evaluated with regard to their potential for the case of Brexit, and the constructivist model is identified as most suitable. The third part is dedicated to describing social constructivism in more detail in order to deduce a hypothesis based on this theoretical framework. Insights on the methodology are given in the third section. The hypothesis is verified by a t-test of average means, linear regression, and descriptive analysis of the Standard Eurobarometer. The results demonstrate a significant increase in European identity before and after the Brexit referendum. While on average 1,961.6 people indicated feeling mostly attached to Europe before Brexit, this number increased to 2,244 after the vote. The referendum is shown to account for 56.8 per cent of the change of identity. Growth in European identity is also underpinned by descriptive indications. Less statistical and descriptive evidence is found, however, for the impact of the referendum on the development of predominantly national identity. Lastly, the results and strategy of this paper are discussed, limitations are described, and prospects for further research are presented.

1. The State of Research on European Identity

In order to understand and examine how the Brexit referendum has changed the European identity, it is necessary to comprehend the meaning of “identity” and its different dimensions identified in previous research. This section is therefore dedicated to firstly defining the term, then reviewing different theoretical approaches on the change of identity, and lastly applying these theories to the EU.

1.1. Definition of identity

Identity can refer to diverse levels of belonging. Therefore, this subsection also follows a multi-level structure, starting with the broad topic of identity and reviewing more details, firstly on the European and then the British level. A general definition of identity is given, a deeper analysis of European identity is made, and different approaches are evaluated on their potential for the case of Brexit.

Generally, identity can be perceived to derive from societal norms and moral concepts.² It represents a multidimensional concept, with a variety of different levels and components. Firstly, it can refer to several characteristics such as origin, language, or gender. A variety of cultural, political,

² Doris Teetzmann, *Europäische Identität Im Spannungsfeld Von Theorie, Empirie Und Leitbildern* (Göttingen: Cuvillier, 2001), 16.

ethnic, imaginary, and real factors are involved in the concept of identity. Secondly, it consists of both affective and rational components meaning that the formation and persistence of one's identity relies both on emotional as well as intellectual motives.³ It can further be distinguished between the individual and the collective level.⁴ These levels must still not be seen as exclusive, but rather as coexistent and interactive. Identification with one aspect does not necessarily signify the non-identification with another. Accordingly, a person's individual identity does not hinder the simultaneous sense of belonging to a group. People can and, in fact, do possess multiple identities that often depend on each other and adapt accordingly if one aspect of the whole changes.

The sociological classification differentiates between not two but three types of identity, namely personal, social, and political. Based on this differentiation, Michael Bruter⁵ elaborates further on the political facet that is closely connected to the concepts of citizenship and constitutional identification. Bruter offers a definition of political identity as a person's "sense of belonging to politically relevant human groups and political structures."⁶ Moreover, he attributes the civic and cultural components to the political identity. The cultural aspect also takes into account the political group to which an individual citizen feels attached, while the civic aspect monitors if a citizen identifies with political institutions and laws.⁷

Besides the sociological conceptualisations, collective identity can also be observed from top-down and bottom-up perspectives. The top-down point of view addresses the question of who can and should be considered as European and how European identity can be developed.⁸ Meanwhile, the bottom-up perspective focuses more on the aspect of who feels European and what one means by admitting their European identification.⁹

Identity in the EU is even more complex and includes more dimensions than the general term of identity, which predominantly refers to nations. As well as the features described above, the soci-

³ Matthew Gabel, *Interests and Integration: Market Liberalization, Public Opinion, and European Union* (Ann Arbor: University of Michigan Press, 2009).

⁴ e.g. Maurizio Bach, "Kollektive Identität in Europa. Kritische Anmerkung Zu Einem Mythos Der Gegenwart", in *Europäische Identität*, ed. Stefan Kadelbach (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2008).

⁵ Michael Bruter, "Winning Hearts and Minds for Europe: The Impact of News and Symbols on Civic and Cultural European Identity", *Comparative Political Studies* 36, no. 10 (2003): 1148-1179; Michael Bruter, *Citizens of Europe? The Emergence of a Mass European Identity* (Basingstoke: Palgrave Macmillan, 2005).

⁶ Bruter, *Citizens of Europe?*, *op. cit.*, p. 1.

⁷ *Ibid.*, pp. 11-13.

⁸ Peter Ester, Loek Halman, and Ruud de Moor, *The Individualizing Society: Value Change in Europe and North America*, (Tilburg: Tilburg University Press, 1994, 1st ed.); Cris Shore, "Inventing the 'People's Europe': Critical Approaches to European Community 'Cultural Policy'," *Man* 28, no. 4 (1993): 779-800; Paul How, "A Community of Europeans - the Requisite Underpinnings," *Journal of Common Market Studies* 33, no. 1 (1995): 27-46; Michael Wintle (ed.), *Culture and Identity in Europe: Perceptions of Divergence and Unity in Past and Present* (London: Avebury, 1996).

⁹ Bruter, "Winning Hearts and Minds for Europe", *op. cit.*

ocultural, macro-historical characteristics attributed to Europe also play a role when looking at European identity.¹⁰ Applying Bruter's concept of political identities, the cultural component of European identity describes whether European citizens feel more closely connected to other Europeans than they do to people from other continents. The civic component in the case of the EU is the extent to which Europeans see themselves as citizens of the EU's political system and how they observe the impact of the output of the EU's political process.¹¹

When looking at European identity, the question arises if the feeling of Europe being a unitary community in terms of politics, culture, and society has emerged since its foundation.¹² The majority of scholars agree on the existence of a European identity in some sense, but there is no consensus on its scope. The existing research on the topic has not yet been able to give a concrete and accepted answer on the instruments shaping and changing (European) identity.¹³ The next subsection dives into the approaches explaining the formation and dynamics of identity.

Limited research exists on the connection between Brexit and identity. Most scholars of this topic have focused so far on how the identity of the British has led to the "Leave" outcome of the referendum. Besides other explanations, one approach for explaining Brexit refers to Britain's Euroscepticism and the absence of a European identity in the UK. According to Carl, Dennison and Evans¹⁴ for example, the percentages of Eurosceptic citizens and members of the European Parliament in the UK trumped any other Member State in the last 40 years. These scholars see the maintaining of national identity and sovereignty as a major driver for the 'Leave' vote. Besides that, the state of research is limited regarding Brexit and identity. No concrete findings exist on the impact of the aftermath of the Brexit referendum on the British (European) identity. Nor has there been research on the consequences of the British decision to leave the EU on the European identity of the remaining Member States. Consequently, this research gap is addressed in this article.

1.2. Theoretical perspectives on the impacts on identity

Following the definition of identity, it is also important to identify the determinants that have an impact on it. Different explanations and approaches have been developed and discussed in the literature. This subsection mainly focuses on the structural, primordialist, instrumentalist, and constructivist arguments to identity.

¹⁰ Teetzmann, *op. cit.*, pp. 18-19.

¹¹ Bruter, "Winning Hearts and Minds for Europe", *op. cit.*, p. 1155.

¹² *Ibid.*, 1153.

¹³ Gemma Scalise, "The Narrative Construction of European Identity. Meanings of Europe 'from Below'", *European Societies* 17, no. 4 (2015): 598.

¹⁴ Noah Carl, James Dennison, and Geoffrey Evans, "European but Not European Enough: An Explanation for Brexit", *European Union Politics* 20, no. 2 (2019): 282-304.

The structural model argues that factors such as institutions and symbols intensify and even construct identity. This approach concentrates on a top-down perspective focusing on the awakening of a sense of identity among the citizens by the political elite in order to secure their power. Vice versa, citizens can also feel the need for common symbols in order to construct their identity. Based on the structural point of view, Castoriadis¹⁵ suggests that mass identity emerges from the image of individuals that form a community that tends to be very heterogeneous and diverse in modern societies. A national anthem or a flag, for example, creates a visual image of the diffuse community and can even become the representative and characteristic of an entity.¹⁶ This task can also be fulfilled by political institutions to which political elites commonly refer as they imply certain values for a community.¹⁷ In the case of the EU, the European anthem, flag and motto, the common passport and currency as well as the European elections among others may serve as such identity-building symbols. However, the identification with and interpretation of these symbols must be understood as dynamic and differentiated across Europe.¹⁸ The extent to which these markers create identity among the wider population is questionable, as Bruter¹⁹ found hints for them being perceived as rather elitist. His study showed that while most people know about the common European symbols such as the flag, the anthem, and the passport, they express doubts as to whether these are famous among the public. On the contrary, there is evidence that the euro as the common currency creates a sense of belonging to the EU among its citizens.²⁰

Another approach is formulated by M. Crawford Young²¹ who makes a distinction between three categories: the primordialist, the instrumentalist, and the constructivist.²² Primordialism regards identity as a concept defined by historical parameters. The anthropologist Clifford Geertz, renowned for his work on symbolic anthropology and his critique on primordialism, explains the term as follows:

By a primordial attachment is meant [...] immediate contiguity and kin connection mainly, but beyond them the givenness that stems from being born into a particular religious community, speaking a particular language, or even a dialect of a language, and following particular social practices.

¹⁵ Cornelius Castoriadis, *L'institution Imaginaire De La Société* (Paris: Seuil, 1992, 5th ed.).

¹⁶ Bruter, *Citizens of Europe?*, *op. cit.*, pp. 27-28.

¹⁷ *Ibid.*, p. 28.

¹⁸ Michael Bruter, "On What Citizens Mean by Feeling 'European': Perceptions of News, Symbols and Borderless-Ness", *Journal of Ethnic and Migration Studies* 30, no. 1 (2004): 21-39; Johan Fornäs, "European Identification: Symbolic Mediations of Unity and Diversity", *Global Media Journal: Australian Edition* 6, no. 1 (2012).

¹⁹ Bruter, "On What Citizens Mean by Feeling 'European'", *op. cit.*

²⁰ Matthias Kaelberer, "The Euro and European Identity: Symbols, Power and the Politics of European Monetary Union", *Review of International Studies* 30 (2004): 161-178; Thomas Risse, "The Euro between National and European Identity", *Journal of European Public Policy* 10, no. 4 (2003): 487-505.

²¹ Crawford Young, *The Politics of Cultural Pluralism* (Madison: University of Wisconsin Press, 1976); Crawford Young, "The Dialectics of Cultural Pluralism: Concept and Reality", in *The Rising Tide of Cultural Pluralism: The Nation-State at Bay?*, ed. Crawford Young (Madison: University of Wisconsin Press, 1993).

²² Young, "The Dialectics of Cultural Pluralism", *op. cit.*, p. 21.

*These congruities of blood, speech, custom, and so on, are seen to have an ineffable, and at times overpowering, coerciveness in and of themselves.*²³

This definition provides a cause for the affective, sometimes unbreakable bond that one has to a certain group of people. Primordialist identities lead to a strict definition of an in- and an out-group. Due to anthropological reasons, people cannot change their group or rather cannot become members of an in-group, if they were not born into the collective.²⁴ Applied to the EU, primordialism generates a distinct image of who belongs to Europe and who does not, and consequently also which countries can become Member States of the EU, and which cannot. Having in mind that the composition of the Union has been dynamic, the applicability of primordialism to the EU seems rather limited. This may be a reason why this approach has hardly been used by researchers for exploring European identity. While many studies are connected to primordialism and the nation²⁵, only a handful of articles can be found regarding primordial European identification²⁶.

According to the constructivist approach, nations or other collectives are perceived as “imagined communities”.²⁷ Contrary to the other two categories identified by Young, there is no necessity for the real existence of a group, in order to feel a sense of belonging.²⁸ It is only required that the person who feels attached to a community perceives it to be real. The model detects identities as objects of constant change that adapt with respect to the situation and the circumstances.²⁹ Parallel to the structural model, symbols form identities according to this approach. Yet going beyond the structuralist assumptions, constructivism takes narratives, norms, and networks into account. Consequently, the group one feels attached to does not need to be one’s historical home state or country of residence, but can be any group that is perceived to share the same values, aims and features.

²³ Clifford Geertz, "The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States", in *Old Societies and New States: The Quest for Modernity in Asia and Africa*, ed. Clifford Geertz (New York: Free Press, 1967), 109.

²⁴ Thomas Risse, *A Community of Europeans?: Transnational Identities and Public Spheres* (Ithaca: Cornell University Press, 2015), 27.

²⁵ Uriel Abulof, "Nationalism as Legitimation: The Appeal of Ethnicity and the Plea for Popular Sovereignty", *Nations and Nationalism* 24, no. 3 (2018): 528-534; Alan Bairner, "National Sports and National Landscapes: In Defence of Primordialism", *National Identities* 11, no. 3 (2009): 223-239; Alexander Bligh and Gadi Hitman, "The Fate of the Assyrian Minority in Early Independent Iraq: A Test Case of Political Violence Based on Rational Primordialism", *Middle Eastern Studies* 55, no. 3 (2019): 419-432; Shmuel Noah Eisenstadt and Bernhard Giesen, "The Construction of Collective Identity", *Archives Européennes De Sociologie* 36, no. 1 (1995): 72-102; Juan J Linz, "From Primordialism to Nationalism", in *New Nationalisms of the Developed West*, ed. Edward Tiryakian and Ronald Rogowski (London: Routledge, 2020); Andreas Wimmer, "The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory", *American Journal of Sociology* 113, no. 4 (2008): 970-1022.

²⁶ Viera Bačová, "The Construction of National Identity - on Primordialism and Instrumentalism", *Human Affairs* 8, no. 1 (1998): 29-43; Eugeen Roosens, "National Identity, Social Order and Political System in Western Europe: Primordial Autochthony", in *Societies, Corporations, and the Nation State*, ed. Edwin Scheuch and David Sciulli (Leiden: Brill, 2000).

²⁷ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, New York: Verso, 2006).

²⁸ Young, "The Dialectics of Cultural Pluralism: Concept and Reality", *op. cit.*, p. 23.

²⁹ Shore, *op. cit.*, p. 783.

This is especially relevant regarding European identity as the Union has vastly expanded in terms of geography and competences over the years. The vocation to be a ‘community of shared values’, however, has persisted and was codified in the Lisbon Treaty. The imaginative creation of Europe becomes apparent when looking at the acceptance or rejection of membership applications. When Morocco applied to the European Economic Community in 1987, it was rejected for the reason of not being a “European country” in a geographical sense. On the contrary, Cyprus was admitted to the Union despite not being located on the European continent either. Thus, the ‘Europeanness’ of states plays in fact an important role, but not in the geographical sense. What matters is for countries to be identified as European, holding the same values, and chasing the same vision. The creation of European identity happens in delimitation to the outside as well as internally in reference to the similarities. Using common narratives and networks, European identity can and is evoked rhetorically. Accordingly, constructivist scholars have placed a focus on the emergence of a European public sphere³⁰ and explored the construction of identities by European players and the media³¹.

Lastly, the instrumentalist argument recognises the origin of identity in connection to one’s own benefit. A person feels connected to the unit or group where he or she expects the greatest benefit for their interest. This approach is – contrary to the structuralist and constructivist models – based on the rational component of identity. When it comes to the EU, Waechter adduces that “the instrumental approach assumes that European identification is based on conscious, rational considerations of individuals about the gains (or losses) they perceive or expect from ‘being European.’”³² The economic advantages of belonging to the Union were typically identified as the most important rational reasons by scholars. Consequently, early research testing the instrumental model for the EU, claimed that economic benefits that nations and individuals receive from the single European market, foster support for European integration.³³ More recent studies demonstrate that perceived economic gains are, in fact, more important than the real benefits for the formation of identity.³⁴

³⁰ e.g. Erik John Fossum and Hans-Jörg Trezz, "The EU's Fledgling Society: From Deafening Silence to Critical Voice in European Constitution-Making", *Journal of Civil Society* 2, no. 1 (2006): 57-77.

³¹ Cristiano Bee, "The 'Institutionally Constructed' European Identity: Citizenship and Public Sphere Narrated by the Commission", *Perspectives on European Politics and Society* 9, no. 4 (2008): 431-450; Alun Jones and Julian Clark, "Europeanisation and Discourse Building: The European Commission, European Narratives and European Neighbourhood Policy", *Geopolitics* 13, no. 3 (2008): 545-571; Scalise, *op. cit.*

³² Natalia Waechter, "Instrumental and Cultural Considerations in Constructing European Identity among Ethnic Minority Groups in Lithuania in a Generational Perspective", *Nationalities Papers: The Journal of Nationalism and Ethnicity* 45, no. 4 (2017): 652.

³³ Matthew Gabel and Harvey Palmer, "Understanding Variation in Public Support for European Integration", *European Journal of Political Research* 27, no. 1 (1995): 3-19.

³⁴ Soetkin Verhaegen, Marc Hooghe, and Ellen Quintelier, "European Identity and Support for European Integration: A Matter of Perceived Economic Benefits?", *Kyklos* 67, no. 2 (2014): 295-314.

However, other benefits of the EU can additionally have a positive instrumentalist impact on identity. Thus, Jiménez et al³⁵ maintain that the freedom of movement within the EU and the common borders have a similar effect as that of economic factors.

1.3. Which is more suitable for the case of Brexit?

Does the Brexit referendum represent a threat to the EU? The answer to this question is necessary to evaluate the previously presented approaches against each other for this case. Firstly, looking at the media at the time, it seems obvious that the Leave vote was a largely unexpected outcome. This impression was proven to be true by the European Journalism Observatory study "Will It Kill Us Or Make Us Stronger? How Europe's Media Covered Brexit" which found newspaper coverage both in the UK and the remaining Member States to be mostly negative and described the decision as "disastrous" and "shocking news".³⁶ Not only the media but also scholars in the field have identified the Brexit referendum as a crisis for the Union. Cini and Verdun³⁷ argue that the EU's shock regarding the Brexit result was due to three reasons in particular: the representation of the first geographical diminishment, the expectation of the impact of the event on many political arenas and the questions that remained regarding the close outcome. Thus, they conclude that Brexit as such a critical event might very well lead to a weakening and further fragmentation of the EU, posing threats to European integration and ultimately endangering the existence of the Union. This threat is underpinned by the fact that the media covered possible referenda in other Member States after the UK's decision.³⁸ Additionally, Brexit is even more challenging for the EU as it does not represent the only crisis the Union faced at that time but rather one among many.³⁹ Consequently, the event represents a critical moment for the Union and is thus expected to have an impact on the identity of the remaining Member States.

From the three models described above, primordialism has the least capability for explaining identity in our case. Max Weber⁴⁰, among others, criticised the argument of collectives held together only by anthropological reasons, as they perceive identities not as being permanent but rather dynamic, changing, and having the tendency to be constructed. Additionally, since the in-group is

³⁵ Antonia M.R. Jiménez et al., "European and National Identities in the EU's Old and New Member States: Ethnic, Civic, Instrumental and Symbolic Components", *European Integration Online Papers* 8, no. 11 (2004).

³⁶ European Journalism Observatory, "Will It Kill Us or Make Us Stronger? How Europe's Media Covered Brexit", (2016).

³⁷ Michelle Cini and Amy Verdun, "The Implications of Brexit for the Future of Europe," in *Brexit and Beyond: Rethinking the Futures of Europe*, ed. Benjamin Martill and Uta Staiger (London: UCL Press, 2018), 63.

³⁸ e.g. Michael Wilkinson and Laura Hughes, "EU Referendum: Brexit Contagion Spreads across Europe as Italy, France, Holland and Denmark Call for Referendums," *Telegraph*, 22 June 2016; Jon Stone, "Nearly All EU States 'Could Follow Britain's Lead and Leave the Union,' Senior French MP Warns," *The Independent*, 26 September 2016.

³⁹ Neill Nugent, "Brexit: Yet Another Crisis for the EU," in *Brexit and Beyond: Rethinking the Futures of Europe*, ed. Benjamin Martill and Uta Staiger, (London: UCL Press, 2018).

⁴⁰ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978).

clearly defined, primordialism gives few answers as to why a country or the citizens of a country belonging to the in-group, should decide not to be a part of it anymore. The sole reason for that could be that the UK has never felt any affection towards the rest of the EU. This is possible, especially as it has been found to be the most Eurosceptic state.⁴¹ However, because there is no change in identity according to the model, Brexit would neither have an impact on the identity of Britons nor on one of the remaining EU members. As Brexit was still an extraordinary agitation for the Union as described above, identifying no change at all is unlikely.

Both the instrumentalist and the constructivist approaches are adequate for explaining dynamic changes in identity. The instrumentalist approach would allow distinct predictions of Brexit on European identity by taking the economic consequences for the remaining Member States into account. However, besides economic consequences, Brexit cannot be seen exclusively as a purely economic decision disregarding normative or emotional factors. Different scholars have argued that (national) identity is in fact more influential on people's opinions regarding European integration than economic motives and they have found empirical support for this claim.⁴² This may especially be true for the rest of the EU in this case. Losing a member for the first time causes an existential threat that is likely to be more crucial regarding the self-perception and expectations on the future of the Union rather than the economic losses generated by one state leaving the single market. As this threat goes beyond economic concerns, the constructivist approach offers a more suitable explanatory potential for the issue at hand than instrumentalism. In addition to this, it is the most fitting model as it states that identities are particularly shaped under pressing circumstances and crises.⁴³

2. Constructing European Identity after the Referendum

The constructivist approach – recognised as the most apt to describe Brexit – will now be explained in more detail in order to develop predictions. The constructivist perspective on identity is based on the broader theory of social constructivism. In contrast with the mainstream theories in the field, constructivism assumes a primacy of ideational over materialistic structures. Social values, structures and meanings determine the interests, and therefore the behaviour of states.⁴⁴ The logic that

⁴¹ Carl, Dennison, and Evans, "European but Not European Enough: An Explanation for Brexit", *op. cit.*

⁴² e.g. Hajo G Boomgaarden et al., "Mapping EU Attitudes: Conceptual and Empirical Dimensions of Euroscepticism and EU Support", *European Union Politics* 12, no. 2 (2011): 241-266; Liesbet Hooghe and Gary Marks, "Does Identity or Economic Rationality Drive Public Opinion on European Integration?", *PS: Political Science and Politics* 37, no. 3 (2004): 415-420.

⁴³ Shore, *op. cit.*, p. 783.

⁴⁴ Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), 2.

shapes decisions follows appropriateness rather than consequentiality.⁴⁵ Actors in the international sphere do not act consistently with rational choice considerations. Instead, communication and interaction affect the process of understanding.

The key terms of social constructivism are norms and identity which emerge endogenously. International, as well as regional or specific values, affect international actors. By acting in compliance with the prevailing norms, they are reproduced and internalised.⁴⁶ As a result, they continue to be spread globally. However, the concepts are not fixed but can change in the process of interaction. New norms can originate and are suppressed or adapted as new rules depending on the specific situation. The standards that an actor follows interact with their identity. In sum, constructivism states that changeable values influence the identity of states and other actors in international relations.

In the case of Brexit and the EU, the relevant, conflicting norms seem to be national sovereignty versus inter-European, collaboration. These two concepts cannot be seen as material aims that states can ultimately obtain. Instead, it is rather the underlying cosmopolitan or ideational aim of these concepts which counts. According to the constructivist argument, the remaining EU Member States stay in the Union because they believe in the value of cooperation beyond borders. Many countries are still traumatised by the Second World War and the infringement of norms that came along with it. In that time, many common values connected to humanity, respect and coexistence were damaged. During or after the war, a new norm emerged: the idea of a united and peaceful Europe. When the war was still ongoing, respective ideas developed in several European countries and were promoted among others by European federalist movements.⁴⁷ Non-totalitarian European states as well as the United States of America pushed for a new approach for Europe in the late 1940s to create peace and stability through cooperation. The EU was an outcome of this process and serves these norms.⁴⁸ Based on this standard, the EU Member States and candidates shape their identity, following the image of a prosperous and undivided continent – which has been observed by many scholars, prominently in the case of Germany.⁴⁹ Even if it may be true that Germany constitutes a special case regarding the significance the EU has for it, all Member States have grown together following the literature on the socialisation of states as part of constructivism.⁵⁰ “European socialisation implies, then, that the involvement in European venues causes a redefinition of norms and practices, and these European norms and values gradually become ‘internalized’ as part of the

⁴⁵ *Ibid.*, p. 29.

⁴⁶ *Ibid.*, p. 30.

⁴⁷ Dan Vataman, "History of the European Union", *Lex ET Scientia International Journal* 17, no. 2 (2010): 111-12.

⁴⁸ *Ibid.*, p. 112.

⁴⁹ Hanns W Maull, "Germany and the Use of Force: Still a 'Civilian Power'?", *Survival* 42, no. 2 (2000): 56-80; Heidemarie Uhl and Richard J Golsan, *The Politics of Memory in Postwar Europe* (Durham: Duke University Press, 2006), 30.

⁵⁰ e.g. Jeffrey T Checkel, "International Institutions and Socialization in Europe: Introduction and Framework," *International Organization* 59, no. 4 (2005): 801-826.

self.”⁵¹ Consequently, the norm of inter-European collaboration and hence the European identity of states are replicated every time a European consensus is achieved, or common rules regulate the lives of the EU citizens.

The possible erosion of the norm of European unity by Brexit represents an existential threat to the identity of the remaining Member States as it does not only endanger the current self-perception but possibly also retrenches the support for further European integration⁵² (see 2.3). Situations of crisis are expected, according to social constructivism, to have a great impact on identity.⁵³ The Brexit referendum as such critical moment for the EU is thus assumed to affect European identity. In this clash of norms as described above, the UK is perceived by the remaining members to abandon the norms of cooperation and unity which lie at the heart of the EU. This first-time decision to leave the Union poses the threat of other countries following suit, as in fact the possibility of referenda in other European states appeared in the news.⁵⁴ Since a wave of EU referenda could ultimately cause the collapse of the Union, states building their identity upon their membership feel threatened. To escape this fate, it seems plausible that these states close their ranks. This may provoke an even more intense advocacy for the norm of European cooperation. The Member States constitute further the perception that the European continent can and must be strong in unity. This leads to the assumption that after the referendum the EU Member States exhibit an increased sense of belonging to the European idea.

The expectation for states will now be translated into a hypothesis concerning European identity on the individual level of citizens. This is necessary as the measurement of identity remains a challenge and relies on proxies for grasping it on a collective stage. State-level identity is still dependent on the perceptions of individuals which can also be explored more easily through direct questioning. Thus, the aggregate assumption is substantiated by methodological individualism and visualised by the so-called Coleman’s boat.⁵⁵ The explanation frame by Coleman is used because it is well-suited for outlining the path from a societal phenomenon to the aggregate outcome of individual behaviour. A graphical presentation of the adaption to the case at hand can be seen below in Figure 1. On the macro level, the assumption stands at the beginning that the identities of the EU Member States have become more European after the referendum. The collective explanandum that is to be linked to the increased European identity of states is the aggregate feeling of a wider spread European identity among the EU citizens. The first macro-stage leads to the individual level of the actor.

⁵¹ Jan Beyers, "Conceptual and Methodological Challenges in the Study of European Socialization", *Journal of European Public Policy* 17, no. 6 (2010): 909.

⁵² Cini and Verdun, *op. cit.*

⁵³ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", *International Organization* 52, no. 4 (1998): 906.

⁵⁴ Stone, *op. cit.*; Wilkinson and Hughes, *op. cit.*

⁵⁵ James Samuel Coleman, *Foundations of Social Theory* (Cambridge: Harvard University Press, 1990).

A single citizen and their values are influenced by the self-image of the home country. The affirmative perception of a nation belonging to the Union is reproduced and promoted within and outside of the country mostly by politicians, symbolic gestures, and the media. In this manner, an individual can observe the state’s position following the logic of the situation of Coleman’s model. In the subsequent step, the logic of selection derives the individual choice of action from the perception and values of an individual. Accordingly, an actor does not only acknowledge the standpoint of his or her state but also feels a sense of belonging and duty to support the country linked to national identity as described in the second section. Stemming from the civic responsibility that a person experiences, the citizens support the point of view of the national state and express this if asked – for example in surveys. Applied to our specific case, citizens of the remaining Member States are expected to grasp their states’ strengthened European identity, choose to support the stance and mirror it. Therefore, more citizens would admit to a European identity following the logic of aggregation. This paper thus expects an increase of European identity on the aggregate level. The hypothesis consequently is:

H1: The number of citizens in the remaining Member States of the European Union having a European identity has increased after the Brexit referendum.

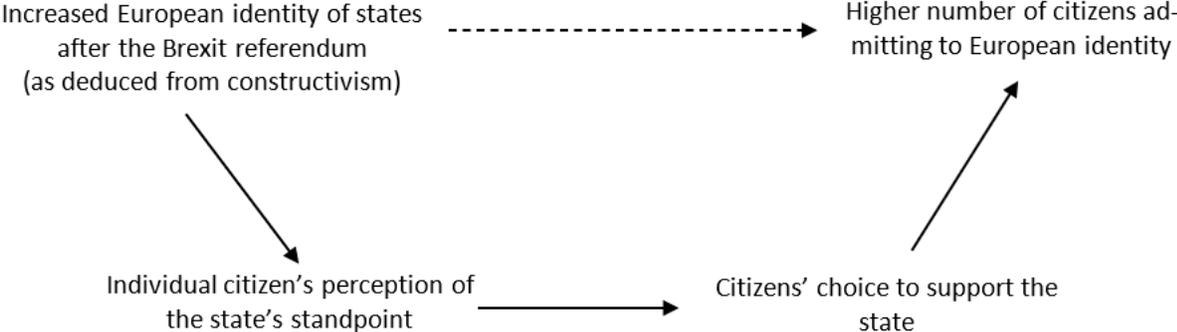


Figure 1: Implementation of Coleman's boat on European identity

3. Data and Sources

The deduction in the previous section led to the assumption of an increased feeling of being European among the other EU countries after the Brexit referendum. The research object represents, therefore, European identity. To test the hypothesis, data is required that gives insights, in the sense of belonging to Europe of the citizens of the 27 remaining Member States.

Interviews seem to be the most appropriate method for collecting information, as in this way people can best provide information about their personal feeling of identity. This interview data is retrieved from the Standard Eurobarometer, a survey format in which approximately 1,000 alternate citizens of every EU Member State are interrogated twice a year.⁵⁶ The sample period is chosen from the first survey in 2014 (Edition 81) to the second in 2018 (Edition 90). By that, the sample contains five interview editions before and five after the referendum in June 2016. The entirety of the data is analysed. Access to the Eurobarometer data is provided by the EU Open Data Portal⁵⁷ and the GESIS – Leibniz Institute for Social Science⁵⁸.

The Standard Eurobarometer contains one question (mostly number QD3) that asks about which identity the respondent feels most closely connected to. The exact phrasing is the following: “Do you see yourself as...?”. The menu items are “National only”, “National and European”, “European and National”, “European only” and “None”. Adapted to the question of this paper, the items are simplified to “More national” including the first two choices and “More European” including answers number three and four. The second merged item is certainly the more important one for this study as it registers European identity. Nevertheless, the item of feeling more national also gives important information because it records if there has been a shift from national to European identity or if a possible increment comes just from the group of people previously admitting to no identity. The fifth answer is disregarded as it is not considered a necessary piece of information regarding the research question. Additionally, an identity index is created out of the four original items attributing each item a number from “1” for “Only national” to “4” for “Only European” and calculating the average mean for each year. Thus, an index score is produced ranging between “1” and “4” where a higher score indicates a greater number of people feeling more European.

The population consists of the answers of all interviewees – except the Britons – to the question described above in the chosen time period. A statistical t-test on the difference of the arithmetical means on the summarised items “More national” and “More European” before and after the referendum is conducted as well as bivariate, linear regression between the referendum and the identity index. The statistical findings are underpinned by a descriptive analysis in order to receive a more precise understanding of the process of identity change.

4. Findings on the Shift of Identity

⁵⁶ European Commission, “Public Opinion”, <https://ec.europa.eu/comfrontoffice/publicopinion/index.cfm>.

⁵⁷ Data.europa.eu, “Datasets”, http://data.europa.eu/euodp/en/data/dataset?q=Standard+Eurobarometer&ext_boolean=all&sort=.

⁵⁸ GESIS (Leibniz Institute for the Social Sciences), “The European Commission’s Eurobarometer Surveys”, <https://www.gesis.org/eurobarometer-data-service/home>.

The research question on whether the Brexit referendum had an impact on the identity of European citizens is now tested statistically through a t-test for arithmetical means and linear regression as well as descriptively.

Statistical t-test

As the first step of the analysis, it is to be discovered whether a statistically significant shift of identity has occurred around the time of the referendum. Therefore, the t-test for arithmetical means is used as the method that allows pinpointing differences in the averages of two groups.

$$t = \frac{\bar{x}_1 - \bar{x}_2}{\sigma_{\bar{x}_1 - \bar{x}_2}}$$

In this case, the two groups are the surveys before and after the referendum. As the Eurobarometer interviews different people every time, and respondents are not expected to influence each other's indications, a t-test for independent samples is used. The normality assumptions for this t-test are that both samples are normally distributed and have similar variations. These necessities are met as the two samples despite being independent are drawn from the same population consisting of citizens of the EU Member States except for the UK. The correspondent standard error of the means $\sigma_{\bar{x}_1 - \bar{x}_2}$ is calculated based on the samples' sizes $n_{1/2}$ as follows:

$$\sigma_{\bar{x}_1 - \bar{x}_2} = \sqrt{s_p^2 \times \left(\frac{1}{n_1} + \frac{1}{n_2}\right)}; s_p^2 = \frac{(n_1 - 1) \times s_1^2 + (n_2 - 1) \times s_2^2}{n_1 + n_2 - 2}$$

A five per cent significance level ($p < .05$) for the rejection of the null hypothesis is set in this statistical analysis. The t-test shows a significant difference before ($M_1=1961.60$; $SD=126.936$; $n=5$) and after the Brexit vote ($M_2=2244.40$; $SD=200.414$; $n=5$) regarding the variable "Feeling more European than national" ($t(8) = -2.666$; $p = .029$). The change in the variable "More national than European" is, by contrast, not statistically significant on the five per cent significance level ($M_1=23917.80$; $M_2=23690.20$; $SD_1=122.060$; $SD_2=244.190$; $n_{1/2}=5$; $t(8)=1.864$; $p = .099$). Therefore, there has been a significant change in the number of people with a European identity, but no significant variation in the number of citizens who feel more national.

Linear regression

As a difference exists between the time before and after the referendum, the impact ascribed to the Brexit vote is consequently analysed. For this aim, a linear regression model testing the impact of the referendum as the independent variable on the calculated identity index as the dependent variable is deployed. The preconditions are fulfilled as the connection between the two variables as well as the coefficients are linear, and the conditional expected value is given. The required heteroscedasticity is also recorded as the Chi² test for homoscedasticity is not statistically significant (Chi²

=1.18; $p > .05$). Nevertheless, the regression faces the risk of an omitted variable bias as it is a bivariate one, the implications of which are further discussed in the section dedicated to limitations. The statistical analysis shows that the Brexit referendum had a significant impact on the feeling of identity of the European population as operationalised by the identity index ($F(1,8)=12.836$, $p < .007$; see Table 1 below). This means that the Brexit vote is a factor that had a distinctive, positive influence on the mean identity indicated by the interviewees. The impact of the referendum is significant ($p = .007$), and the regression constant is set at 1.704 and also significant ($p < .001$). The referendum explains 56.8 per cent of the change in the identity score which is a strong effect according to Cohen⁵⁹.

$$\text{Identity score} = 1.704 + 0.053 \times \text{Referendum} + \varepsilon_i$$

Regression Statistics

Multiple R	0.785
R ²	0.616
Adjusted R ²	0.568
Standard error	0.023
Number of obs	10

ANOVA

	Df	SS	MS	F	Significance
Regression	1	0.007	0.007	12.836	0.007
Residual	8	0.004	0.001		
Total	9	0.011			

Coefficients

	Coefficients	SE	T	Significance
Constant	1.704	0.010	163.747	0.000
Referendum	0.053	0.015	3.583	0.007

Table 1: Regression statistics

⁵⁹ Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* (New York: Academic Press, 1992).

Descriptive analysis

Subsequently to the statistical analysis, the development of the variables “Feeling more European than national” and “Feeling more national than European” is submitted to a more detailed descriptive study in order to explore the direction of the development. Firstly, the variation in European identity is assessed as shown in Figure 2. The x-axis shows the editions of the Standard Eurobarometer, while the y-axis presents the number of people who gave the correspondent answer.

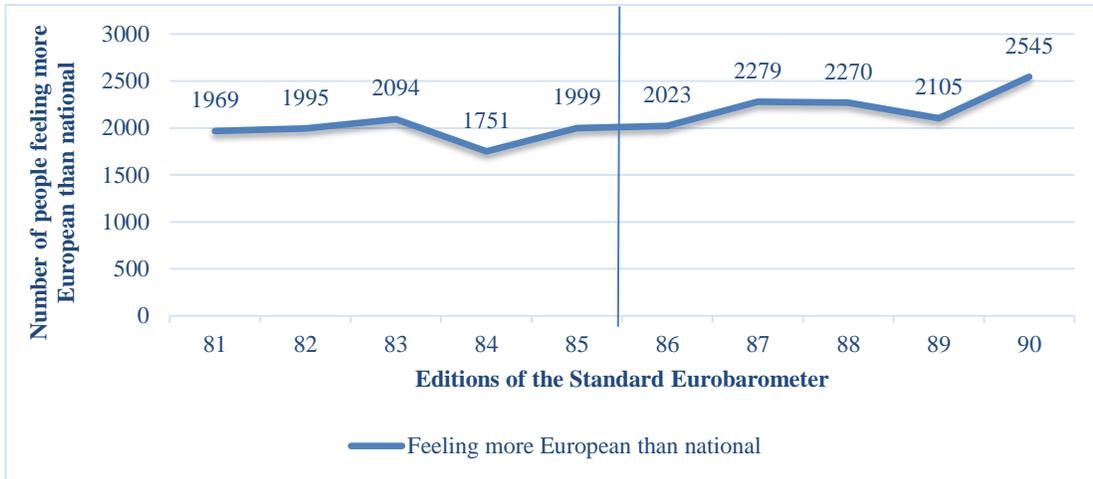


Figure 2: Development of the variable "Feeling more European than national" from Standard Eurobarometer 81 to 90

The Figure shows that the development identified by the statistical analysis exists in the postulated direction. The number of people that considered themselves more as European was around 2,000 out of 26,000 participants (equalling about 8 per cent) from Eurobarometer 81 to 86 with a downwards discrepancy in the 84th Eurobarometer. After the Brexit referendum in June 2016 (between the 85th and 86th Eurobarometer – here depicted by the blue line) the number of people who felt more European increased in the next year. Then it gradually decreased again but remained higher than in the surveys preceding the referendum. In the 90th Eurobarometer the answer “Feeling more European” reached the highest count.

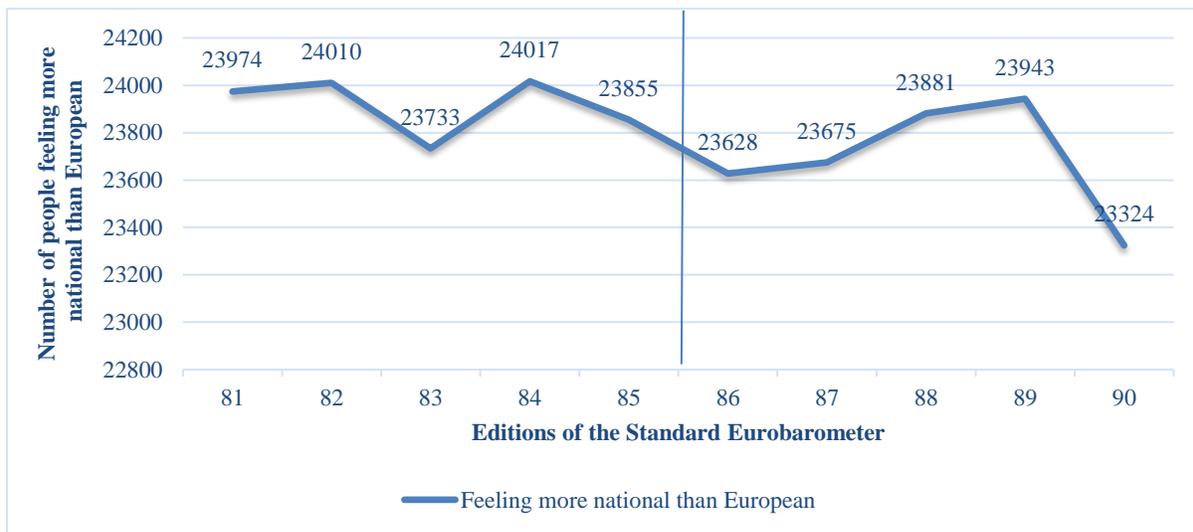


Figure 3: Development of the variable "Feeling more national than European"

The variable "Feeling more national than European" is depicted in Figure 3. Here the course shows more variation. There was a decrease in people feeling more national in the 83rd edition of the Eurobarometer (May 2015). The number of interviewees giving this answer rose again in the consecutive edition but was followed by a bigger decline starting from November 2015 that reached its local minimum in November 2016. Afterwards, more citizens felt national again until the 89th Eurobarometer. In November 2018 the least amount of people committing to this answer is reported for the analysed time period. The implications of the descriptive analysis are discussed in the following section.

5. Discussion and Limitations

The conducted empirical analysis has produced results on the research question that support the previously deduced hypothesis. The research aimed to answer the question of how the Brexit referendum has changed the European identity in the remaining EU Member States. In particular, the objective was to identify the individual impact of Brexit on European identity rather than assessing all factors that influence the level of the sense of belonging to the Union. It was expected that the referendum increased European identity in the rest of the EU. This was supported by empirical evidence as the statistical as well as descriptive assessments have demonstrated the impact of the Brexit referendum on the identity of the European citizens. A t-test for arithmetical means has found a significant difference between the number of people admitting to a more European than national feeling of belonging in the years before and after the vote, which supports the hypothesis. However,

no significant outcome was found for the people feeling more connected to their nation-state. This can be explained by focusing on the data. It can be seen that there has been a shift from people feeling only national to feeling national and European. The combined variable “More national than European” cannot display this variation as it constitutes both items. Additionally, the t-test for people feeling more national is significant on a ten per cent level indicating at least some change before and after the British vote. The linear regression revealed that this change can be ascribed to the referendum which had a significant effect on this change of identity. By reporting a corrected R^2 of 0.568, it means that 56.8 per cent of the change of identity per unit can be explained by the absence or existence of the referendum.

Furthermore, the results were supported by a descriptive look at the data and the direction of the connection was additionally explored. The chart showed an upward trend for people with a more European identity. It makes sense according to the constructivist approach that identity did not change rapidly and without small downturns. Instead, the process of interaction required time and the remarkable increase in people admitting to a European identity did not take place until the 87th edition of the Eurobarometer. For more than a year after the referendum, the negotiations continued without any breakthrough. It was speculated that there would be another referendum and hope arose that the UK – contrary to prior expectations – would not leave the Union. This could be a reason for a reduction of the perceived identity crisis at that time. Therefore, this is likely to have contributed to the decline in the 88th and 89th Eurobarometer. The considerable increase in the 90th survey from November 2018 backs the hypothesis again, especially as a withdrawal agreement was in sight when the fieldwork was conducted. For the number of people feeling more national than European, the events in connection to Brexit possess less explanatory potential coinciding with the result of the t-test. The start of a decrease in national identity could already be traced in the 85th Eurobarometer and was therefore unconnected to the referendum. The following increase cannot be explained by Brexit either. Only the latest record as the lowest in the analysed time frame could be ascribed to the imminent departure of the UK and represents the same exceptional drift as reported for more European identity. Summarising the results of the empirical analysis, the hypothesis that the referendum had an impact and influenced the identity of the people in the remaining EU Member States towards a greater Europeanness can be accepted.

Despite having produced evidence for the postulated assumption, certain issues of the analysis limit the scope of the outcome. Firstly, the inquiry of identity poses a difficulty to researchers as it remains challenging to extract it out of people, even if asking them directly about it. The phrasing of such a question in surveys is, thus, crucial and has not yet been solved satisfactorily. Secondly, the data for the analysis were retrieved from the Standard Eurobarometer which utilises a large sample and extensive fieldwork that allows representative statements about the people in the EU. Besides this asset, the survey is not directly connected to Brexit and changes in the identity of the European citizens could be evoked by different events or developments than the one assessed in this paper.

Brexit might be a factor that explains some shifts in the outcome of the Eurobarometer on the question of European identity. Several other circumstances, that are not discussed in this paper, could, however, also have influenced the feeling of being European. Brexit cannot holistically explain the progression of identity – and this research does not raise the claim for that. Instead, it aims to detect the impact of the independent variable “Brexit” on the dependent variable “European identity in the EU” rather than to identify all factors that affect the dependent variable. This also results in the regression being a bivariate one which contains the risk of an omitted variable bias. The shortcoming could, however, not be circumvented as other possible influences are challenging to study in this case and can hardly be controlled. Besides, the sample varies from survey to survey which can also cause deviations. The explanatory power of statistical significance of the tests conducted here might also be considered small due to the low number of cases of Eurobarometer editions. However, this is less problematic as each case consists of a representative sample of European citizens composed around 26,000 interviewees each.

6. Conclusion

This research paper has analysed the question of how much of an impact the Brexit referendum has had on the European identity of the remaining EU Member States. The underlying concept of identity was initially explored as a multi-dimensional, dynamic phenomenon. Different approaches on the impacts on identity were assessed including the structural, primordialist, instrumentalist and constructivist argument, and, the constructivist approach was identified as the most fitting one for Brexit. The hypothesis deduced from the constructivist model was that the sense of feeling European has increased since the referendum because the constructed identity of a united Europe strengthens in such a crucial situation of endogenous crisis as Brexit. The findings on the issue mostly support the argument. A statistical t-test has shown that there was a significant increase of EU citizens who feel mostly European after the referendum. The effect of the referendum on the change of identity was demonstrated by a linear regression and quantified to account for 56.8 per cent of the identity shift. These results are supported by the descriptive analysis which showed that the response of a predominantly European identity has increased after June 2016. For the number of people who ascribe themselves as more national, the findings could not be confirmed. The statistical as well as the descriptive analysis only delivered small hints for a decline of national identity due to the Brexit vote.

This research has contributed to the literature on European identity indicating that events such as Brexit which threaten the endurance of the European project can, in fact, strengthen the sense of belonging to the Union among its citizens. The research on Brexit was also widened by this paper

as it has explored the side of the remaining EU Member States and their citizens. The article constitutes an early step in this field of study and could act as a reference point for ensuing investigations that could also address some limitations of this article. Further research could extend the scope of the results using a wider time frame as well as data that is more directly aimed at investigating identity. Moreover, the article focuses on the impact of the referendum whereas the process of the UK leaving the EU has only been completed with the final withdrawal on 31 January 2020. The definite departure could possibly have an even broader impact on identity than the referendum. Thus, further research on the effect of this event may offer useful, additional insights into the dynamics of European identity. Beyond that, the question of the practical implications of an increased European identity remains. Will Brexit in fact create greater support for the European Union?

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A New European Neighbourhood without the EU's Neighbourhood Clause: The (potential) special relationship in EU-UK relations under Article 8 TEU

Brendan Rooney¹

Abstract: For the first time in its history, a Member State has withdrawn from the EU through the process of Article 50 TEU, resulting in the UK occupying an unforeseen and unique position within the EU's neighbourhood. Unlike any other relationship that the EU has developed with a neighbouring country, the aim of EU-UK relations is the disentanglement of the UK from the European legal order instead of integration into it. This is coupled with the fact that withdrawing from the EU actually takes place in an integration-based framework and is interwoven with the values of the EU. In this context, Article 8 TEU, the often forgotten Neighbourhood clause, would seem to provide the EU with an unambiguous legal basis to develop a special relationship with neighbouring countries founded on EU values. Despite the unique starting point and nature of the relationship, the EU-UK Trade and Cooperation Agreement has been concluded, not on the basis of the Neighbourhood clause, but on the 'catch-all' provision of Article 217 TFEU. Article 217 TFEU is the substantive legal basis used to establish an association between the EU and a third country, regardless of that third country being a neighbour or not. However, the Trade and Cooperation Agreement does not establish an association between the EU and the UK but, instead, pursues the ultimate aim of Article 8 TEU, namely to establish a relationship "within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation". The role that Article 8 TEU could have played or could still play in the development of EU-UK neighbourly relations remains to be assessed.

Keywords: Article 8 TEU, Association, EU-UK Relations, Neighbourhood clause, Privileged Partnership, Withdrawal.

Introduction

Article 8 (1) TEU provides the EU with a legal basis to "develop a special relationship with

¹ Brendan Rooney is a practising Barrister-at-Law in Ireland and is a 2019 graduate from the Master of European Law (LLM) programme at the the College of Europe specialising in the European Neighbourhood Policy.

neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.” However, since its inception, it has never been employed as the substantive legal basis to any agreement concluded between the EU and a neighbour. Instead, Article 217 TFEU, the legal basis used to establish associations, is frequently used to conclude such agreements. In the context of EU-UK relations, the UK has become the first EU Member State to leave under the Article 50 TEU process. The process of withdrawal is one that the Court of Justice of the European Union (‘CJEU’) has linked directly to the values of the EU found in Article 2 TEU and has interpreted within the context of Article 1(2) TEU, namely “the process of creating an ever closer union among the peoples of Europe.”² Article 8 TEU is potentially relevant to this relationship as it provides for the foundation of a special neighbourly relationship as an alternative path to membership and it requires that such a relationship must be founded on EU values.

The framework governing this new relationship is the EU-UK Trade and Cooperation Agreement (‘TCA’).³ Article COMPROV.1 of the TCA states that its purpose is to establish “the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties’ autonomy and sovereignty.” The TCA, therefore, does not establish an association between the EU and the UK but pursues the objective found in Article 8 (1) TEU. Despite this, the TCA was concluded on the sole legal basis of Article 217 TFEU.⁴ Consequently, it must be asked whether the EU-UK relationship should have been developed on the basis of Article 8 TEU and whether there lies any potential in the future use of the Neighbourhood clause in the context of this relationship. This paper proposes that Article 8 TEU would have been a more suitable legal basis to conclude the EU-UK TCA than Article 217 TFEU and that Article 8 TEU may still provide an appropriate legal basis for the conclusion of future sector-specific agreements between the EU and the UK.

This paper is divided into three sections. The first section outlines: (i) the nature and intended purpose of Article 8 TEU; and, (ii) the suitability of the Neighbourhood clause as a legal basis to conclude agreements with neighbouring countries not seeking EU membership. The second section discusses: (i) the special relationship that the UK has always had with the EU both prior to its accession as well as during its time as a Member State; and, (ii) the integration and value-oriented focus of the process of withdrawal under Article 50 TEU. The final section (i) analyses the suitability of Article 8 TEU as the appropriate legal basis for the conclusion of the EU-UK TCA by contrasting two schools of thought which differ in arguing whether Article 8 TEU is a self-standing legal basis or whether it is an essentially political provision without any practical legal effect. Additionally, this section (ii) examines the potential of Article 8 TEU as the

² Judgment of 10 December 2018, *Wightman and others v Secretary of State for Exiting the European Union*, C-621/18, EU:C:2018:999, paras. 61-62.

³ 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, ST/5198/2021/INIT OJ L 149, 30.4.2021, 10-2539.

⁴ Council Decision of 29 December 2020 on the signing and on provisional application of the Trade and Cooperation Agreement between the European Union and the United Kingdom, OJ L 444, 31.12.2020, 2-10.

appropriate legal basis for future sector-specific agreements in providing the foundation of a privileged partnership between the EU and the UK.

1. Historical Overview of Article 8 TEU

1.1. Nature and Intended Purpose of the Neighbourhood Clause

Article 8 TEU states that:

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

For its part, Article 217 TFEU states:

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

There is extensive literature on the genesis and wording of Article 8 TEU in addition to its potential use within the context of the European Neighbourhood Policy ('ENP').⁵ Consequently, in lieu of repeating what already exists, this paper emphasises the neighbourly focus of Article 8 TEU which differentiates it from Article 217 TFEU, and underlines the importance of the "values of the Union" mentioned in Article 8 (1) TEU.

1.1.1. A Neighbourly Focus

According to the *travaux préparatoires* of the proposed Article I-57 of the Treaty establishing a Constitution for Europe ('TCE'), which has since become Article 8 TEU, the provision was intended to recognise "for the first time the importance to the EU of its immediate environment."⁶ The point of departure for Article I-57 TCE was Article 310 of the Treaty Establishing the European Community ('TEC'), which has since become Article 217 TFEU.⁷ However, Article I-57 TCE was distinct from Article 310 TEC due to the emphasis placed on relations with neighbouring

⁵ See for example Peter Van Elsuwege, Roman Petrov, "Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?" *European Law Review* 36, no. 5 (2011): 688-703; and Dominik Hanf, "The ENP in the light of the new Neighbourhood clause" in *Challenges of the European Neighbourhood Policy*, ed. Erwan Lannon (Brussels-Berlin: Peter Lang Publishers, 2011).

⁶ Title IX: The Union and its immediate environment, CONV 649/3, 2 April 2003, <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00649.en03.pdf>, 2.

⁷ *Ibid.*

countries. In this regard, while the EU had already established contractual relations with its neighbours using Article 310 TEC, the purpose of Article I-57 TCE was to provide a coherent framework to define the “privileged relationship between the Union and its neighbouring states.”⁸

One of the reasons for the necessity of a proximity-specific clause such as Article I-57 TCE was driven by the over-use of Article 310 TEC with neighbouring and non-neighbouring countries alike.⁹ In order to reflect the importance of the EU’s relations with its neighbours, a separate title on “the Union and its Neighbours” was created within the TCE,¹⁰ with Article I-57 TCE being the sole provision under this title.¹¹ It is thus clear that the Article 217 TFEU and Article 8 TEU are distinct from each other insofar as the Neighbourhood clause provides a separate framework for relations with third countries who are neighbours.

1.1.2. A Special Relationship Founded on EU Values

At the time the Neighbourhood clause was put forward, it was proposed that the provision should be amended to include a reference that the “special relationship” must “respect basic values such as democratic principles, the rule of law, and human rights”.¹² It should therefore be noted that while the original wording of the Neighbourhood clause in the *travaux préparatoires* contained no reference to EU values,¹³ Article 8 (1) TEU requires the special relationship to be “founded on the values of the Union”. This change in wording represents a deliberate choice to connect the special relationship formed under the Neighbourhood clause to EU values.

In this context, it is also worthwhile to take into account the difference between the placement of Article 8 TEU and the proposed Article I-57 TCE. While Article I-57 TCE was located immediately before the provision concerning accession to the EU,¹⁴ Article 8 TEU is found under Title I on the “Common Provisions” of the TEU. This is another element which links Article 8 TEU closer to the governing values of the EU found in Article 2 TEU and distances it from the path of membership.¹⁵

1.2. Accession, Associations, and Good Neighbourliness

⁸ *Ibid.*, 1.

⁹ Guillaume Van Der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration Without Membership?* (Boston: Brill Nijhoff: 2016), 98.

¹⁰ *Ibid.*, 96.

¹¹ In Title VIII: The Union and its Neighbours under Part I of the now defunct Treaty establishing a Constitution for Europe, Article I-57 is the only provision found under this title.

¹² Reactions to draft Article 42 (The Union and its immediate environment), CONV 671/03, <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00671.en03.pdf>, 4.

¹³ See Title IX, 2, where the first part of the Neighbourhood clause originally states: “The Union shall develop a special relationship with its neighbouring States, aiming to establish an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation.”

¹⁴ Article I-58 TCE is now Article 49 TEU on accession to the EU.

¹⁵ Van Der Loo, *EU-Ukraine*, 98.

An interesting dynamic between Article 8 TEU and Article 217 TFEU is the position of each provision in relation to offering a membership perspective to neighbouring countries. With regard to Article 217 TFEU, it is clear that its primary purpose is to conclude “agreements establishing an association” between the EU and a third country. An association itself is a very broad and flexible legal instrument. There can be “association as a pre-accession status, association as an alternative to membership and association as a privileged status of non-European countries”.¹⁶ While an association can grant pre-accession status, association in and of itself does not grant any definitive membership dimension.¹⁷ In fact, it is quite possible to join the EU without first forming an association.¹⁸ However, the different generations of associations established with neighbouring countries are intertwined with the refinement of the enlargement process.¹⁹ As a result, establishing an association with the EU is often perceived to be a “stepping-stone” to EU membership.²⁰

The path, perceived or real, of accession through association can be contrasted with the neighbourly emphasis of Article 8 TEU. To this effect, neighbouring countries aspiring to join the EU have no desire for the use of a neighbour-focused formula such as Article 8 TEU.²¹ Such countries in fact explicitly seek to conclude an association agreement with the EU in order to advance their membership ambitions and avoid a neighbour-type *finalité* taking the place of a possible membership perspective.²² Viewed in this light, Article 8 TEU could be best described as providing the basis for a “special integration-driven ‘privileged’ partnership ... without the necessity, however, of having any association to be established between the parties and excluding the accession perspectives.”²³ Thus, while Article 8 TEU would not be appropriate where a neighbouring country is seeking a membership perspective, it would provide a suitable basis for neighbouring countries seeking a close neighbourly relationship in lieu of membership.

A neighbour which has withdrawn from EU membership would evidently be seeking such a relationship. Article 8 TEU would thus provide an appropriate basis for the development of EU-UK relations. Additionally, the UK’s relationship with the European project; prior to, during and even after its membership; has always been characterised by the constant push-and-pull of integration into and disentanglement from the EU legal order. As such, Article 8 TEU would be even more suited to this relationship given that the provision is connected with the integration objective of the EU but removed from the path of accession.

¹⁶ Peter Van Elsuwege, “The Meaning of ‘Association’ Under EU Law: A Study on the Law and Practice of EU Association Agreements: STUDY”, *European Parliament*, 2019, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU\(2019\)608861_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf), 8.

¹⁷ *Ibid.*, 24.

¹⁸ *Ibid.*

¹⁹ See Van Elsuwege, “Meaning of ‘Association’”, 24-31, where Van Elsuwege analyses different generations of associations as being pre-accession instruments or as alternatives to membership.

²⁰ David Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield: Sheffield Academic Press, 1999), 15.

²¹ Van Elsuwege, “Meaning of ‘Association’”, 13.

²² See Van Der Loo, *EU-Ukraine*, 105, where Van der Loo discusses the desire of Ukraine to conclude an association agreement with the EU in order to advance their membership perspective.

²³ Jenó Czuczai, “Article 8 TEU as a potential (still waiting) legal basis for “Privileged Partnership”-type agreements between the EU and its neighbours”, *JURA* 1 (2019): 42.

2. The Unique Case of a Neighbour resulting from Withdrawal

2.1. British Membership in the European Union

The UK's relationship with the European project began in 1946 when the British expressed their support for European integration with the caveat, however, that the UK would remain uninvolved in such a project and would be "the friends and sponsors of the new Europe".²⁴ In particular, the UK declined to join at first because it wished to retain its own independent trade policy.²⁵ Indeed, the UK was one of the primary actors in establishing the European Free Trade Association ('EFTA') which was a rival organisation to counter the influence of the European Economic Community ('EEC').²⁶ In contrast to the economic integration of the EEC, EFTA promoted tariff-free trade in industrial goods by opting for a looser form of intergovernmental cooperation between its members.²⁷ Nonetheless, due to the EEC's economic success, the UK applied to join on two different occasions.²⁸ However, the UK was rejected both times,²⁹ with France expressing the deepest opposition as it was concerned that enlargement would prevent greater European integration.³⁰ The UK finally acceded to the EEC in 1973, but then attempted to renegotiate its membership in 1974 in order to retain sovereignty over regional, economic and industrial policies, and negotiate changes to the EEC Budget.³¹ The negotiations concluded with mixed results and the UK held a referendum on its membership in 1975 with the government recommending that the UK should remain in the EEC.³²

In its journey to joining the EEC, it can be seen that the UK desired to remain separate from as well as be a part of the European project. Its membership is likewise defined by this characteristic due to the many opt-outs the UK secured from European integration. These opt-outs began to materialise in tandem with the intensified integration of the European project around the time of the Single European Act in 1986.³³ By the time of its departure, the UK had four operative opt-outs from EU law, namely from participation in the Economic and Monetary Union ('EMU') (Protocol No. 15), the Schengen *acquis* (Protocol No. 19), the area of freedom, security and justice ('AFSJ') (Protocol No. 21) and the Charter of Fundamental Rights ('CFR') (Protocol No. 30). The UK desired to fully exercise its opt-outs and it employed both judicial and political

²⁴ Winston Churchill, Speech [on a Council of Europe], Zurich, September 19, 1946, <https://rm.coe.int/CoERM-PublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806981f3>.

²⁵ Kenneth Armstrong, *Brexit Time: Leaving the EU-Why, How and When?* (Cambridge: Cambridge University Press, 2017), 11.

²⁶ Maurice Torrelli, *La Grande-Bretagne Et L'Europe Des Six: L'Echec d'une Negociation* (Montréal: Pressesdel 'Ecoledeshautesétudes commerciales (Cahiers du C.E.D.E, 2), 1969), 17.

²⁷ Armstrong, *Brexit Time*, 11.

²⁸ *Ibid.*

²⁹ For an examination on the failure of the original British negotiations on accession, see Torrelli, *La Grande-Bretagne Et L'Europe*.

³⁰ Armstrong, *Brexit Time*, 13.

³¹ *Ibid.*, 22.

³² *Ibid.*, 24.

³³ Andrew Glencross, *Why the UK Voted for Brexit: David Cameron's Great Miscalculation* (London: Palgrave Macmillan (Palgrave studies in European Union politics), 2016), 30.

means to maximise their effectiveness.

In the context of its EMU opt-out, the UK managed to enhance its position by securing further concessions both by judicial action through the CJEU³⁴ and by political means through negotiations³⁵ to safeguard, respectfully, against additional financial obligations and the risk of discriminatory action from eurozone Member States. The opt-out from Schengen operated in parallel to the bespoke arrangements of the Common Travel Area between the UK and Ireland which are explicitly recognised in Article 2 of Protocol No. 20. However, despite effectively exercising its opt-outs from the EMU and the Schengen *acquis*, the UK was less successful in exercising its other opt-outs from the AFSJ and the CFR.

Prior to its departure, there was a trend whereby the UK sought to increase the use of its opt-out from the AFSJ. The UK brought three separate actions against the Council regarding the EEA Agreement, the EU-Switzerland Agreement on the free movement of persons and the EEC-Turkey Association Agreement.³⁶ The disputes concerned the correct legal basis for the adoption of the EU position within the Joint/Association Committees, established by those agreements, in order to update the agreements to reflect new EU social security legislation.³⁷ The UK contested the use of Article 48 TFEU (an Internal Market provision) as the legal basis for the contested decisions and argued instead that Article 79 (2) (b) TFEU (an AFSJ provision) should have been used. As Article 79 (2) (b) TFEU belongs to the AFSJ, the UK would have had the option to opt-out from any measures based on this provision.

In all three cases, however, the CJEU rejected the legal basis of Article 79 (2) (b) TFEU and held that Article 48 TFEU was the correct legal basis for the adoption of the EU position (although the CJEU held that a combined legal basis of Article 217 TFEU and Article 48 TFEU was required in the case of Turkey).³⁸ As a result, the UK was unable to exercise its opt-out. Nonetheless, while the UK did not fare well judicially in its attempts to broaden the scope of its opt-out from the AFSJ, it did succeed in doing so politically. In the conclusion of the EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area ('AA-DCFTA'), the UK, in essence, obliged the Council to separate the provisions relating to the treatment of third country nationals legally employed as workers in the territory of the parties from the remainder of the agreement.³⁹ While the rest of the AA-DCFTA was concluded on the basis of Article 217 TFEU, these provisions were concluded separately on the basis of Article 79 (2) (b) TFEU, which enabled the UK to exercise its opt-out from Protocol No. 21.⁴⁰

³⁴ Judgment of 4 March 2015, *United Kingdom v European Central Bank*, T-496/11, T:2015:133, para. 110.

³⁵ European Council Conclusions, Brussels, February 19, 2016, <https://www.consilium.europa.eu/media/21787/0216-euco-conclusions.pdf>, 13.

³⁶ Judgment of 26 September 2013, *UK v Council (EEA Agreement)*, C-431/11, EU:C:2013:589; Judgment of 27 February 2014, *UK v Council (Switzerland)*, C-656/11, EU:C:2014:97; and Judgment of 18 December 2014, *UK v Council (EEC-Turkey Association Agreement)*, C-81/13, EU:C:2014:2449.

³⁷ Van Der Loo, *EU-Ukraine*, 169-170.

³⁸ C-431/11 *UK v Council (EEA)*, para. 68, C-656/11; *UK v Council (Switzerland)*, para. 64; C-81/13, *UK v Council (EEC-Turkey Association Agreement)*, para. 63.

³⁹ Van Elsuwege, "Meaning of 'Association'", 16.

⁴⁰ *Ibid.*, 16-17.

The UK's opt-out from the CFR arose in the case of C-411/10 *NS*,⁴¹ where the CJEU held that Protocol No. 30 did "not call into question the applicability of the Charter in the United Kingdom".⁴² The Court also stated that the Protocol did not intend to exempt "the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions."⁴³ It should be noted that while Article 1 (2) of Protocol No. 30 provides that "nothing in Title IV of the Charter creates justiciable rights applicable to ... the United Kingdom", the CJEU reserved its interpretation on that provision as the rights at issue in *NS* did not fall under Title IV of the CFR.⁴⁴ Thus, while some uncertainty remained regarding the applicability of the provisions under Title IV of the CFR, the opt-out did not exempt the UK from its obligation to comply with the provisions under the CFR.

The culmination of British efforts to disassociate from European integration resulted in a unique and innovative fifth opt-out that the UK secured in 2016 but was never implemented because of the UK's decision to withdraw from the EU. This opt-out was from Article 1 (2) TEU, regarding "the process of creating an ever closer Union", and would have been explicitly recognised in the EU Treaties in the form of a Treaty amendment.⁴⁵ Article 1 (2) TEU is acknowledged as neither extending the scope of EU law nor increasing the competences of the institutions,⁴⁶ however, it is accepted that the provision does hold interpretative value for the CJEU.⁴⁷ However, even if its value is substantially symbolic, it is, nonetheless, an important symbol and the UK would have been unique as the only Member State to possess this opt-out. It can thus be seen that while the UK sometimes had mixed results in exercising its opt-outs, the outcome was that its membership was a special membership with more opt-outs from European integration than any other Member State. In this way, the UK continued its aspiration of establishing a relationship that sought to be involved with the European project but simultaneously endeavoured to distance itself from the process of integration. This trend continued up to and even beyond its decision to leave the EU due to the integration and value-based context of withdrawal under Article 50 TEU.

2.2. Integration and Value-Oriented Process of Withdrawal from the EU

In C-621/18 *Wightman*, the CJEU placed Article 50 TEU within the context of Article 1 (2) TEU, on "the creation of an ever closer union among the peoples of Europe", and Article 2 TEU, namely the "common values ... [which] form part of the very foundations of the European Union

⁴¹ Judgment of 21 December 2011, *NS v Secretary of State for the Home Department and others*, C-411/10, EU:C:2011:865.

⁴² *Ibid.*, para. 119.

⁴³ *Ibid.*, para. 120.

⁴⁴ *Ibid.*, para. 121.

⁴⁵ European Council Conclusions, 2016, 16.

⁴⁶ *Ibid.*

⁴⁷ Vaughne Miller, "'Ever Closer Union' in the EU Treaties and Court of Justice case law", *House of Commons Library, Briefing Paper No. 07230*, November 16, 2015, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7230#fullreport>.

legal order”.⁴⁸ In interpreting Article 50 TEU this way, the CJEU held that a withdrawing Member State, which has given the notification of its intention to withdraw from the EU, retains the right to unilaterally revoke its notification and resume its membership.⁴⁹ It is notable that Article 1 (2) TEU, from which the UK had secured an opt-out as discussed above, should be used here in an interpretative capacity. Advocate General Campos Sánchez-Bordona provided further clarification on this point in his Opinion of C-621/18 *Wightman*.⁵⁰ He noted that the objective under Article 1 (2) TEU of creating “an ever closer union among the peoples of Europe” supports the interpretation of allowing for the unilateral revocation of the notification.⁵¹ This is because such an interpretation, which allows the Member State concerned to continue its membership unimpeded, conforms to the objective of European integration.⁵² It can thus be seen that, although Article 50 TEU provides for the unilateral right of a Member State to withdraw from the EU, the CJEU placed the process of withdrawal within an integration-based context.

Additionally, the CJEU described Article 50 TEU on withdrawal as the direct counterpart to Article 49 TEU on accession by linking them both to the foundational values of the Union found in Article 2 TEU.⁵³ The result of this triangular connection between accession and withdrawal and EU values is that just as “a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will”.⁵⁴ In being intrinsically connected to the values of the EU, Article 50 TEU has reinforced the voluntary nature of participation in the European project through membership of the EU. It can thus be seen that “withdrawal is not an expression of disintegration, but a manifestation of the premises on which the Union is based”.⁵⁵ The EU objective of creating an ever closer union would seem to be ill at ease with the value of respecting the democratic will of a Member State withdrawing from the Union. However, it must be pointed out that withdrawing from the EU is very different to disassociating from its legal order. The EU’s relationship with the EEA/EFTA states and its bilateral arrangements with Switzerland demonstrate that “non-membership need not mechanically result in non-participation in, let alone rejection of, the European integration process.”⁵⁶

In the context of a Member State which has withdrawn from EU membership, Hillion proposes that Article 8 TEU should be used to develop the new relationship as the former Member State becomes a new neighbour with which the EU is bound to engage.⁵⁷ He argues that the mandate

⁴⁸ C-621/18, *Wightman*, paras. 61-62.

⁴⁹ *Ibid.*, para. 73.

⁵⁰ Opinion of Advocate General Campos Sánchez-Bordona delivered on 4 December 2018, *Wightman and others v Secretary of State for Exiting the European Union*, C-621/18, ECLI:EU:C:2018:978.

⁵¹ *Ibid.*, para. 133.

⁵² *Ibid.*, paras. 133-137.

⁵³ C-621/18, *Wightman*, para. 63.

⁵⁴ *Ibid.*, para. 64.

⁵⁵ Christophe Hillion, “Withdrawal Under Article 50 TEU: An Integration-Friendly Process” *Common Market Law Review* 55, no. 3 (2018): 53.

⁵⁶ *Ibid.*, 54.

⁵⁷ *Ibid.*, 55.

under Article 8 TEU to develop a special relationship with neighbouring countries would bolster the normative basis for a negotiated withdrawal and demonstrate post-exit engagement by the EU with its former Member State.⁵⁸ Hillion notes that the new neighbour can continue to participate in the integration process through an integration agreement, such as the EEA Agreement, which provides for an alternative form of participation for a neighbour not seeking membership.⁵⁹ Indeed, in line with the Protocol on Ireland/Northern Ireland attached to the EU-UK Withdrawal Agreement,⁶⁰ it is already the case that UK has a unique participation in the integration process due to the position of Northern Ireland within the EU legal order. The Protocol sets out the necessary arrangements to avoid a hard border, i.e. without customs and regulatory checks or controls and related physical infrastructure at the border, between Ireland and Northern Ireland.⁶¹ These arrangements are unique as they result in Northern Ireland, but not the rest of the UK (England, Scotland and Wales), adopting a large amount of the EU's internal market *acquis* in order to remain to a significant degree within the EU's customs union and single market.⁶²

Article 8 TEU, which is intertwined with the integration objective and values of the EU, can thus provide a suitable basis for the development of relations with a neighbouring country that has emerged from withdrawal. This is because such a country seeks the *finalité* of a neighbourly relationship and because of the integration and value-oriented process of withdrawal itself. Additionally, the history of British participation within the European project is characterised by integration into and separation from the EU legal order. Moreover, the UK has emerged from withdrawal, not with a rejection of the European integration process, but rather with a different and unique participation within it. Article 8 TEU would also provide an appropriate legal basis for the development of such a relationship due to its mandate to develop a special relationship with neighbouring countries founded on the values of the Union. It now needs to be examined whether the EU-UK TCA should have been concluded on the basis of Article 8 TEU instead of Article 217 TFEU, and whether the Neighbourhood clause could be used to conclude future sector-specific agreements between the EU and the UK.

3. The Case for Article 8 TEU

3.1. As the legal basis for the EU-UK TCA

As recalled above, Article COMPROV.1 of the TCA outlines that its purpose is to establish “the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L 29, 31.1.2020, 7-187.

⁶¹ Article 1 (3) of the Protocol on Ireland/Northern Ireland.

⁶² For a full analysis on Northern Ireland's participation within the EU's customs unions and single market see: Stephen Weatherill, "The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's" *European Law Review* 45, no. 2 (2020): 222-236.

Parties' autonomy and sovereignty". Although the substantive legal basis of the EU-UK TCA is Article 217 TFEU, the TCA does not establish an association between the parties and its purpose aligns with the objective pursued by Article 8 (1) TEU. It must therefore be asked why Article 8 TEU was not used to conclude the EU-UK TCA.

There are two recent distinct schools of thought regarding the use of Article 8 TEU as the legal basis to conclude an agreement of a general nature. One is the proposition put forward by Czuczai that Article 8 TEU has a completely different purpose than Article 217 TFEU and that, in effect, the two provisions are separate, distinct and self-standing legal bases which should not be mixed up.⁶³ The other is the view adopted by Van Elsuwege that Article 8 TEU is an essentially political provision without any practical legal effect and Article 217 TFEU is capable of being the sole legal basis for such agreements on its own.⁶⁴

3.1.1. Article 8 TEU as the appropriate legal basis

Czuczai argues, in relation to the Neighbourhood clause, that "there is *effet utile véritable* of this so far unused legal basis."⁶⁵ Among its potential uses, Czuczai outlines that Article 8 TEU "is a distinct and self-standing so-called 'catch all' legal basis".⁶⁶ He notes that the objective of Article 217 TFEU, establishing an association with a third country, is "as a rule, done typically in the first paragraph of the concerned association agreements".⁶⁷ He contrasts this with the aim pursued by Article 8 (1) TEU and concludes that the two provisions have "completely different purposes and aims".⁶⁸

Additionally, Czuczai argues that a combined legal basis of Article 8 TEU and Article 217 TFEU would not be possible as the two provisions exclude each other by virtue of both being catch-all provisions.⁶⁹ In this regard, he asserts that the recent jurisprudence of the CJEU on Article 217 TFEU would preclude the combined legal basis of two general provisions.⁷⁰ Therefore, under this interpretation, the EU-UK TCA should have been concluded under Article 8 TEU alone in light of the objective pursued by the TCA and the lack of any association established between the parties.

3.1.2. Article 217 TFEU as the appropriate legal basis

Van Elsuwege notes that due to its broad scope and general nature, Article 217 TFEU by itself provides an appropriate legal basis for agreements covering a wide variety of substantive areas without requiring additional substantive legal bases.⁷¹ Concerning the lack of an association

⁶³ Czuczai, "Article 8", 41.

⁶⁴ Van Elsuwege, "Meaning of 'Association'", 13.

⁶⁵ Czuczai, "Article 8", 39, emphasis original.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 41.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 42.

⁷⁰ *Ibid.*

⁷¹ Van Elsuwege, "Meaning of 'Association'", 16.

established by the EU-UK TCA, Van Elsuwege notes that, while it is possible to indicate the intention of concluding an association agreement from the outset of negotiations, the legal basis to conclude an agreement is usually chosen only at the end of the procedure and is solely reflected in the Council's decision to conclude an agreement.⁷² It is thus not a requirement for an agreement concluded under Article 217 TFEU to explicitly establish an association and this explains why certain agreements legally based on this provision contain no reference to "association" in their text or title.⁷³ Article 217 TFEU is thus capable of providing a suitable legal basis for the conclusion of a general agreement such as the EU-UK TCA, even without any reference being made to "association" in the TCA itself.

However, Van Elsuwege does acknowledge the possibility that Article 8 TEU could be added to the substantive legal basis of an association agreement concluded as an essentially political provision, i.e. without affecting the legal practice of the EU's external action, in order to clarify the agreement's specific nature and objectives of good neighbourliness.⁷⁴ A combined Article 8 TEU and Article 217 TFEU approach was in fact proposed in a 2018 resolution by the European Parliament which explicitly suggested that "an association agreement negotiated and agreed between the EU and the UK ... pursuant to Article 8 TEU and Article 217 TFEU could provide an appropriate framework".⁷⁵ Under this perspective of Article 8 TEU, it is evident that the most appropriate course should have been to employ a combined legal basis of Article 217 TFEU and Article 8 TEU together, with the first provision reflecting the broad scope and general nature of the agreement and the latter reflecting the purpose of the agreement.

3.1.3. The correct legal basis to conclude the EU-UK TCA

Despite the suitability of Article 8 TEU to conclude the EU-UK TCA, it was concluded solely on the basis of Article 217 TFEU. However, there does not appear to be a definitive reason that explains why Article 8 TEU was not used. Van Elsuwege argues that its "general wording and unusual location under Title I on 'Common Provisions' of the TEU as well as the absence of specific procedural guidelines under Article 218 TFEU" support the interpretation that Article 8 TEU cannot be used as an autonomous substantive legal basis.⁷⁶ Nonetheless, these arguments are not conclusive reasons that would prevent the use of the Neighbourhood clause.

Van Elsuwege himself observes that, in principle, nothing in the Treaties seems to prevent Article 8 TEU from being used to conclude agreements with neighbouring countries.⁷⁷ He further reinforces this proposition by noting that "Article 216 (1) TFEU makes clear that a legal basis for concluding international agreements can also be found in the TEU."⁷⁸ The wording and

⁷² *Ibid.*, 15.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 13.

⁷⁵ European Parliament Resolution of 14 March 2018 on the framework of the future EU-UK relationship, P8 TA(2018)0069, para. 5, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0069_EN.html.

⁷⁶ Van Elsuwege, "Meaning of 'Association'", 13.

⁷⁷ Van Elsuwege and Petrov, "Article 8 TEU", 696.

⁷⁸ *Ibid.*

placement of Article 8 TEU, therefore, do not prohibit its use as a legal basis. Concerning the absence of specific procedural guidelines under Article 218 TFEU, it must first be noted that, regardless of the substantive legal basis used, Article 218 TFEU provides a general procedure that applies to the conclusion of all international agreements.⁷⁹ Consequently, where there are no specific procedural rules applicable to a substantive legal basis, as is the case with Article 8 TEU, the general procedure found under Article 218 TFEU automatically applies.⁸⁰ As such, there is no reason why Article 8 TEU should not have been used.

However, Van Elsuwege offers a possible explanation for the use of Article 217 TFEU to conclude the EU-UK TCA. He notes that the application of the association formula to the EU-UK relationship is advantageous as “[f]rom a pragmatic point of view, it avoids potentially complex discussions regarding the choice of the correct legal basis for the new legal arrangement”.⁸¹ This is, however, an argument of convenience that Article 8 TEU should not be used. Moreover, in light of the purpose of the EU-UK TCA, Van Elsuwege’s reasoning results in an extension of the association formula to the space that is meant to be occupied by Article 8 TEU, i.e. an agreement concluded under Article 217 TFEU pursues the objective outlined in Article 8 (1) TEU of establishing a neighbourly relationship “within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation”. The conclusion of the EU-UK TCA on the basis of Article 217 TFEU thus has the effect of reducing the *effet utile* of Article 8 TEU to virtually nothing regarding the conclusion of general agreements with neighbouring countries.

Additionally, Article 8 TEU was not even referenced as an essentially political provision to clarify the aims of the agreement. However, Van Elsuwege again provides a reason for this. Regarding this use of the Neighbourhood clause, he states that “the added value of such a reference is not very clear because this type of privileged relations can be perfectly established under Article 217 TFEU alone”.⁸² Nonetheless, the purpose of adding a reference of Article 8 TEU to an agreement concluded under Article 217 TFEU would be, as noted by Van Elsuwege, “to clarify its specific nature and objectives of ‘good neighbourliness’.”⁸³ The added value of including such a reference is found because Article 8 TEU has its own defined aims, distinct from Article 217 TFEU, which align with the purpose of the EU-UK TCA. Even if one does proceed on the basis that Article 8 TEU cannot be a substantive legal basis, it is evident that a reference to Article 8 TEU should have been added to the conclusion of the EU-UK TCA in order to clarify its aims as the TCA does not establish an association but pursues the objective of the Neighbourhood clause.

⁷⁹ Allan Rosas and Lorna Armati, “*EU Constitutional Law: an Introduction*” (Oxford: Hart Publishing, 2018), 248.

⁸⁰ Czuczai, “Article 8”, 43, where Czuczai outlines the general procedure under Article 218 TFEU that applies in relation to the conclusion of “neighbourhood agreements” under the substantive legal basis of Article 8 TEU.

⁸¹ Van Elsuwege, “Meaning of ‘Association’”, 32.

⁸² *Ibid.*, 13.

⁸³ *Ibid.*

3.2. As the legal basis for future sector-specific EU-UK agreements

While Article 8 TEU was not used to conclude the EU-UK TCA, it may still provide an appropriate legal basis for the conclusion of future sector-specific agreements between the EU and the UK. The second part of Article 8 TEU explicitly distinguishes itself from the far-reaching and comprehensive nature of Article 217 TFEU by providing that “the Union may conclude specific agreements”. Concerning such agreements, Czuczai proposes that Article 8 TEU could provide the basis to establish a privileged partnership with a neighbouring country through the conclusion of sector-specific agreements.⁸⁴ Those agreements would all have the same ultimate objective, namely to establish an area of prosperity, peace, good neighbourliness and close cooperation between the EU and its concerned neighbour.⁸⁵ The potential to apply Article 8 TEU this way in the context of EU-UK neighbourly relations lies in the fact that, unlike in other agreements concluded with neighbouring countries,⁸⁶ it is envisaged in Article COMPROV.2 of the EU-UK TCA that the parties will “conclude other bilateral agreements between them [which] shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements”.

The closest relationship resembling the privileged partnership put forward by Czuczai is the EU-Swiss relationship. Switzerland possesses its own special relationship with the European project due to its geographical location at the centre of the EU, its status as one of the EU’s largest trading partners and the fact that it shares the same history and values of the EU.⁸⁷ Switzerland also has a unique integrated position of sectoral association within the EU legal order.⁸⁸ In a similar fashion to the UK deciding to withdraw from the EU, Switzerland rejected European integration in a popular referendum and opted instead for a relationship based on “a dense network of bilateral agreements”.⁸⁹ In 1999, the EU and Switzerland concluded seven sectoral agreements, known as the Bilaterals I, under the legal basis of Article 217 TFEU.⁹⁰ While these agreements are distinct from one another, they are all interconnected through a guillotine clause, with the effect that, upon termination of one of the agreements, all of the agreements will be terminated together.⁹¹ A second set of nine sectoral agreements were concluded in 2004, known as the Bilaterals II.⁹² While these agreements were negotiated in parallel, each agreement was concluded separately and they are distinct from one another.⁹³ As the agreements under the Bilaterals II were concluded separately, Article 217 TFEU was not employed

⁸⁴ Czuczai, “Article 8”, 44.

⁸⁵ *Ibid.*

⁸⁶ For example, there is no such provision to be found in the association agreements concluded with Georgia, Moldova, Ukraine or the Stabilisation and Association Agreement concluded with Kosovo.

⁸⁷ Matthias Oesch, *Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation* (Zurich: Dike, 2018), 14-16; Marc Maresceau, “EU-Switzerland: Quo Vadis?”, *Georgia Journal of International and Comparative Law* 39, (2011): 729-732.

⁸⁸ Van Elsuwege, “Meaning of ‘Association’”, 29.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Maresceau, “EU-Switzerland”, 734.

⁹² *Ibid.*

⁹³ *Ibid.*

as the legal basis for the Bilaterals II.⁹⁴

In analysing the above sets of agreements, the main difference is that the agreements under the Bilaterals I are interconnected through the legal basis of Article 217 TFEU while those under the Bilaterals II are separate and distinct from one another. It is noted, however, that both sets of agreements suffer from different defects:

- (i) Regarding the Bilaterals I, Article 217 TFEU is best suited to conclude agreements of a general nature and it is not appropriate to be used as the legal basis to conclude sector-specific agreements as such agreements are related to more specific legal bases in the EU Treaties.⁹⁵ In this regard, one of the significant limitations of the Bilaterals I, in comparison to traditional association status, is that there is no common institutional framework for managing the development of the bilateral relationship which is a “lacunae [that] creates legal uncertainty for citizens and businesses.”⁹⁶
- (ii) Regarding the Bilaterals II, the agreements avoid the disadvantage of being connected through Article 217 TFEU. However, they suffer from not having any connection at all between them, despite being negotiated in parallel by the same parties and forming an integral part of the overall bilateral relationship between the EU and Switzerland.

Therefore, it is seen that either interconnecting these agreements under the basis of Article 217 TFEU or providing for no connection at all between them present a less-than-ideal situation. Article 8 TEU has the capacity to remedy the above defects by providing an appropriate legal basis for the conclusion of sector-specific agreements, and simultaneously providing the foundation of a privileged partnership, such as the one described by Czuczai. The unsuitability of applying Article 8 TEU in the context of EU-Swiss relations, however, is found simply because the Bilaterals I and Bilaterals II were concluded prior to the existence of the Neighbourhood clause. This can be contrasted with EU-UK neighbourly relations which have only just commenced and the starting point of this relationship is the opposite of the EU-Swiss relationship. Although the EU has yet to conclude an institutional framework agreement with Switzerland,⁹⁷ EU-UK relations are governed from the outset by an overarching framework, namely the EU-UK TCA.

Additionally, further and more specific agreements are likely to be concluded between the EU and the UK in line with Article COMPROV.2 of the TCA. For example, although there are no provisions in the TCA regarding cooperation in the areas of Common Foreign and Security Policy (‘CFSP’) and Common Security and Defence Policy (‘CSDP’), such cooperation is nonetheless

⁹⁴ Van Elsuwege, “Meaning of ‘Association’”, 29.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Van Elsuwege, “Meaning of ‘Association’”, 30.

envisaged between the EU and the UK.⁹⁸ It is thus very possible that agreements concerning cooperation in these areas might be concluded. Additionally, the conclusion of an agreement regarding sanitary and phytosanitary measures may be desirable in relation to the implementation of the Ireland/Northern Ireland Protocol.⁹⁹ Such agreements would invariably contribute to the aim of establishing “an area of prosperity and good neighbourliness”. Given the overarching purpose governing EU-UK relations and the potential use of Article 8 TEU to provide the basis of a privileged partnership through the conclusion of sector-specific agreements, in addition to the unsuitability of Article 217 TFEU to be used in this manner, the most appropriate legal basis for such agreements would be Article 8 TEU.

Conclusion

Article 8 TEU was envisaged to provide a privileged framework for relations between the EU and its neighbours. This distinguishes it from Article 217 TFEU as the need for the Neighbourhood clause was partly driven by the overuse of Article 217 TFEU with both neighbouring and non-neighbouring countries alike. In its development, the wording of Article 8 TEU evolved to explicitly refer to “the values of the Union”, and its location in the Treaties changed from originally preceding the Accession clause to being placed within the Common Provisions of the TEU. Consequently, the connection between Article 8 TEU and the EU values found in Article 2 TEU was strengthened and the provision was further removed from the path of accession to the EU.

Another aspect that distinguishes Article 8 TEU from Article 217 TFEU is the connection between establishing an association with the EU and pursuing a membership perspective. On the one hand, neighbouring countries aspiring to join the EU object to the use of neighbourly terms to define their relationship and instead seek to conclude an association agreement under Article 217 TFEU in order to advance their membership ambitions. On the other hand, Article 8 TEU provides the basis for a special integration-driven partnership without the necessity of establishing an association or offering a membership perspective. Article 8 TEU is thus appropriate for use in circumstances where a neighbouring country seeks the *finalité* of a neighbourly relationship in lieu of membership. As a neighbour which has withdrawn from the EU would evidently be seeking such a relationship, Article 8 TEU would provide a suitable legal basis for the development of EU-UK relations.

Analysing the potential of Article 8 TEU in the context of this relationship, it is seen that the UK’s participation within the European project has always been characterised by a constant push-and-pull of integration into and disentanglement from the EU legal order. The UK’s withdrawal from the EU is also defined by this same characteristic as the CJEU has interpreted the

⁹⁸ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom 2020/C 34/01, OJ C 34, 31.1.2020, 1–16, point 95.

⁹⁹ See: European Commission Vice-President M. ŠEFČOVIČ, Speech [on the implementation of the Protocol on Ireland / Northern Ireland], London, June 9, 2021, https://ec.europa.eu/commission/presscorner/detail/en/speech_21_2927; and, UK Parliament Motion on a UK-EU veterinary agreement, EDM (Early Day Motion)1658: tabled on March 18, 2021, <https://edm.parliament.uk/early-day-motion/58287/ukey-veterinary-agreement>.

process of withdrawal under Article 50 TEU within the objective of further European integration under Article 1 (2) TEU. However, the CJEU also explicitly connected Article 50 TEU to the EU values found in Article 2 TEU, namely the value of respecting the democratic will of a Member State to withdraw from the EU. While this value appears to be directly opposed by the objective of further integration, withdrawing from the EU does not automatically result in either rejection of or disassociation from the EU legal order. It is already seen that the UK has emerged from the withdrawal not with a rejection of the European integration process but rather with a new participation within it due to the unique position of Northern Ireland within the EU legal order. Within this context, Article 8 TEU, with its mandate to develop a special relationship with neighbouring countries, is capable of strengthening the basis to develop relations with a country that has renounced its membership and is seeking to develop a new relationship with the EU as a neighbouring country.

The suitability of Article 8 TEU to be used in the context of EU-UK relations is supported by the fact that the basis of the new relationship found in Article COMPROV.1 of the TCA aligns with the objective pursued by Article 8 (1) TEU. In the interpretation proposed by Czuczai, the EU-UK TCA should have been concluded on the basis of Article 8 TEU, instead of Article 217 TFEU, due to the purpose of the TCA and the lack of any association established between the parties. In the interpretation offered by Van Elsuwege, Article 217 TFEU is perfectly capable of providing a suitable legal basis to conclude the EU-UK TCA due to its broad scope and general nature, and because an agreement concluded under this provision does not need to make any reference to the term “association”. Additionally, Van Elsuwege regards Article 8 TEU only as an essentially political provision that could be added to the substantive legal basis of an association agreement in order to clarify the agreement’s specific nature and objectives of good neighbourliness.

Van Elsuwege argues that the wording and location of Article 8 TEU as well as the absence of specific procedural guidelines under Article 218 TFEU support the proposition that the Neighbourhood clause cannot be used as a substantive legal basis. However, these are not conclusive arguments as a legal basis for concluding international agreements can be found in either the TEU or the TFEU, and the general procedure for EU treaty-making found under Article 218 TFEU applies in relation to a substantive legal basis for treaty-making where there are no specific procedural guidelines. Nonetheless, Van Elsuwege also notes that the application of Article 217 TFEU is desirable from a pragmatic perspective as it avoids potentially complex discussions regarding the choice of the correct legal basis for the new EU-UK relationship. However, this amounts to an argument of convenience against the use of Article 8 TEU and results in an extension of the association formula to the space that is meant to be occupied by Article 8 TEU. As Article 217 TFEU is capable of concluding an agreement that has for its purpose the objective pursued by Article 8 (1) TEU, this reduces the *effet utile* of the Neighbourhood clause to virtually nothing regarding the conclusion of general agreements. Even if Article 8 TEU cannot be used as a substantive legal basis, its role as an essentially political provision was not realised as there is no reference to Article 8 TEU in the conclusion of the TCA to clarify the purpose of the agreement.

If Article 8 TEU does indeed have no utility regarding the conclusion of general agreements with neighbouring countries, its remaining potential concerns the conclusion of specific agreements with those countries. The Neighbourhood clause is suitable to be used in this manner as Article 8 (2) TEU provides that “the Union may conclude specific agreements”. The future potential use of Article 8 TEU in the context of EU-UK relations lies in the fact that Article COM-PROV.2 of the TCA envisages the conclusion of other bilateral agreements between the parties. As put forward by Czuczai, Article 8 TEU has the potential to build a privileged partnership between the EU and the UK by providing an appropriate legal basis to conclude sector-specific agreements. The suitability of Article 8 TEU to be used this way is reinforced by the fact that Article 217 TFEU is not a suitable legal basis for the conclusion of specific agreements, which is demonstrated by its past use to conclude such an agreement in EU-Swiss relations. Article 8 TEU, however, does have the potential to properly remedy the defects in the Swiss relationship model. In this regard, the Neighbourhood clause would be the most appropriate legal basis for the conclusion of multiple specific agreements such as cooperation in the areas of CFSP or CSDP or relating to the implementation of the Ireland/Northern Ireland Protocol. These agreements would be distinct from one another, but would nonetheless still form an integral part of the overall EU-UK bilateral relationship and pursue the ultimate aim of Article 8 TEU.

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Russia's (un)Controlled Disinformation

*Adriano Rodari*¹

Abstract: As the first wave of COVID-19 pandemic hit the world and Europe, another spreading menace caught the attention of experts and policymakers: infodemic. The same kind of concerns were voiced by European and international news outlets, pointing the finger at Russia, which was accused of waging an information war against the European Union, or the “West” more broadly. Allegedly, Russia was profiting from the health crisis to spread chaos within European democracies and advance its objectives. This paper intends to shed more light on the intentions and might of the Russian-backed disinformation towards Europe during the initial outbreak of COVID-19. The focus is not only on disinformation per se but on Russia's degree of commitment to such information campaigns. To do so, this work centres on the potential strategic interests of the Kremlin, outlining three relevant goals which Russia tried to achieve during the pandemic with the support of information operations. When compared to previous attempts to influence the West, the level of coordination of narratives and actors is evidently lower. Instead of being the golden age of Russian-led disinformation, the COVID-19 pandemic was revealed to be a challenging time to advance Moscow's strategic objectives.

Keywords: Russia, disinformation, COVID-19 pandemic, information operations, infodemic

Introduction

The COVID-19 pandemic hit societies unexpectedly quickly, bringing health systems to the verge of collapse, affecting economies and shaking up media platforms. When referring to the unfolding information environment at the Munich conference, the World Health Organisation's

¹ Adriano Rodari is a second-year student of the Master's degree in Interdisciplinary Research and Studies on Eastern Europe at the University of Bologna. He is interning at the Berlin office of the German Marshall Fund of the United States and volunteering as a Young European Ambassador.

Director-General Tedros Adhanom Ghebreyesus affirmed that “we are not just fighting an epidemic, we are fighting an infodemic”.² The declaration drew attention to the abundance of misleading information found on formal and informal channels, clearly underlining the vulnerability of the Western media ecosystem from both internal and external points of view. Indeed, this fragility was afterwards stressed in March by the current EU High Representative Josep Borrell, who highlighted a “clear attempt to discredit the European Union”, adding that the “spreading [of] disinformation is playing with people’s lives”.³

Throughout Western media, commentaries on the disinformation coming from Russia have flourished, often labelling it as “attacks”⁴ or a “coronavirus offensive”⁵ planned in Moscow, as well as being aimed at “aggravating the public health crisis in the West”.⁶ Framing the output originating from Russian-controlled media in this way implies that these actions are aimed at winning over European counterparts. It also emphasises the Kremlin’s ability to turn the weakness of European countries to its advantage.

Most of the assertions and opinion pieces at a European level were based on the data and analysis provided by EUvsDisinfo, “the flagship project of the European External Action Service’s East StratCom Task Force”⁷, which provides reports on disinformation and narratives put out by Russian media, disproving the stories with fact-based rebuttals.⁸ According to one of the April 2020 reports, there have been “coordinated campaigns” throughout Europe carried out by state-sponsored media, aimed at “undermining EU and its crisis response”.⁹ Moreover, in early March 2020, the European Union’s lead spokesperson for Foreign Affairs and Security Policy asserted: “We have seen an increase in the amount of misinformation originating outside the EU. Some has been Russian, spread by Russian providers and pro-Kremlin sources”.¹⁰

² World Health Organization, “Munich Security Conference”, 15 February 2020, <https://www.who.int/dg/speeches/detail/munich-security-conference>.

³ Josep Borrell Fontelles, “A lot of inaccurate information”, tweet by Josep Borrell Fontelles, 23 March 2020, <https://twitter.com/josepborrell/status/1242148469407649802>, accessed 12 September 2021.

⁴ See William J. Broad, “Putin’s Long War Against American Science”, *New York Times*, 13 April 2020, <https://www.nytimes.com/2020/04/13/science/putin-russia-disinformation-health-coronavirus.html>.

⁵ See Hannah Roberts, “Moscow’s Coronavirus Offensive”, *Politico Europe*, 22 April 2020, <https://www.politico.eu/article/moscow-coronavirus-offensive-vladimir-putin/>.

⁶ See Jennifer Rankin, “Russian Media ‘Spreading Covid-19 Disinformation’”, *The Guardian*, 18 March 2020, <https://www.theguardian.com/world/2020/mar/18/russian-media-spreading-covid-19-disinformation>.

⁷ Data.europa.eu, “EUvsDisinfo: Disinformation Operations About COVID-19”, <https://data.europa.eu/data/datasets/euvsdisinfo-disinformation-operations-about-covid-19?locale=en>.

⁸ European External Action Service, “Questions and Answers about the East StratCom Task Force”, 2018, https://eeas.europa.eu/headquarters/headquarters-homepage/2116/questions-and-answers-about-east-strat-com-task-force_en.

⁹ EUvsDisinfo, “EEAS Special Report Update: Short Assessment of Narratives and Disinformation around the COVID-19/Coronavirus Pandemic (Updated 2 – 22 April)”, 24 April 2020, <https://euvsdisinfo.eu/eeas-special-report-update-2-22-april/>.

¹⁰ Barbara Wesel, “Is Russia Running A Coronavirus Disinformation Campaign?”, *Deutsche Welle*, 20 March 2020, <https://www.dw.com/en/is-russia-running-a-coronavirus-disinformation-campaign/a-52864106>.

On the other hand, academics and researchers have raised some doubts over the level of coordination and power of the Russian propaganda ecosystem.¹¹ For example, disinformation expert Ben Nimmo declared that these media outlets did not appear to be following an orchestrated set of actions (as had happened during the Ukraine crisis in 2014 and the alleged shooting down of flight MH17), and that “the whole thing seems more like standard anti-Western posturing than a targeted campaign devised at the Kremlin”.¹² Following this point of view, the assessment of Russian disinformation as a polyphony of misleading articles and opinions would mean re-framing the response of both European countries and institutions.

Understanding how Russian disinformation campaigns are shaped by the Kremlin is a vital task for Europe in the time to come. The shift towards hybrid tools requires the European Union and the Member States to rethink their security strategy and swiftly adapt to this changing reality. The openness of the European virtual space has become the object of state and non-state actors, which aim at exerting their influence through the use of misleading information and targeted campaigns. It is in the interest of Europe to comprehend the strategy behind information operations and learn how to face such threats in the future. The COVID-19 pandemic has increased the awareness that disinformation can be as spreadable and dangerous as a virus. To increase Europe's future resilience, it is necessary to engage in a discussion about vulnerabilities, reliability of information sources and long-term solutions like digital literacy. The first step to do so should be to comprehend and compare past disinformation efforts directed towards the EU and European countries, in order to grasp the might and characteristics of such operations.

This paper intends to explore the main characteristics and peculiarities of Russian-led information campaigns. It seeks to apply the academic tools provided by studies on information warfare and disinformation to the coronavirus outbreak in Europe, in order to assess the intentions, targets, goals and degree of coordination of the Kremlin's instruments. It devotes particular attention to the most manifest trends and their effectiveness. Different from the analysis provided by some private and public fact-checkers which mainly, if not only, have focused on the “message” sent by Russian-backed means of communication, this work intends to focus additionally on the “messenger”, namely Russia and on the level of commitment to such information campaigns. To do so, the first section provides a general overview of the main points outlined in the academic debate on disinformation. Subsequently, attention is paid to the potential strategic interest of Russia in launching disinformation campaigns. Keeping these objectives in mind, the paper analyses three relevant goals which Russia tried to achieve during the pandemic with the support of information campaigns. The final section focuses on the way in which COVID-19-

¹¹ Mark Galeotti, “Coronavirus Propaganda a Problem for the Kremlin, Not a Ploy”, *Moscow Times*, 6 April 2020, <https://www.themoscowtimes.com/2020/04/06/coronavirus-propaganda-a-problem-for-the-kremlin-not-a-ploy-a69879>; Cynthia Garcia, “Untangling the Disinformation Problem: Russia, China and the West”, *Wilson Center*, 17 April 2020, <https://www.wilsoncenter.org/blog-post/untangling-disinformation-problem-russia-china-and-west>; Keir Giles, “Beware Russian and Chinese Positioning for After the Pandemic”, *Chatham House*, 9 April 2020, <https://www.chathamhouse.org/expert/comment/beware-russian-and-chinese-positioning-after-pandemic>.

¹² Wesel, *op. cit.*

related disinformation added to the long-term objectives of information campaigns, resulting in a cacophony of narratives. Moreover, a brief comparison with previous cases displays the differing levels of coordination of information campaigns.

What this paper argues is that the COVID-19 outbreak did not result in a favourable opportunity for Russian disinformation as the country found itself under the international spotlight. This hampered the ability of the Kremlin to achieve its objectives, such as the lifting of sanctions, and showed the inability of Russia to get an advantage from the narratives spread within its disinformation ecosystem. This analysis is conducted by addressing the following questions: How did the Kremlin spread disinformation during the COVID-19 pandemic? What level of coordination was evident in the effort to influence European countries? How does it differ from previous examples of disinformation?

1. Disinformation: old but gold

Disinformation came under the spotlight in academia and public debate in Western countries straight after Russia annexed Crimea and with the beginning of the ongoing war in the Donbas region, creating different perceptions and understandings of what the term means. Throughout recent years, the word disinformation has been used in the media and policy spheres as a synonym for expressions like “propaganda,” “information war,” “hybrid warfare”, “active measures”, “fake news” and “influence operations”, creating a lack of common understanding and, arguably, a delayed response.¹³ On top of this, disinformation not only refers to actions waged by an actor against another but can also allude to the realm of the domestic flow of information within a country, for instance internal disinformation in Russia.

There are different ways to define what disinformation is. Essentially, disinformation is information since it represents data and knowledge.¹⁴ Yet, what makes it distinctive is the purpose of conveying a message that is intentionally misleading.¹⁵ Therefore, disinformation can be defined as “false information that is deliberately created or disseminated with the express purpose to cause harm”.¹⁶ The component of intent differentiates disinformation from misinformation,

¹³ Nina Jankowicz, *How to Lose the Information War: Russia, Fake News, and the Future of Conflict* (London: I.B. Tauris, 2020), 8.

¹⁴ Alexander Lanoszka, “Disinformation in International Politics”, *European Journal of International Security* 4, no. 2 (2019): 229, <https://doi.org/10.1017/eis.2019.6>.

¹⁵ Caroline Jack, “Lexicon of Lies: Terms for Problematic Information”, *Data & Society Research Institute*, 2017, pp. 2–4.

¹⁶ Claire Wardle, “Information Disorder: The Essential Glossary”, *Harvard Kennedy School Shorenstein Center on Media, Politics and Public Policy*, https://firstdraftnews.org/wp-content/uploads/2018/07/infoDisorder_glossary.pdf, p. 43.

which stands for the creation of misleading information, typically not maliciously.¹⁷ Besides, misinformation is usually a single act that can be re-connected to an identifiable actor/person, while disinformation corresponds to a consistent effort to instrumentalise distorted messages across a network of information channels targeting a specific audience.¹⁸

The differentiation in understanding, and the ways in which the term has been analysed is consistent in the academic sphere as well. For instance, Lucas and Pomerantsev link disinformation to the concept of “information warfare”, indicating the constant implementation of informational tactics against Russia’s opponents, carried out both during peace and wartime.¹⁹ Following this conceptualisation, Giles notes that information warfare is not a static situation but an evolving process, implying a constant development of approaches, models, and successful and failed attempts.²⁰ Snegovaya asserts that information warfare is part of Russia’s system of carrying out hybrid warfare.²¹ This way of conducting conflict heavily relies on deliberate disinformation campaigns, paired with the actions of intelligence agencies. It is aimed at bewildering the enemy, as well as gaining a strategic advantage within Russia’s budgetary constraints. However, the concept of hybrid warfare itself (*gibridnaya voйна*) has received criticism for being misleading.²² Nimmo has characterised the ways the Kremlin tries to exert its influence on the West as being very simple. According to him, disinformation can follow some precise aims: “dismiss the critique, distort the fact, distract from the main issue, dismay the audience”.²³ In his analysis, Nimmo shows that the simplicity of these techniques constitutes both the strength and the weakness of Russia’s information operations, as essentially it is “repetitive and predictable”.²⁴

The continuity of Russia’s actions with its Soviet past or the novelty of its disinformation techniques has been widely discussed by experts. According to several scholars, disinformation is nothing but Soviet techniques, adapted and updated to the new interconnected and globalised environment.²⁵ Pomerantsev and Weiss, in their study of the weaponisation of information by

¹⁷ Janis Sarts, “Disinformation as a Threat to National Security”, in *Disinformation and Fake News*, ed. Shashi Jayakumar, Benjamin Ang and Nur Diyanah Anwar (Singapore: Springer, 2021), 25, https://doi.org/10.1007/978-981-15-5876-4_2.

¹⁸ *Ibid.*

¹⁹ Edward Lucas and Peter Pomerantsev, “Winning the Information War: Techniques and Counterstrategies to Russian Propaganda in Central and Eastern Europe”, *Center for European Policy Analysis*, 2016, <https://li.com/wp-content/uploads/2016/08/winning-the-information-war-full-report-pdf.pdf>, p. 5.

²⁰ Keir Giles, “The Next Phase of Russian Information Warfare”, *NATO Strategic Communications Centre of Excellence*, 2016, p. 2.

²¹ Maria Snegovaya, “Putin’s Information Warfare in Ukraine: Soviet Origins of Russia’s Hybrid Warfare”, *Institute for the Study of War*, 2015, pp. 10–12.

²² Mark Galeotti, “The Mythical ‘Gerasimov Doctrine’ and the Language of Threat”, *Critical Studies on Security* 7, no. 2 (2019): 157–61, <https://doi.org/10.1080/21624887.2018.1441623>.

²³ Edward Lucas and Ben Nimmo, “Information Warfare: What Is It and How to Win It?”, *Center for European Policy Analysis*, 2015, https://cepa.ecms.pl/files/?id_plik=1896, p. 5.

²⁴ *Ibid.*

²⁵ Mark Galeotti, “Hybrid, Ambiguous, and Non-Linear? How New Is Russia’s ‘New Way of War?’”, *Small Wars & Insurgencies* 27, no. 2 (2016): 283–291, <https://doi.org/10.1080/09592318.2015.1129170>; Keir Giles, *Handbook of Russian Information Warfare* (Rome: NATO Defense College, 2016); Snegovaya, *op. cit.*, pp. 12–15.

the Kremlin, trace the origins of this approach back to Lenin's time and its idea of "spinning the West against itself [and] 'building communism with non-communist hands'".²⁶ This laid the foundation for the KGB's "active measures" (*aktivnye meropriyatiya*), meaning information and psychological warfare aimed at influencing people in the West.²⁷ Within the various techniques employed by the Committee for State Security, disinformation (*dezinformatsiya*) was one of them. Galeotti stresses the changing nature of today's information environment when assessing disinformation as one of the tools at the Kremlin's disposal.²⁸ He defines this "new way of doing war" not as particularly new in the way in which war is fought, but argues that it is distinctive in terms of the degree to which priority is given to "non-kinetic" elements, especially information warfare.²⁹ He concludes that the novelty is, in fact, the globalised context in which economies are interdependent and media operate without constraints around the globe, thus shaping the state's actions.³⁰ Yet, some experts prefer to mark a clear line when the comparison is made with Soviet propaganda. Lucas and Nimmo distinguish Soviet propaganda – intended to promote the Soviet agenda – from information warfare, which has the aim to "confuse, befuddle and distract".³¹ In the same vein, according to Jankowicz, the Soviet objective to promote a communist-centric worldview has been substituted by the Kremlin's aim of "destroying Western democracy as we know it".³²

What seems to drive Russia's attempt to influence through non-traditional means is the internal unease regarding the country's position vis-à-vis the West and the consequent decision to lean on the West's "weaknesses". Russia understands that freedom of information is sacred in Western countries and decides to weaponise this aspect in order to spread disinformation.³³ This is done because of Russia's constant perception of being threatened by Western countries and their institutions.³⁴ Snegovaya observes that this asymmetric development of information capability is carried out because of Russia's understanding of being in a weaker financial position compared to European and NATO countries, thus requiring the country to achieve superiority in the field of information.³⁵ As a matter of fact, information warfare is mentioned in the latest

²⁶ Peter Pomerantsev and Michael Weiss, "The Menace of Unreality: How the Kremlin Weaponizes Information, Culture and Money", *Institute of Modern Russia*, 2014, p. 8. This is also elaborated by Pynnöniemi and Rácz (2016, p. 33) with the concept "reflexive control", meaning attacks directed to provoke self-destruction, based on "self-organisation" and "self-disorientation".

²⁷ Pomerantsev and Weiss, *op. cit.*, pp. 8–9.

²⁸ Galeotti, "Hybrid, Ambiguous, and Non-Linear? How New Is Russia's 'New Way of War'?", *op. cit.*, pp. 296–298.

²⁹ Galeotti, "Hybrid, Ambiguous, and Non-Linear? How New Is Russia's 'New Way of War'?", *op. cit.*

³⁰ *Ibid.*

³¹ Lucas and Nimmo, *op. cit.*, pp. 3–4.

³² Jankowicz, *op. cit.*, p. 6.

³³ Pomerantsev and Weiss, *op. cit.*, p. 4.

³⁴ Keir Giles, "Russia's 'New' Tools for Confronting the West Continuity and Innovation in Moscow's Exercise of Power", *Chatham House*, 2016, p. 15.

³⁵ Snegovaya, *op. cit.*, pp. 9–10.

Military Doctrine (*Voyennaya Doktrina Rossiyskoy Federatsii*) approved in December 2014, although the concept is described as serving purely defensive objectives.³⁶

However, disinformation is not only used to increase Russian influence abroad, but also within its borders. The controlled flux of news is conducted especially in the domestic sphere through state-controlled channels and digital news outlets.³⁷ Pomerantsev and Weiss stress that officials are concerned with domestic support of their actions, so media agencies fill the public sphere with propaganda, conspiracy theories and fabricated narratives in order to keep the Kremlin's audience passive, distracted and paranoid.³⁸ Thus, this phenomenon links both the internal and external dimension of the country's strategy.

The way in which the Kremlin employs information to achieve its aims is manifold, though sometimes understood as highly controlled or orchestrated. The instrumentalisation of the flow of information for achieving strategic aims is carried out through Russian-owned media channels broadcasting abroad in Russian and other foreign languages, while it also attempts to exert influence through journalists, trolls and bots.³⁹ However, Kent warns of the risk of overestimating the tangible dimension of the Kremlin's information ecosystem.⁴⁰ He highlights how these techniques of information operations developed by the Kremlin have been endorsed by actors independent from Moscow, but share the same interest in spreading misleading information, sometimes only for the purpose of earning money from clicks.⁴¹ In addition, Galeotti points out that disinformation is only the tip of the iceberg of the whole set of active measures employed to influence other countries, which can include economic leverage, soft power, religious and ethnic instruments, as well as malign non-state actors; disinformation is just the most obvious constituent of the system.⁴² Thus, it happens that this element is overestimated in its might, effectiveness and goals by Western observers. Often, the mere act of distracting the public and the state's attention from more important matters, increasing suspicion and fear is considered as success for these kinds of campaigns.

New findings show that it is hard to measure the degree to which disinformation campaigns have been successful or fruitful for the actors establishing them. Maschmeyer identifies the fact that a big gap in the empirical data remains on the mechanisms through which online disinformation

³⁶ President of the Russian Federation, "Военная Доктрина Российской Федерации", 2014, <http://static.kremlin.ru/media/events/files/41d527556bec8deb3530.pdf>.

³⁷ Snegovaya, *op. cit.*, pp. 10–11.

³⁸ Pomerantsev and Weiss, *op. cit.*, pp. 10–12.

³⁹ Lucas and Pomerantsev, *op. cit.*, p. 5.

⁴⁰ Thomas Kent, "If We Do It, Is It Propaganda?", *Center for European Policy Analysis*, 29 April, 2020, <https://cepa.org/if-we-do-it-is-it-propaganda/>.

⁴¹ *Ibid.*

⁴² Mark Galeotti, "Controlling Chaos: How Russia Manages Its Political War in Europe", *European Council on Foreign Relations*, 2017, p. 5.

is able to influence, as well as the actual impact on the audience's beliefs.⁴³ Even in the archetypal case of information warfare – Ukraine – digital disinformation does not seem to exert the expected influence, while traditional pro-Russia television is more effective in having an impact on the audience.⁴⁴ As Nimmo et al. show, the online operation “Secondary Infektion”, which included fake account activities and forged documents using multiple platforms, displays a surprisingly low level of engagement.⁴⁵ Moreover, by applying international relations theories, Lanoszka shows how disinformation is poorly equipped to affect the global balance of power.⁴⁶ Moreover, the author indicates that Russian disinformation towards the Baltic countries has not been particularly successful. Estonia, Latvia and Lithuania have always been consistently targeted by Russian information operations, but especially since the 2016 Warsaw NATO summit, where the Enhanced Forward Presence (EFP) was established to strengthen NATO's deterrence and defence in the Eastern Region of the alliance.⁴⁷ However, the targeted campaign against NATO presence in these countries has not led to a decrease in the military spending of these countries.⁴⁸

In view of these shortcomings and the difficulties in measuring the effectiveness of disinformation campaigns, this paper attempts to look at disinformation through the lens of Russia's objectives. Therefore, in this work disinformation is understood as an element of information operations undertaken by the Kremlin. The term ‘information operation’ stands for a series of actions taken by governments or non-state actors, with the intent of influencing or distorting domestic or foreign political views.⁴⁹ These activities are usually done in order to achieve strategic outcomes. Yet, it takes place in the wider information ecosystem to which Russia contributes. This definition makes it possible to focus on the interests of the Kremlin and on how they transpire from the level of multi-platform and multi-actor coordination. Therefore, it is necessary to try to understand both the long-term interests in which the Kremlin operates and the more immediate needs that Moscow tries to satisfy. It is essential not to misread the opportunistic nature of the system created by President Vladimir Putin as following an all-encompassing masterplan.⁵⁰

2. Disinformation and strategic objectives

⁴³ Lennart Maschmeyer, “Digital Disinformation: Evidence from Ukraine”, *ETH Zürich Center for Security Studies*, 2021, <https://doi.org/10.3929/ETHZ-B-000463741>, p. 3.

⁴⁴ *Ibid.*, p. 2.

⁴⁵ Ben Nimmo et al., “Exposing Secondary Infektion”, *Graphika*, 2020, <https://secondaryinfektion.org/>.

⁴⁶ Lanoszka, *op. cit.*, pp. 238–240.

⁴⁷ NATO, “Boosting NATO's Presence in the East and Southeast”, 2021, http://www.nato.int/cps/en/natohq/topics_136388.htm.

⁴⁸ Lanoszka, *op. cit.*, pp. 241–246.

⁴⁹ Claire Wardle and Hossein Derakhshan, “Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making”, Council of Europe Report DGI(2017)09, 2017, <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c>, p. 16.

⁵⁰ Mark Galeotti, *We Need to Talk About Putin: How the West Gets Him Wrong* (London: Ebury Publishing, 2019), chapter 1.

Information operations are the most visible of the measures undertaken by the Kremlin to achieve its strategic goals. Although disinformation might seem a source of alarm for targeted countries across Europe and the Atlantic, the degree and the intensity of information campaigns to which states are exposed varies according to Russia's strategic interests, economic concerns, ability to leverage influence on certain groups and the effectiveness of previous campaigns.⁵¹ This implies finding the balance between over-estimating Russia's might and turn a blind eye to these operations.

With regard to the intensity with which it pursues its strategic goals, Cohen and Radin have established that Russia conducts both "direct hostile measures" and "routine hostile measures", implying not only disinformation but the employment of all the tools available to the country.⁵² They argue that most of the effort made in the European Union consists of broader, long-term objectives, principally involving routine hostility. Additionally, they have been able to identify five broad targets which Russia will arguably be interested in pursuing in the upcoming years:

- 1. pursuing security and survival of the regime*
- 2. developing and maintaining great-power status*
- 3. exerting influence within the near abroad, meaning Russia's immediate neighbourhood and desired sphere of influence*
- 4. increasing cooperation and trade with Western Europe*
- 5. undermining enlargement of the European Union (EU) and North Atlantic Treaty Organization (NATO).⁵³*

During the first wave of COVID-19, Russia seemed to stick to these wider objectives. For instance, the aim of increasing cooperation and trade was pursued by directing soft-power efforts towards Italy by sending humanitarian help to improve Russia's position when calling for sanctions to be lifted.⁵⁴ It also allows Russia to be seen internally and externally as a great power, playing a prominent role internationally.⁵⁵ This of course was endorsed by the Russian media ecosystem, which did not refrain from attacking Moscow's critics. When the newspaper *La Stampa*⁵⁶ reported the uselessness of some equipment and the military ranking of the personnel

⁵¹ Giles, "The Next Phase of Russian Information Warfare", *op. cit.*, pp. 6–8.

⁵² Raphael Cohen and Andrew Radin, *Russia's Hostile Measures in Europe: Understanding the Threat* (Santa Monica: RAND Corporation, 2019), 5–13, <https://doi.org/10.7249/RR1793>.

⁵³ *Ibid.*, p. 10.

⁵⁴ Elisabeth Braw, "Beware of Russian and Chinese Aid in Response to the Coronavirus", *Foreign Policy*, 30 March 2020, <https://foreignpolicy.com/2020/03/30/russia-china-coronavirus-geopolitics/>.

⁵⁵ Dario Cristiani, "Russian Motives Behind Helping Italy's Coronavirus Response: A Multifaceted Approach", *Eurasia Daily Monitor* 17, no. 47 (2020).

⁵⁶ Jacopo Iacoboni, "Coronavirus, la telefonata Conte-Putin agita il governo: 'Più che aiuti arrivano militari russi in Italia'", *La Stampa*, 25 March 2020, <https://www.lastampa.it/topnews/primo-piano/2020/03/25/news/coronavirus-la-telefonata-conte-putin-agita-il-governo-piu-che-aiuti-arrivano-militari-russi-in-italia-1.38633327>.

arriving in Rome, Russian-backed media retaliated against the journalist, together with Russian diplomatic representatives⁵⁷.

When analysing Russia's disinformation operations, it is important to bear these broad objectives in mind to understand which intentions are hidden behind narratives employed by state-backed media during the first COVID-19 outbreak. In this sense, disinformation is seen as a long-term process with some arguable broad objectives, while allowing for immediate needs to be prioritised depending on the opportunities available. Considering Russia's priorities, some of the main targets in Kremlin-backed information operations attempts will be analysed in the following section, for example lifting Western sanctions, undermining Ukraine and maintaining domestic control.

3. Three narrow goals

According to Clark et al, Russia's efforts in the information environment during the first months of the worldwide COVID-19 outbreak focused on three pillars: lifting sanctions, reinforcing its previous campaign against Ukraine, and managing the domestic information realm.⁵⁸ Indeed, these three focuses are consistent with Russian objectives outlined by Cohen and Radin⁵⁹ and, most importantly, showed organised actions over multiple platforms (though there were some issues and incoherent results).

3.1 Lifting Sanctions

Since mid-March in 2020, revoking sanctions turned into one of the main trends in Russia's information campaigns. The calls for partial sanctions relief by the UN Secretary-General Antonio Guterres provided the perfect pretext for the Kremlin to push forward its economic interests.⁶⁰ This narrative was framed throughout the Russian- and foreign-language media as a humanitarian issue, creating the idea of a "win-win" scenario in which countries would be able to help each other both economically and in terms of aid supply.⁶¹ This trend is particularly important not only because of conspicuous media visibility, but also because it was supported by claims firstly

⁵⁷ TASS, "Захарова: За Вбросами в La Stampa о Российской Помощи Италии Стоит Британская Компания", TASS, 2 April 2020, <https://tass.ru/politika/8144221>.

⁵⁸ Mason Clark, Aleksey Zimnitca, and Nataliya Bugayova, "Kremlin Attempts to Exploit COVID-19 Crisis to Remove Sanctions on Russia and Its Partners," *Institute for the Study of War*, 3 April 2020, <http://www.understandingwar.org/backgroundunder/russia-review-kremlin-attempts-exploit-covid-19-crisis-remove-sanctions-russia-and-its>.

⁵⁹ Cohen and Radin, *op. cit.*, pp. 5–13.

⁶⁰ Colum Lynch, "U.N. Secretary-General Calls for Easing Sanctions on Iran, North Korea, and Others to Fight Coronavirus Pandemic", *Foreign Policy*, 24 March 2020, <https://foreignpolicy.com/2020/03/24/un-coronavirus-cuba-iran-venezuela-north-korea-zimbabwe-sanctions-pandemic/>.

⁶¹ Clark et al., *op. cit.*

from a Russian member of parliament, and later by Putin on the virtual summit of the G20.⁶² Moreover, according to Clark et al's report for the Institute for the Study of War (ISW), these kinds of actions were reinforced by a series of Kremlin's narratives used to leverage its political influence in Europe.⁶³ For instance, the Russian media depicted Germany as favourable to the measure, quoting the support expressed by a member of the right-wing extremist party Alternative für Deutschland (AFD) as a loose piece of evidence.⁶⁴

Given the weak economic position of the Kremlin caused by the price war on oil with Saudi Arabia, the COVID-19 crisis seemed to be a good opportunity to reach the West for more cooperation on trade by getting sanctions lifted.⁶⁵ Yet, the soft-power attempt did not appear to be very fruitful, partly aggravated by the perceived attempt at the manipulation of information on the part of the Russian state. In general, this has demonstrated how Russian soft power is weak vis-à-vis the EU, especially when Moscow-backed disinformation attempts aggravate its perception abroad.

3.2 Never-ending hostility towards Ukraine

On the other side, in the case of Ukraine, Russia pursued its usual campaign against the country. According to Barros, the flow of disinformation which caused protests against the arrival of Ukrainian evacuees from Wuhan in February of this year is likely to have been orchestrated by Russia.⁶⁶ In this case, the targeting of disinformation was thoroughly accurate, selecting specific cities and engaging in different measures ranging from fake-messages, posts and advertisements on social media, to fake emails presented as having been sent by the Ukrainian Minister of Health.⁶⁷ These measures were accompanied by a constant flow of confusing messages through fringe Ukrainian media outlets which kept publishing false claims and medical advice, often using a combination of alphabets to foil Google's attempts to control coronavirus misinformation.⁶⁸

⁶² iSANS, "Ковид-Политинформация От Кремля: Новые Мутации Вируса Пропаганды", *Reformation.by*, 23 April 2020, <https://reform.by/kovid-politinformacija-ot-kremlja-novye-mutacii-virusa-propagandy>.

⁶³ Clark et al., *op. cit.*

⁶⁴ *Ibid.*

⁶⁵ The Insider, "Вирус пропаганды. Как Кремль распространяет фейки о коронавирусе и использует пандемию для отмены санкций," *The Insider*, 26 March 2020, <https://theins.ru/antifake/209084>.

⁶⁶ George Barros, "Viral Disinformation: The Kremlin's Coronavirus Information Operation in Ukraine", *Institute for the Study of War*, 11 May 2020, <http://www.understandingwar.org/backgrounder/viral-disinformation-kremlin%E2%80%99s-coronavirus-information-operation-ukraine>. The ISW investigation collected sufficient resources to assess with moderate confidence that this multiplatform information campaign was supported by Russia. Moreover, the Ukrainian Government identified some of the participants in the Novi Sanzhary riots as "professional provocateurs".

⁶⁷ *Ibid.*

⁶⁸ Roman Osadchuk, "Find, Copy, Amplify: How Ukrainian Fringe Media Used Other Alphabets to Disguise COVID-19 Claims", *Atlantic Council's Digital Forensic Research Lab*, 23 April 2020, <https://medium.com/dfrlab/%C6%92in%C4%91-c%C3%B8py-amp1%C4%B1fy-how-ukrainian-fringe-media-used-other-alphabets-to-disguise-covid-19-claims-58a2f73bb145>.

Overall, harsh criticism against Ukraine never ended up on Russia's media, once again describing the country as a failed state unable to deal with the crisis by itself. What the analysis of "The Insider"⁶⁹ points out is that Ukraine was consistently targeted as a scapegoat. First of all, the country was described as the main factor hampering the elimination of the sanctions against Russia. Secondly, it was held responsible for the spreading of the virus throughout Europe and beyond because of Ukrainian guestworkers and refugees. It is evident that the coronavirus outbreak simply gave a chance to the Kremlin to lay the blame on Ukraine, as it has done consistently since the annexation of Crimea.⁷⁰

3.4 Maintaining domestic control

The final and most important trend in Russian disinformation is broadly related to keeping control of its citizens. Russia was under great pressure during the first half of 2020, first caused by the economic shock of falling oil prices and then by the skyrocketing number of cases since the end of March.⁷¹ The concern for maintaining domestic control translated into the most common practice: diverting attention from local crisis management to the handling of the pandemic in foreign countries, depicting health systems and economies in Europe and the US as being on the verge of collapse, lacking economic cooperation in EU countries and an overall absence of solidarity.⁷² Conversely, since 2014 the Kremlin has been presenting itself as the winning side, especially during the first months of the pandemic.⁷³ The general tactic is to show that "the other" is doing worse while claiming that the national situation is under control. This even led to domestic media criticising the weak pandemic response of Russia's closest partner, Belarus.⁷⁴ Interestingly, this attempt to display success internally in handling the crisis was coupled with Russia Today's English-language content, where Western countries are accused of having "overreacted" to the crisis.⁷⁵

Despite the Kremlin's attempt to control the internet, most platforms and independent media outlets remain accessible within Russia's borders, providing evidence-based information.⁷⁶ When the pictures and footage of ambulances queuing in front of hospitals in Moscow began to spread on 10 April, the Kremlin was then forced to admit that the situation was indeed

⁶⁹ The Insider, *op. cit.*

⁷⁰ See Nimmo et al., *op. cit.*

⁷¹ Financial Times editorial board, "Russia's Economic Woes Will Clip Vladimir Putin's Wings", *Financial Times*, 27 April 2020, <https://www.ft.com/content/d000617c-8620-11ea-b872-8db45d5f6714>.

⁷² Olga Kevere, "The Illusion of Control - COVID-19 Russian Propaganda", *Visegrad Insight*, 13 May 2020, <https://visegradinsight.eu/the-illusion-of-control-russian-propaganda-covid19/>.

⁷³ Ilya Shepelin, "How Kremlin Propaganda Destroyed Russian Healthcare", *Moscow Times*, 11 May 2020, <https://www.themoscowtimes.com/2020/05/11/how-kremlin-propaganda-destroyed-russian-healthcare-a70242>.

⁷⁴ *Ibid.*

⁷⁵ Daniel Bush, "Virality Project (Russia): Penguins and Protests", *Stanford Internet Observatory*, 9 June 2020, <https://cyber.fsi.stanford.edu/io/news/penguins-and-protests-rt-and-coronavirus-pandemic>.

⁷⁶ Pavel Baev, "Coronavirus Crisis Engulfs Russia", *Eurasia Daily Monitor* 17, no. 57 (2020).

worsening and subsequently postponed the WWII Victory Day parade throughout the country.⁷⁷ As a consequence of the contradicting messages sent by state-supported media and officials, which added to the facts provided by informal and independent media, support for the government fell sharply, either because of Putin or because of preventing measures against the pandemic.⁷⁸ Unexpectedly for state officials, the polluted Russian media environment resulted in growing mistrust for the authorities coupled with widespread belief in anti-Western conspiracy theories regarding the nature of the pandemic.⁷⁹ The outcome was Russians' unwillingness to comply with quarantine measures and widespread protests⁸⁰, making the whole crisis even more unbearable for the government.

4. Coronavirus: Russia's disinformation golden days, self-harm or routine operations?

As other international newspapers had more overtly done during the previous days, the Deutsche Welle international webpage moderately opened on 20 of March 2020 with an article by Barbara Wesel, questioning: "Is Russia running a coronavirus disinformation campaign?"⁸¹ Many experts were inclined to respond with a positive answer.⁸² Nonetheless, as pointed out earlier, Russia had been feeding the disinformation ecosystem well before COVID-19 had started to raise global concern in the Chinese province of Wuhan.

Since the beginning of the pandemic, disinformation became one of the many worries for governments dealing with a full-scale health crisis, as well as for the public.⁸³ However, it is important to understand that deliberately misleading information can be home-grown or part of foreign state-led campaigns. It is difficult to differentiate between the sources of disinformation, given the extent to which they influence and reverberate one another. As appealing as it might seem, laying the blame mainly on an external actor for the abundance of deceptive claims is not

⁷⁷ Lucas Andriukaitis, "Footage Captures Signs of COVID-19 Overwhelming Moscow", *Medium*, 17 April 2020, <https://medium.com/dfrlab/footage-captures-signs-of-covid-19-overwhelming-moscow-686aaef60352>.

⁷⁸ Andrei Kolesnikov, "Почему рейтинг одобрения Путина бьет антирекорды," *Carnegie Moscow Center*, 7 May 2020, <https://carnegie.ru/commentary/81735>.

⁷⁹ Ksenya Kirillova, "Russian Population Does Not Trust the Authorities but Still Believes the Propaganda", *Eurasia Daily Monitor* 17, no. 58 (2020).

⁸⁰ In April, hundreds of people protested in North Ossetia against coronavirus restrictions (Marrow and Tsvetkova 2020). After the authorities arrested several objectors, Russians went on expressing their dissent online, through various channels and initiatives, like virtual demonstrations on YandexMaps (Sherwin 2020).

⁸¹ Wesel, *op. cit.*

⁸² See Chatham House's webinar, "Russian Disinformation's Golden Moment: Challenges and Responses in the COVID-19 Era", held on 7th May 2020, <https://www.chathamhouse.org/events/all/research-event/webinar-russian-disinformations-golden-moment-challenges-and-responses>.

⁸³ See Google trend statistics on the hype that the word "disinformation" got during the month of March 2020 compared to the previous years (https://trends.google.com/trends/explore?date=2013-04-24%202020-05-24&q=%2Fm%2F011_2z)

fully accurate. As Warren and Linvill⁸⁴ noted in the case of the United States, the domestic production of disinformation is booming and foreign actors are not the main threat to reliable sources of information.

Contrary to expectations, Hutchings and Tolz pointed out that the English-language version of RT is more factually accurate when covering international events like the ongoing pandemic, than issues of Russia's strategic interest.⁸⁵ Conversely, it strongly leans towards disinformation when the events covered concern Russia's foreign policies objectives (such as the annexation of the Crimean Peninsula and the Salisbury poisoning).⁸⁶ Rietjens⁸⁷, when referring to the disinformation campaign that followed the annexation of Crimea, quotes Robert Coalson⁸⁸ stating that "it became clear very quickly that Russian politicians, journalists, purportedly nongovernmental organizations, state companies, think tanks, the military, the courts, government agencies and the Duma were all working from the same instructions for the same goals". High-level coordination is key in differentiating the usual deceptive narratives spread by Russian media and politicians from information campaigns aimed at a specific goal.

Even if not that stark, a consistent level of multi-platform and multi-actor coordination was noted in the context of events following the seizure of Crimea. During the aftermath of the alleged shooting down of flight MH17, a wide range of Russian actors such as Russian politicians, news outlets and government agencies were consistently involved in spreading the Kremlin's strategic narratives. Rietjens describes how the Kremlin has upheld three main narratives regarding the incident: (1) Ukrainian responsibility for the downing of the aeroplane, (2) Russia as the victim of international collusion and (3) the accidental nature of the shooting.⁸⁹ Rietjens uses examples such as the video broadcast by RT, tweets posted by the Russian Embassy to the United Kingdom, and declarations of the Russian Ambassador to the United Nations which spread these narratives.⁹⁰ Moreover, a Bellingcat investigation⁹¹ showed that the Russian Ministry of Defence spread falsified satellite images to deliberately deceive the domestic and

⁸⁴ Patrick Warren and Darren Linvill. "The Misinformation Russia Spreads about Coronavirus Was Made in America", *Washington Post*, 2 April 2020, <https://www.washingtonpost.com/outlook/2020/04/02/yes-russia-spreads-coronavirus-lies-they-were-made-america/>.

⁸⁵ Stephen Hutchings and Vera Tolz, "COVID-19 Disinformation: Two Short Reports on the Russian Dimension", *Reframing Russia*, 6 April 2020, <https://reframingrussia.com/2020/04/06/covid-19-disinformation-two-short-reports-on-the-russian-dimension/>.

⁸⁶ *Ibid.*

⁸⁷ Sebastiaan Rietjens, "Unraveling Disinformation: The Case of Malaysia Airlines Flight MH17", *The International Journal of Intelligence, Security, and Public Affairs* 21, no. 3 (2019): 212, <https://doi.org/10.1080/23800992.2019.1695666>.

⁸⁸ Robert Coalson, "Top Russian General Lays Bare Putin's Plan for Ukraine", *Huffpost*, 9 February 2014, https://www.huffpost.com/entry/valery-gerasimov-putin-ukraine_b_5748480.

⁸⁹ Rietjens, *op. cit.*

⁹⁰ *Ibid.*, pp. 199–200.

⁹¹ Bellingcat Investigation Team, "MH17 - Forensic Analysis of Satellite Images Released by the Russian Ministry of Defence", *Bellingcat*, 31 May 2015, <https://www.bellingcat.com/news/uk-and-europe/2015/05/31/mh17-forensic-analysis-of-satellite-images-released-by-the-russian-ministry-of-defence/>.

international public. In the aftermath of the incident, these deceptive messages were channelled through Russian official media (such as Russia Today, *Vesti*, *TV Zvezda*), international media outlets reporting messages of the Russian agencies, Kremlin-linked troll factories and the Russian state defence manufacturer Almaz-Antey.⁹² These attempts clearly show the extent to which the Kremlin tries to display a consistent retelling of events.

Another example of the Kremlin's attempt to shape narratives around their strategic interests is the Salisbury poisoning. When the British police published the pictures and names of the two suspects for the poisonings, both agents working for Russia's military intelligence agency GRU⁹³, the Kremlin went on denying the evidence. They did this through declarations made by the spokeswoman for the Russian Foreign Ministry, Maria Zakharova, who repeated already-debunked claims spread by conspiracy theory bloggers⁹⁴. However, though recognising the attempt to control the narratives, Tolz et al challenge the extent to which Russia has control over state-backed media.⁹⁵ Adapting the concept of mediatization to the undemocratic example of Russia, they demonstrate how the level of coordination even during a strategic moment for the Kremlin has been inflated by many analysts and experts in Western countries, exaggerating the role of state-funded media in being able to influence multiple public spheres.⁹⁶ The scholars point to the presence of partially free internet in Russia, and citizens' access to foreign news outlets, which set the conditions by which Russian politicians are constrained and cannot channel information solely according to their needs.⁹⁷ Moreover, commercial imperatives and professional norms also deviate state-sponsored journalists from these political objectives.⁹⁸ These factors paint a picture of the Kremlin as less capable of projecting its interest through the power pyramid, even when the strategic goal is clearly defined and not simply driven by an opportunistic approach as during the initial phase of the COVID-19 pandemic. Much of the strategic narratives in these cases were designed around the Kremlin interests, while in the case of the coronavirus pandemic they mostly resembled the usual opportunistic strategy surrounded by a mix of contradicting messages.

⁹² Rietjens, *op. cit.*, pp. 207–209.

⁹³ Vikram Dodd, "Salisbury Poisonings: Police Name Two Russian Suspects", *The Guardian*, 5 September 2018, <https://www.theguardian.com/uk-news/2018/sep/05/salisbury-poisonings-police-name-and-charge-two-suspects>.

⁹⁴ Eliot Higgins, "'God-Level Trolling' - Russian Ministry of Foreign Affairs Spokesperson Maria Zakharova Promotes Debunked Internet Conspiracy Theories on The Skripal Nerve Agent Attack", *Bellingcat*, 6 September 2018, <https://www.bellingcat.com/news/uk-and-europe/2018/09/06/god-level-trolling-russian-ministry-foreign-affairs-spokesperson-maria-zakharova-promotes-debunked-internet-conspiracy-theories-skripal-nerve-agent-attack/>.

⁹⁵ Vera Tolz et al, 2020. "Mediatization and Journalistic Agency: Russian Television Coverage of the Skripal Poisonings", *Journalism* (2020), <https://doi.org/10.1177/1464884920941967>.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, p. 4.

⁹⁸ *Ibid.*

When referring to the case of the pandemic, it is very difficult to establish to what extent Russia's channels are responsible for increasing distrust in the public. "More" quantity does not equate to "more" effectiveness. It is possible to monitor Russia's state-backed media, yet it is hard to fully capture the resonance that the misleading claims have on its audience, especially in such chaotic conditions. In fact, Lanoszka underlines that attempting to understand the effect of foreign disinformation is hard because of difficulties in isolating the effect of the campaign per se.⁹⁹

This, certainly, does not mean that monitoring bodies such as the East StratCom Task Force which publishes its report on EUvsDisinfo should be deemed as useless. Instead, its reports should be taken as the first clear layer of Russia's disinformation campaigns and as part of the solution against the spread of misleading narratives. The EUvsDisinfo reports are an optimal way to find dissonance or continuities between media outlets (such as Sputnik, RT and RIA Novosti) and different platforms or tools (trolls, bots, cyber-attacks, phishing) as well as understanding what is stated by the authorities. Moreover, it shows how consistent Russia is in its routine disinformation campaign and highlights the times when it struggles to build a coherent approach.

The 2021 analysis of the Atlantic Council's Digital Forensic Research Lab (DFRLab) on the weaponisation of COVID-19 related rumours seems to show the classic disinformation attempt towards the US: blaming the US for everything.¹⁰⁰ Yet, this attempt appeared to be less organised than prior efforts, due to a more opportunistic approach. In fact, the DFRLab report characterises Russia's current strategy as based on amplifying local narratives instead of forging new profiles spreading divisive content. The information flow towards Europe arguably followed the same tactic. As EUvsDisinfo reported in its April 2020 review, Russian outlets spread narratives against the West, waiting to "see what sticks".¹⁰¹ This lack of consistent approach arguably shows the incapacity of the Kremlin to fully have control over the disinformation ecosystem. In the words of Galeotti, the Kremlin "can't stop the lying".¹⁰² In fact, as these channels spread more and more conspiracy theories, Russia's own success in handling the crisis is at stake. In addition, the incoherent flow of misleading information arguably harms the other more organised information operations and soft-power efforts, as international attention is increasingly directed towards the Kremlin. More and more negative visibility makes the disinformation attempts less likely to be effective, as Russia is automatically accused of being behind them, even when it seeks to exert influence in a less obvious way.

⁹⁹ Lanoszka, *op. cit.*

¹⁰⁰ Luiza Bandeira et al., "Weaponized: How Rumors about COVID-19's Origins Led to a Narrative Arms Race", *Atlantic Council's Digital Forensic Research Lab*, 2021, <https://www.atlanticcouncil.org/weaponized-covid19-narratives/>.

¹⁰¹ EUvsDisinfo, "Throwing Coronavirus Disinfo At The Wall To See What Sticks", *EUvsDisinfo*, 2 April 2020, <https://euvsdisinfo.eu/throwing-coronavirus-disinfo-at-the-wall-to-see-what-sticks/>.

¹⁰² Galeotti, "Hybrid, Ambiguous, and Non-Linear? How New Is Russia's 'New Way of War'?", *op. cit.*

Certainly, other instances than the ones mentioned above might be taken as examples of Russia machinations to sow chaos and division within societies, even though they appeared to be even less successful. For instance, the Baltic countries consistently remained at the centre of Russia's disinformation attempt, as they were discredited even during the first COVID-19 outbreak. Yet, as the Latvian Foreign Minister Edgars Rinkēvičs affirmed that the Kremlin's narratives and tactics have not changed that much, showing continuity and not much innovation in the way disinformation is conducted.¹⁰³ On top of that, the Estonian case reveals how Russian information sources have been losing grip in the region, as more and more people turned to local networks to get reliable information during the health crisis.¹⁰⁴

What is crucial to understand is that the presence of disinformation does not automatically equate with a large-scale increase in the campaign against the West. Sowing confusion, or as the Sputnik logo declares, "providing different views", is the habitual low-intensity tactic of the Kremlin-backed media. The main difference is that COVID-19 provided more controversial material to spread in addition to the necessity for citizens to rely on factual-based information. More importantly, the ability to capitalise on COVID-19-related disinformation and achieve some concrete goals was lacking.¹⁰⁵

Conclusion

Russia cannot fully control the flow of information internally and at the same time, it suffers from chronic unreliable sources in the bureaucratic machine.¹⁰⁶ This pressure restricts Putin's might and ability to influence foreign countries. Galeotti affirms that as part of its active tools of influence, Russia's disinformation apparatus is to a certain extent independent, though the main input and coordination depend on the president's administration.¹⁰⁷ However, during the pandemic outbreak the media outlets seemed to go in different directions, all resulting in a cacophony of conspiracy narratives. While the Russian government was attempting to leverage its influence in Europe by sending aid to Italy in the hope of gaining support for rolling back sanctions, the disinformation ecosystem kept pouring conflicting messages into Europe and Russia.¹⁰⁸

This analysis attempts to show how the Kremlin has been consistent with its strategic aims. It has focused on the intentions and might of Russian information operations towards the

¹⁰³ DFRLab, "#DFRLabCoffeeBreak with Latvian Foreign Minister Edgars Rinkevics", *Medium*, 9 July 2020, <https://medium.com/dfrlab/dfrlabcoffeebreak-with-latvian-foreign-minister-edgars-rinkevics-b78d791a8ba4>.

¹⁰⁴ ERR News, "Survey: ERR Most Trusted News Source during Emergency Situation," *ERR*, 30 March 2020, <https://news.err.ee/1070435/survey-err-most-trusted-news-source-during-emergency-situation>.

¹⁰⁵ Galeotti, *Coronavirus Propaganda a Problem for the Kremlin, Not a Ploy*, *op. cit.*

¹⁰⁶ Pavel Baev, "Putin's Non-Decisions Paralyze Crisis-Stricken Russia", *Eurasia Daily Monitor* 17, no. 61 (2020). Many experts reported Russia's difficulties in dealing with crisis, due to the "power vertical" structure, in which reliable information does not flow smoothly (see Galeotti 2020; Twigg 2020).

¹⁰⁷ Galeotti, "Controlling Chaos", *op. cit.*, p. 2.

¹⁰⁸ Galeotti, "Coronavirus Propaganda a Problem for the Kremlin, Not a Ploy", *op. cit.*

European Union and its allies during the initial outbreak of COVID-19. What has been pointed out as a “golden age” of Russian disinformation has instead resulted in being a counterproductive foreign policy tool for the Kremlin. Even if it tried to ride the wave of COVID-19 related disinformation, it failed to turn these campaigns in its favour. The objectives of getting sanctions lifted, continuing hostility towards Ukraine and maintaining domestic control were arguably negatively affected by un-controlled disinformation reverberating within Moscow’s information ecosystem. What happened during the COVID-19 crisis, given the overflow of fake news and misleading messages, brought Kremlin-led disinformation into the international spotlight.

Overall, this is not an apologetic view on Russian-backed disinformation, but an attempt to critically view the phenomenon and understand its scope and intentions. Sowing confusion is the background of information operations, and it is not intended by the Kremlin as the main character in its international play. Actually, this diversion puts the Russian Federation in an uncomfortable position. On the Western side, this implies understanding that disinformation is a long-term and low-intensity threat which needs to be monitored and debunked (as EUvsDisinfo is currently doing), but it also requires structural reforms in the information ecosystem to enhance local independent media and to keep track of weak and unregulated areas such as social media and blogs.¹⁰⁹

With Russia’s long engagement in disinformation, it is easy for European democracies to lay the blame on the country for the plentiful nature of false narratives flooding the Internet. Yet, when it comes to disentangling active measures that the Kremlin has been ready to employ in order to influence democracies, one realises that these attempts are just the tip of the iceberg. Most importantly, they do not account for the majority of misleading information available on the internet.

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¹⁰⁹ Giles, “Beware Russian and Chinese Positioning for After the Pandemic”, *op. cit.*

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La Protection Environnementale dans les Accords Régionaux de Libre-Échange : une étude comparée

Luis Galiano Bastarrica¹

Résumé : Cet article examine les différences dans les clauses de protection environnementale d'un échantillon d'accords de libre-échange. Nous avons sélectionné cinq accords (ALENA, CETA, CPTPP, ASEAN et UE-MERCOSUR) pour comparer des variables-clés comme les motivations des parties contractantes, les types de dispositions environnementales ou les systèmes de gouvernance pour la résolution des conflits. L'analyse comparative révèle des différences significatives entre les accords, notamment sur le degré de protection environnementale réalisé dans chacun d'entre eux. La place donnée à la question environnementale dans les négociations commerciales est au cœur de ces différences – des facteurs géopolitiques comme la présence d'un processus plus large d'intégration économique, l'existence d'asymétries économiques et sociales marquées entre les signataires ou la dynamique de la négociation sont identifiés comme facteurs explicatifs des différences observées. La comparaison des accords dévoile aussi une approche fragmentée de l'Union européenne à la protection environnementale, avec des tensions entre les objectifs commerciaux et géopolitiques de l'agenda européen, tels que l'augmentation de l'influence sur des régions stratégiques et l'ambition environnementale du Pacte vert.

Mots-clés : commerce, changement climatique, environnement, développement durable, accord de libre-échange

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¹ Luis Galiano est doctorant en économie du changement climatique (Climate Change Economics) à l'Université de Séville. Il est un ancien du Collège d'Europe, diplômé en Études économiques européennes. Il est titulaire de deux licences, en économie et en droit, de l'Université de Séville, et il travaille à Bruxelles en tant que spécialiste de la politique énergétique.

Introduction

La multiplication des Accords Régionaux de Libre Échange (ARLEs) dès la fin du XX^{ème} siècle est devenue un facteur majeur du changement global dans les processus d'intégration économique. L'immobilisme du système multilatéral de l'Organisation Mondiale du Commerce (OMC) depuis les cycles de négociations à Doha² a eu pour conséquence la création, par les principales puissances économiques, du régionalisme (la négociation bilatérale et sélective des accords de libre-échange) comme une opportunité pour concevoir une mosaïque normative à la carte³ qui sert à mieux protéger les intérêts stratégiques nationaux.

Le régionalisme économique est souvent vu comme un risque pour la cohérence de la gouvernance des relations économiques internationales. En effet, la littérature a défini la dépendance entre les ARLEs et le multilatéralisme de l'OMC comme une relation « compliquée ». La validité de la clause de la nation la plus favorisée est remise en question avec l'établissement de conditions plus privilégiées entre groupes d'États par rapport au reste du monde, posant un risque de discrimination envers les pays non-signataires.⁴ Cependant, l'importance des ARLEs est aussi considérée comme une opportunité pour le multilatéralisme, car ils donnent aux États l'opportunité d'atteindre des compromis plus profonds qui ne seraient pas faisables dans le contexte de l'OMC, et qui vont au-delà du plan strictement commercial.⁵ De plus, d'autres auteurs reconnaissent le régionalisme comme un élément accélérateur du multilatéralisme, sous la condition que le commerce régional soit ouvert aux pays non-signataires sans discrimination.⁶

Cette relation ambivalente entre régionalisme et multilatéralisme n'est pas passée inaperçue à l'OMC qui, depuis 2002, a mis en place un groupe de travail spécifique appelé "Groupe de Négociation sur les Règles" qui tente d'affirmer la primauté des accords multilatéraux.⁷ En revanche, récemment, l'Union européenne (UE), dans sa communication intitulée "Examen de la politique commerciale - Une politique commerciale ouverte, durable et affirmée", a appelé à la nécessité d'une réforme profonde de l'OMC, "y compris par le biais d'accords plurilatéraux ouverts" – un signe clair que le rôle de l'OMC dans le commerce mondial s'est avéré à être profondément révisé.⁸

Également, l'irruption des ARLEs dans les relations commerciales a provoqué un changement d'approche dans les négociations : nous sommes passés d'une conception multilatéraliste centrée presque uniquement sur les réductions des barrières commerciales (tarifaires ou non), où

² Jo-Ann Crawford et Roberto V. Fiorentino, "The Changing Landscape of Regional Trade Agreements", *World Trade Organization Discussion Paper* 8, (2005), p. 6.

³ Christian Deblock, "Le régionalisme commercial. Y a-t-il encore un pilote dans l'avion ?", *Interventions économiques* 55 (2006): 3.

⁴ Crawford & Fiorentino, *op. cit.*, pp. 6-8.

⁵ OCDE, "Environment and Regional Trade Agreements: Summary in English", 2007. p. 1.

⁶ Jayant Menon, "Building blocks or stumbling blocks? Regional Cooperation Arrangements in Southeast Asia", *Asian Development Bank Institute Discussion Paper* 41 (2005): 8-10.

⁷ Organisation mondiale du commerce, "Rules: Regional agreements – Building blocks or stumbling blocks?", 2005.

⁸ Commission européenne, "Trade Policy Review - An Open, Sustainable and Assertive Trade Policy", 2021. p. 12.

le progrès est devenu plutôt modeste dans les dernières années,⁹ à une approche plus atomisée dans laquelle les États peuvent dépasser le débat sur la libéralisation du commerce et négocier sur des sujets connexes, y compris la protection des ressources environnementales et l'adoption de normes de lutte contre le changement climatique.¹⁰

De plus, indépendamment de sa forme multilatérale ou régionale, la globalisation et le libre commerce ont aussi été fortement critiqués. Les critiques reprochent que le bénéfice de ces accords ne soit parfois pas équitablement partagé entre les pays riches et les pays pauvres. L'accord fonctionnerait comme un mécanisme transférant des rentes des pays pauvres, dont les coûts de main-d'œuvre et de capital sont moins élevés, vers les pays développés.¹¹ Le sujet étant complexe en nature, certains économistes affirment que les données ne sont pas suffisamment claires pour conclure à un effet négatif de la libéralisation du commerce sur tous les pays moins développés.¹² D'autres économistes, comme le Prix Nobel Joseph Stiglitz, reprochent aux accords d'accroître les inégalités entre les travailleurs et les investisseurs, tant dans les pays riches que dans les pays pauvres.¹³

En ce contexte de mise en question des bénéfices de la libéralisation commerciale et surtout du multilatéralisme, l'UE a accompli un changement profond dans son agenda commercial avec l'adoption du Pacte vert européen.¹⁴ Le chapitre 3 intitulé "L'UE en tant qu'acteur mondial" est consacré à la dimension extérieure de la politique climatique européenne. Dans ce chapitre, la politique commerciale est mentionnée comme un élément clé pour soutenir l'agenda vert européen ; les accords de libre-échange bilatéraux sont conçus comme une opportunité pour renforcer la politique climatique hors Europe. En 2019, ces clauses dans la communication du Pacte vert européen ont établi un nouveau mandat pour la politique commerciale européenne.¹⁵ Les négociations commerciales de l'UE auraient pu devenir un nouvel instrument exécutif de l'UE pour promouvoir la transition climatique dans le monde.¹⁶ Cependant, d'un autre côté, l'agenda commercial européen a souvent montré d'autres motivations, liées à des gains géopolitiques dans certaines régions sans nécessairement avoir l'environnement comme priorité.¹⁷

L'UE est en train d'élaborer plusieurs initiatives visant à concrétiser ce mandat pour une dimension externe du Pacte Vert en matière de politique commerciale. Les exemples sont nombreux :

⁹ Dale Colyer, "Environmental provisions in free trade agreements", West Virginia University, Department of Agricultural Resource Economics, 2012. pp. 2-3.

¹⁰ OCDE, *op. cit.*, pp. 2-4.

¹¹ Anup Shah, "Criticisms of Current Forms of Free Trade", *Global Issues*, 2006, <https://www.globalissues.org/article/40/criticisms-of-current-forms-of-free-trade>.

¹² Emma Aisbett, "Why are the Critics So Convinced that Globalization is Bad for the Poor?", *Globalization and Poverty* (2007): 66-67.

¹³ Joseph Stiglitz, "Globalisation: time to look at historic mistakes to plot the future", *The Guardian*, 5 décembre 2017.

¹⁴ Commission européenne, "Pacte vert pour l'Europe", 11 décembre 2019, COM(2019)640 final. pp. 25-27.

¹⁵ Johan Bjerckem, "EU trade policy: Global enforcer for the European Green Deal", *European Policy Centre*, 2019.

¹⁶ *Ibid.*

¹⁷ Beatriz Céu, "Portugal defends 'geopolitical' importance of EU-Mercosur trade deal", *Euractiv*, 10 février 2021, <https://www.euractiv.com/section/eu-council-presidency/news/portugal-defends-geopolitical-importance-of-eu-mercotur-deal/>, consulté le 26 février 2021.

Le Mécanisme d'Ajustement Carbone aux Frontières (CBAM selon l'acronyme anglais), l'inclusion de chapitres de développement durable (TSD) dans les ARLEs négociés par l'UE et l'inclusion de critères de durabilité dans la stratégie commerciale de l'UE. Le CBAM vise à mettre en place un mécanisme de tarification du carbone pour les marchandises importées par l'UE. Le but de l'instrument est d'agir sur les incitations des acteurs économiques en faveur de produits moins intensifs en carbone et éviter la relocalisation des industries plus polluantes.¹⁸ Toutefois, l'initiative a été fortement critiquée par des partenaires commerciaux clés tels que les États-Unis, qui y voient une mesure unilatérale contraire à l'esprit du libre-échange, qui ne devrait être utilisée qu'en dernier recours.¹⁹ Le Parlement européen a rendu son opinion sur la mesure dans un rapport spécifique, affirmant qu'un CBAM conforme à l'OMC pourrait être possible tant que les tarifs du carbone ne soient ni arbitraires ni discriminatoires.²⁰

Quant à l'adoption des chapitres TSD dans les ARLEs, la Commission européenne a donné un nouvel élan avec un document de 2017 intitulé « Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs) ». Le rapport appelle à une utilisation renforcée des clauses de développement durable dans les accords de libre-échange, notamment via comités bilatéraux avec des membres européens et des membres des États signataires (DAGs).²¹ Le problème de cette initiative, comme souligné par le Comité économique et social européen dans son avis sur le sujet, a été sa manque de force coercitive et de sanctions en cas de défaillance des chapitres TSD.²²

La récente communication de la Commission intitulée "Examen de la politique commerciale - Une politique commerciale ouverte, durable et affirmée" est une synthèse précise des principales priorités de la politique commerciale européenne. Le développement durable et l'agenda vert sont cités comme l'un des trois objectifs principaux de la stratégie, ce qui renvoie un message clair sur son importance.²³ En outre, les initiatives qui pourraient être considérées comme unilatérales (comme le CBAM) sont énumérées comme des initiatives "autonomes" dans lesquelles l'UE vise à trouver un équilibre entre la conformité à l'OMC et son objectif de réaliser son agenda politique, avec les chaînes d'approvisionnement durables comme objectif clé.²⁴ L'exemple européen montre la complexité de trouver un équilibre entre un agenda commercial influent et une ambition écologique marquée. Néanmoins, le nombre d'accords de libre-échange

¹⁸ Commission européenne, "Carbon Border Adjustment Mechanism – Inception Impact Assessment", 2020. p. 1.

¹⁹ Yuliia Oharenko, "An EU Carbon Border Adjustment Mechanism: Can it Make Global Trade Greener While Respecting WTO Rules?", *International Institute for Sustainable Development SDG Knowledge Hub*, 17 mai 2021, <https://sdg.iisd.org/commentary/guest-articles/an-eu-carbon-border-adjustment-mechanism-can-it-make-global-trade-greener-while-respecting-wto-rules/>.

²⁰ Parlement européen, "Rapport : Vers un mécanisme européen d'ajustement des émissions de carbone aux frontières compatible avec l'OMC", 15 février 2021, 2020/2043(INI). pp. 7-10.

²¹ Commission européenne, "Implementation of the Trade and sustainable development (TSD) chapter in trade agreements - TSD committees and civil society meetings", 2020.

²² Comité économique et sociale européen, "Trade and sustainable development chapters (TSD) in EU Free Trade agreements (FTA) (own-initiative opinion)", 2017. p. 9.

²³ Commission européenne, "Trade Policy Review", *op. cit.*, pp. 4-5.

²⁴ *Ibid.*, pp. 12-13.

contenant des dispositions de protection environnementale a fortement augmenté depuis l'année 2000.²⁵ Or, leur ampleur et leur force juridique divergent en raison d'un ensemble de critères.

Le degré de développement économique des États impliqués est le premier de ces facteurs de divergence, notamment quand il y a des différences importantes entre ceux qui négocient l'accord.²⁶ Ensuite, les motivations sous-jacentes qui invitent les États à négocier peuvent aussi jouer un rôle sur le résultat de l'accord. Ces motivations peuvent être, par exemple, d'obtenir plus de ressources pour atteindre leurs objectifs de développement durable, de partager certains coûts pour accroître l'efficacité dans la production de biens ou d'améliorer la coopération environnementale, parmi d'autres.²⁷ Finalement, la sévérité et la force contraignante des clauses incluses dans les accords et les systèmes de gouvernance et résolution de conflits prévus jouent aussi un rôle significatif.²⁸

Dans cet article, nous utiliserons les quatre critères suivants (États impliqués, motivation, types de provisions et gouvernance) pour examiner et comparer cinq exemples bien divergents²⁹ : l'Accord de Libre-Echange Nord-Américain (ALENA), l'Accord économique et commercial global entre le Canada et l'Union européenne (CETA), l'Accord de partenariat transpacifique global et progressiste (CPTPP), l'Association des Nations de l'Asie du Sud-Est (ASEAN) et finalement le récent accord commercial entre l'Union européenne et le MERCOSUR.³⁰ Quelle place occupe la protection environnementale dans ces accords venant des différentes régions du monde ? Pour y répondre, nous présenterons les raisons empiriques qui expliquent les similarités et disparités observées entre ces accords.

La première section de l'article présente les critères qui seront utilisés pour analyser l'inclusion des considérations environnementales dans les négociations commerciales. Ensuite, nous analyserons chacun des cas dans l'échantillon proposé : L'ASEAN (Section 2), l'ALENA (Section 3), le CPTPP (Section 4), le CETA (Section 5) et finalement l'accord UE-MERCOSUR (Section 6). La section 7 détaillera les conclusions en touchant sur une série de facteurs explicatives des divergences observées entre les accords.

Le choix de l'échantillon d'accords proposé mérite une explication avant de présenter les résultats. Le principal critère de sélection des accords a été de couvrir une grande variété de cas : soit des accords entre pays en développement (ASEAN), développés (ALENA, CETA), et avec et sans la participation de l'UE (CETA et UE-MERCOSUR pour les premiers ; CPTPP entre autres pour les seconds). Dans chacun d'entre eux, la protection de l'environnement a été abordée de manière différente, soit dans le cadre d'un processus d'intégration plus large (ASEAN) ou comme un point délicat dans le processus de ratification de l'accord (UE-MERCOSUR), pour citer un

²⁵ Colyer, *op. cit.*, p.4.

²⁶ Mehdi Nemati, Wuyang Hu et Michael Reed, "Are Free Trade Agreements Good for the Environment? A Panel Data Analysis", *Review of Development Economics* 23, no. 1 (2019).

²⁷ OCDE, "Environment and Regional Trade Agreements", 2007. pp. 26-30. Nous irons plus loin dans le reste de l'essai. La liste de possibles motivations des États a été diminuée pour des raisons d'espace dans le texte introductif.

²⁸ Colyer, *op. cit.*, pp. 4-8.

²⁹ Nous justifierons cet échantillon dans la section suivante de l'essai.

³⁰ Nous utiliserons les acronymes anglais pour tous les accords pour faciliter la lecture.

exemple. Nous verrons comment, dans chaque cas, les critères proposés dans la Section 1 ont joué un rôle décisif dans le résultat final. L'environnement est un bien difficile à protéger, et sa protection entre parfois en conflit avec d'autres objectifs des accords commerciaux. Cet article tente de montrer ces tensions et les différentes manières de les traiter dans une gamme diverse de cas.

1. L'environnement comme sujet de négociation dans les ARLEs

L'inclusion des clauses de protection environnementale dans les Accords Régionaux de Libre-Échange (ARLEs) est un phénomène plutôt récent qui a cependant été considéré comme polémique par la littérature économique : dans quelle mesure peut-on s'assurer que le libre échange est positif pour l'environnement ? Cette question, dont la réponse n'est pas évidente, joue un rôle essentiel dans les dynamiques de négociation des accords et notamment dans les résultats finaux des dispositions environnementales.

Les résultats d'études récentes sont divisés quant à la mesure de l'impact des ARLEs sur l'environnement.³¹ Il y a cependant depuis 1995 un consensus plus large sur les causes de l'impact des ARLEs sur l'environnement. Il y a trois effets clés à cet égard³² :

1.1 Effet d'escalade

La libéralisation des flux d'échange entraîne une augmentation de l'activité économique entre les États signataires des Traités de Libre Commerce (TLC), et en conséquence les émissions de dioxyde de carbone (CO₂) liées au processus de production augmenteront aussi.

1.2 Effet de composition

Quand la concurrence des États membres d'un TLC est basée sur une différence de réglementation environnementale, la libéralisation commerciale peut entraîner des risques pour l'environnement car chaque État sera spécialisé dans les domaines où la réglementation est moins stricte. Par exemple, si deux États (disons A et B) ont des réglementations très différentes dans deux secteurs (agriculture et manufacture), A ayant une législation plus stricte sur la production agricole et B sur la manufacture, une fois que le TLC entre en vigueur les entreprises agricoles de A peuvent être incitées à relocaliser la production vers B où le cadre législatif est plus favorable. La même tendance aura lieu avec les entreprises de la manufacture du pays B. Le TLC risque de faciliter ces mouvements.

³¹ Nemati, Hu et Reed, *op. cit.*, pp. 2-5.

³² Gene M. Grossman et Alan B. Krueger, "Environmental Impacts of a North American Free Trade Agreement", *National Bureau of Economic Research Working Paper 3914* (1991): 3-7; Nemati, Hu et Reed, *loc. cit.*

1.3 Effet technique

Il peut y avoir des transferts de technologie entre les États parties d'un TLC, surtout si l'accord comprend des pays avec des degrés de développement différents. Les États qui sont moins développés peuvent diminuer l'intensité des émissions de CO₂³³ en adoptant des technologies plus avancées qui n'étaient pas accessibles avant la libéralisation des relations commerciales.

Ces trois effets (qui peuvent être opposés) sont communs à toutes les négociations des dispositions de protection environnementale dans les ARLEs, mais leur impact final dépend d'une série de critères que nous réduirons à cinq dans cette étude. Nous expliquerons chacun d'entre eux ci-dessous, puis nous les utiliserons pour examiner l'échantillon d'ARLEs proposé. D'autres variables auraient pu être utilisées pour faire une analyse plus complète, mais nous avons décidé de limiter le nombre de critères aux plus importants d'entre eux pour faciliter les comparaisons.

1.4 États impliqués

Nemati, Hu et Reed³⁴ détectent des différences significatives dans l'impact environnemental des ARLEs en fonction du degré de développement des pays impliqués. Quand les ARLEs sont conclus entre pays développés et en voie de développement, les accords ont tendance à montrer des résultats environnementaux négatifs, alors que dans le cas des accords entre pays en voie de développement, l'effet est contraire.³⁵ L'une des raisons de ce phénomène est l'effet de composition des ARLEs que l'on vient de mentionner : la diminution des barrières commerciales a pour conséquence une relocalisation des industries plus polluantes qui visent à utiliser des réglementations plus laxistes pour augmenter leurs émissions.³⁶

1.5 Motivations

Les États peuvent s'accorder sur l'adoption des clauses de protection environnementale dans les ARLEs pour diverses raisons³⁷ : contribuer au développement durable, éviter des asymétries réglementaires ou améliorer la coopération politique. Cependant, les dispositions peuvent aussi faire face à des réticences parmi les États pendant les négociations³⁸ : la cohérence avec les accords multilatéraux déjà en place, la peur de la création de nouvelles barrières au commerce à cause des provisions environnementales ou, tout simplement, l'absence d'un compromis politique en faveur de ces dernières sont des obstacles qui entravent leur inclusion dans les ARLEs.

1.6 Mise en œuvre

³³ Unités des émissions CO₂ par unité de produit intérieur brut (GDP).

³⁴ Nemati, Hu et Reed, *loc. cit.*

³⁵ *Ibid.*

³⁶ Grossman et Krueger, *op. cit.*, p. 6.

³⁷ OCDE, "Environment and Regional Trade Agreements: Summary in English", *op. cit.*, pp. 2-4.

³⁸ OCDE, "Environment and Regional Trade Agreements", *op. cit.*, pp. 42-46.

Nous pouvons différencier deux étapes dans la mise en œuvre des dispositions environnementales dans les ARLEs : le placement des compromis environnementaux dans le texte des accords et l'application de ces dispositions. Concernant le premier point, les clauses de protection environnementale peuvent être présentes dans un ARLE de façon diverse³⁹ : comme une section dans l'accord principal, comme un accord secondaire et séparé ou sous la forme de provisions générales dans le préambule. La manière dont les compromis sont placés dans le texte conditionne leur efficacité finale.⁴⁰ En outre, la mise en œuvre finale des mesures peut être conditionnée par les instruments prévus dans les ARLEs et son applicabilité dans la réalité.⁴¹

1.7 Types de dispositions

Les aspects environnementaux peuvent être reflétés dans les ARLEs de façons vraiment diverses. Pour simplifier l'analyse comparée, nous adopterons la terminologie de l'OCDE pour classer les dispositions en quatre types⁴² : étroites (où l'environnement est traité comme un sujet secondaire par rapport à la réduction tarifaire), générales (les clauses sont désignées pour adresser les problèmes environnementaux que la libéralisation peut entraîner), composantes d'une stratégie d'intégration plus large (les standards environnementaux sont entendus comme un domaine qui doit être harmonisé pour intégrer les économies qui font partie de l'accord) et de coopération (l'environnement est considéré comme un domaine séparé du commerce sur lequel il faut établir des mécanismes ad-hoc pour coordonner les efforts entre pays).

1.8 Systèmes de gouvernance et résolution de conflits

Enfin, il faut aussi considérer les mécanismes institutionnels créés pour assurer une gouvernance efficace ainsi que la mise en application des dispositions environnementales dans les ARLEs.

2. ASEAN: la protection environnementale comme vecteur d'intégration économique

L'ASEAN est l'accord le moins récent de l'échantillon proposé dans cet essai, signé en 1967 à Bangkok. Cependant, ce n'est que dans les années 1990 que ses membres ont commencé à poursuivre une libéralisation substantielle de leurs échanges.⁴³ Cet effort a abouti à la création de

³⁹ Colyer, *op.cit.*, pp. 4-5.

⁴⁰ OCDE, "Environment and Regional Trade Agreements: Summary in English", *op. cit.*, p. 2.

⁴¹ Dans l'analyse de chaque accord de l'échantillon et pour des raisons pratiques, nous examinerons la mise en œuvre en même temps que les types de dispositions.

⁴² OCDE, "Environment and Regional Trade Agreements", *op. cit.*, pp. 30-34.

⁴³ Jayant Menon, « Building blocks or stumbling blocks? » (2005), pp. 5-6.

l'AFTA, la zone de libre-échange de l'ANASE entre 2003 et 2004.⁴⁴ Dans notre cas, nous parlerons de l'accord complet de l'ASEAN et pas seulement l'AFTA, car il s'agit d'un ARLE qui regroupe les nations du sud-est asiatique autour de mécanismes de coopération qui sont allés plus loin que le plan strictement économique. Il est souvent considéré comme l'exemple le plus prospère d'association économique entre pays en voie de développement.⁴⁵

États impliqués. L'ASEAN comprend la Malaisie, l'Indonésie, le Brunei, le Vietnam, le Cambodge, le Laos, le Myanmar, le Singapour, la Thaïlande et les Philippines. Nous pourrions soutenir que sur le long terme cet accord contribuera à la réduction globale des émissions de CO2 car il n'y a pas d'asymétries fortes entre les pays signataires.⁴⁶ Cependant, sur le court terme, les ARLEs créent des incitations à adopter des normes environnementales moins strictes. Les pays signataires peuvent être motivés à déclencher la croissance économique entre eux sans considérer les effets environnementaux, ce qui est aggravé par l'absence de technologies moins polluantes dans ces pays.⁴⁷ Dans le cas de l'ASEAN, et outre l'impact environnemental, la mise en œuvre de l'accord a été guidée par des engagements remarquables entre les États membres en matière d'institutionnalisation et de respect des standards environnementaux. Les matières principales sont la préservation des littoraux, le développement urbain durable et les réglementations chimiques, parmi d'autres.⁴⁸

Motivations. Contrairement aux exemples de l'ALENA, du CPTPP et du CETA, les motivations sous-jacentes à l'ASEAN vont au-delà de l'économie et du commerce. Dans une région caractérisée par une extrême diversité de systèmes politiques et de religions, la priorité des États signataires n'était pas uniquement liée à l'élimination des barrières commerciales. Au contraire, la finalité de l'accord était, premièrement, l'établissement d'un cadre durable de coopération pour assurer la stabilité de la région et, deuxièmement, de parler avec une voix unie dans un contexte global (des années 1960 à 1970) de forte concurrence entre le bloc capitaliste et l'URSS.⁴⁹ En ce sens, l'ASEAN a été utilisé non seulement comme un accord de libre-échange, mais aussi comme un vecteur d'intégration et de coopération entre les États signataires.

Types de dispositions. L'ASEAN est un exemple de protection environnementale incluse dans un effort d'intégration plus large. Dans cette approche, l'environnement n'est pas considéré comme une matière liée (et secondaire) au commerce, mais comme un domaine avec une identité propre dans l'intégration économique. Plus spécifiquement, les dispositions environnementales sont incluses dans le contexte de l'ASEAN sous l'autorité de la Communauté Culturelle et Sociale

⁴⁴ ASEAN, "ASEAN Free Trade Area (AFTA) Council", <https://asean.org/asean-economic-community/asean-free-trade-area-afta-council/>, consulté le 05 juillet 2021.

⁴⁵ ASEAN, "The Founding of ASEAN", <https://asean.org/about-asean/the-founding-of-asean/>, consulté le 7 septembre 2021.

⁴⁶ Nemati, Hu et Reed, *op. cit.*, p. 17.

⁴⁷ Xing Yao et al., "Free Trade Agreements and Environment for Sustainable Development: A Gravity Model Analysis", *Sustainability* 11, no. 3 (2019).

⁴⁸ ASEAN Cooperation on Environment, "About ASEAN Cooperation on Environment", <https://environment.asean.org/about-asean-cooperation-on-environment/>, consulté le 5 juillet 2021.

⁴⁹ Kishore Mahbubani et Rhonda Severino, "ASEAN: The Way Forward", *McKinsey*, 1 mai 2014, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/asean-the-way-forward>, consulté le 6 juillet 2021.

de l'ASEAN,⁵⁰ un organisme qui désigne et met en œuvre des stratégies coordonnées en matière d'environnement et de justice sociale,⁵¹ parmi d'autres. Un exemple pertinent est le Plan Stratégique sur l'Environnement 2016-2025 (ASPEN) qui sert à diriger des actions spécifiques dans une série de priorités stratégiques identifiées par l'ASPEN.⁵² Le plan comprend des domaines clés comme le changement climatique ou la conservation des ressources maritimes.⁵³

Gouvernance. Les règles environnementales de l'ASEAN sont appliquées en pratique avec une variété de groupes de travail qui surveillent et coordonnent la mise en œuvre de l'ASPEN par les États membres sur les domaines clés identifiés dans le Plan.⁵⁴ Des rapports annuels sont publiés pour suivre les progrès accomplis dans la réalisation des objectifs et des actions politiques prévus dans l'ASPEN.⁵⁵ Toutes les parties de l'ASEAN sont signataires de l'accord de Paris, et ces rapports d'avancement incluent la corrélation des initiatives de l'ASEAN avec l'agenda des Nations Unies.⁵⁶ D'autres accords ont même été conclus grâce à la coopération environnementale, comme la fixation d'objectifs de réduction de l'intensité énergétique entre les signataires.⁵⁷

L'ASEAN est en conséquence un exemple de protection de l'environnement progressiste dans les ARLEs. En 1967, les pays signataires n'ont pas considéré la protection environnementale comme une priorité. Cependant, après un rapprochement prolongé, ils ont décidé de dépasser le cadre purement commercial et de s'engager également en faveur de l'environnement. Toutefois, il est difficile de prévoir si ces engagements seront suffisants pour que les pays signataires soient conformes à l'Accord de Paris.

3. L'ALENA : Les clauses de protection environnementale comme partie intégrante des négociations commerciales

Signé en 1992 entre le Canada, le Mexique et les États-Unis et devenu effectif deux ans plus tard,⁵⁸ L'ALENA a été le premier ARLE à contenir des dispositions environnementales dans son texte original. Contrairement à l'ASEAN, les clauses de protection environnementale ont été considérées dès le moment des négociations. L'ALENA constitue aussi un exemple clé des relations entre environnement et commerce car ces dispositions ne sont pas incluses en tant que situations d'exception mais comme partie intégrante du texte de l'accord.⁵⁹

Le 1er juillet 2020, l'ALENA a été remplacé par l'accord États-Unis-Mexique-Canada (USMCA

⁵⁰ ASEAN Socio-Cultural Community, selon l'acronyme en anglais.

⁵¹ ASEAN, "ASEAN Socio-Cultural Community Blueprint 2025", 2016, pp. 1-3.

⁵² ASEAN, "ASEAN Cooperation on Environment at A Glance", 2016, pp. 2-6.

⁵³ ASEAN, "ASEAN Strategic Plan on Environment (ASPEN) 2016-2025", 2016, pp. 8-11.

⁵⁴ ASEAN, "Fifth ASEAN State of the Environment Report", 2017, pp. 229-231.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, pp. 233-234.

⁵⁷ ASEAN Magazine, "Climate Change – The Time to Act is Now", Issue 05 (septembre 2020), pp. 6-7.

⁵⁸ NAFTA Now, "About NAFTA", https://www.naftanow.org/about/default_en.html, consulté le 05 juillet 2021.

⁵⁹ OCDE, "Environment and Regional Trade Agreements", *op. cit.*, p. 40.

selon son acronyme anglais). L'USMCA est considéré comme une renégociation de l'ALENA initiée par l'administration Trump pour protéger davantage les industries américaines en renforçant leurs droits de propriété intellectuelle et en évitant le dumping social vers le Mexique, entre autres.⁶⁰

En ce qui concerne la protection de l'environnement, le nouvel USMCA comprend un chapitre spécifique sur l'environnement (Chapitre 24) qui inclut pour la première fois une liste explicite des accords environnementaux signés par ses membres.⁶¹ En outre, des engagements spécifiques sur l'amélioration de la pollution atmosphérique et la réduction des déchets marins ont aussi été introduits.⁶² Ce dernier a été le résultat d'un processus de négociation dans lequel le Canada a fait pression pour inclure des normes environnementales plus strictes sur le texte de l'accord.⁶³ En conséquence, l'USMCA est censé faire plus en matière de protection de l'environnement que son prédécesseur.⁶⁴ Néanmoins, le texte de l'accord ne fait toujours pas référence à l'Accord de Paris et à l'acquis de la Convention des Nations Unies sur le changement climatique.⁶⁵ Même si l'USMCA est l'accord le plus récent, dans cette section nous mettrons l'accent sur l'ALENA, car les facteurs explicatifs observés sont très similaires et ce dernier est l'accord qui a déterminé le niveau de protection environnementale entre les trois signataires. Nous soulignerons tout point de comparaison pertinent avec l'USMCA dans le texte.

États impliqués. L'ALENA est un accord commercial établissant une zone de libre-échange entre le Canada, les États-Unis et le Mexique. C'est un accord compréhensif, en ce qu'il essaye d'aborder toutes les problématiques dérivées du libre-échange, y compris l'environnement. Ce qui est pertinent pour l'analyse comparée de cet accord est le fait que l'ALENA intègre deux pays développés (les États-Unis et le Canada) et un pays en voie de développement (le Mexique). C'est pourquoi, au moment des négociations, il y avait des inquiétudes sur les effets environnementaux de l'élimination des barrières commerciales au Mexique vis-à-vis des États-Unis et du Canada. En effet, la relocalisation des industries polluantes vers un pays avec des niveaux d'émissions de CO₂ déjà élevés comme le Mexique était un risque réel au moment des négociations. C'est un exemple clair de l'effet de composition énoncé par Grossman et Krueger en 1991.⁶⁶

Motivations. L'article 102 de l'ALENA énumère les objectifs principaux de l'accord, mais il n'y a aucune référence à l'environnement.⁶⁷ Les motivations des parties pour initier les négociations

⁶⁰ Office of the United States Trade Representative, "United States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement", <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing>, consulté le 05 juillet 2021.

⁶¹ Scott Vaughan, "USMCA Versus NAFTA on the Environment", *International Institute for Sustainable Development*, 3 octobre 2018, <https://www.iisd.org/articles/usmca-nafta-environment>.

⁶² Bashar H. Malkawi et Shakeel Kazmi, "Dissecting and Unpacking the USMCA Environmental Provisions: Game-Changer for Green Governance?", *Jurist Legal News & Commentary*, 5 juin 2020, <https://www.jurist.org/commentary/2020/06/malkawi-kazmi-usmca-environment/>.

⁶³ Brice Armel Simeu, "Free trade 2.0: How USMCA does a better job than NAFTA of protecting the environment", *The Conversation*, 24 septembre 2020, <https://theconversation.com/free-trade-2-0-how-usmca-does-a-better-job-than-nafta-of-protecting-the-environment-146384>.

⁶⁴ *Ibid.*

⁶⁵ Vaughan, *op. cit.*

⁶⁶ Grossman et Krueger, *op. cit.*, pp. 3-6.

⁶⁷ NAFTA Now, *op. cit.*

étaient bien différentes⁶⁸ : les États-Unis souhaitaient consolider les marchés canadiens et mexicains en réduisant les barrières commerciales et en adoptant une stratégie plus régionaliste que multilatérale pour y arriver. Le Canada avait besoin de réduire la dépendance de ses exportations vis-à-vis du marché américain et se rapprocher du Mexique. Ce dernier, avec un poids économique plus réduit, poursuivait la nécessité d'attirer des investissements pour créer des emplois nationaux et consolider son système productif. La question environnementale est apparue dans les négociations à un stade ultérieur à la suite de la pression de groupes environnementaux,⁶⁹ mais au moment de la négociation de l'USMCA, l'environnement est apparu dès le début comme un facteur d'importance majeure du côté canadien.

Types de dispositions. Même si la protection des standards environnementaux n'était pas l'objectif prioritaire des États signataires de l'ALENA, les compromis obtenus ont été remarquables. L'ALENA contient des dispositions environnementales juridiquement contraignantes et un accord supplémentaire en matière de coopération.⁷⁰ Il s'agit d'un accord général au sens de l'OCDE⁷¹ car les dispositions adressent des problèmes environnementaux spécifiques qui peuvent être aggravés par la libéralisation du commerce entre les États signataires.

Gouvernance. L'accord supplémentaire a prévu dans ses articles 8 à 19 la création d'une Commission tripartite pour mettre en œuvre les dispositions de l'accord environnemental de l'ALENA, ainsi que pour servir de forum de discussion entre les trois gouvernements et régler les divergences qui peuvent en résulter.⁷²

En définitive, l'ALENA est un accord précurseur en ce qui concerne l'institutionnalisation des clauses environnementales. C'est un exemple remarquable en matière de gouvernance et de mise en application des dispositions environnementales dans les ARLEs. Également, l'accord montre l'importance de la pression populaire dans les négociations commerciales : la pression des groupes environnementaux a été fondamentale pour augmenter la crédibilité de la gouvernance environnementale de l'accord.

4. Le CPTPP : Une nouvelle approche encourageante

Le CPTPP est un des plus récents et ambitieux ARLEs. Signé le 8 mars 2018 à Santiago du Chili, il essaye de consolider les échanges et réduire les barrières commerciales entre plus de dix pays des deux côtés du Pacifique.⁷³

⁶⁸ Jean Delaneau et Roland du Luart, *L'accord de libre-échange nord-américain: Genèse, résultats et perspectives*, (Paris : Sénat, 1996), 13.

⁶⁹ Grossman et Krueger, *op. cit.*, pp. 1-4.

⁷⁰ OCDE, "Environment and Regional Trade Agreements", *op. cit.*, p. 27.

⁷¹ *Ibid*, p. 33.

⁷² Commission for Environmental Cooperation, "About the CEC", <http://www.cec.org/about/>, consulté le 6 juillet 2021.

⁷³ Y compris l'Australie, le Brunei, le Canada, le Chili, le Japon, la Malaisie, le Mexique, la Nouvelle-Zélande, le Pérou, le Singapour et le Vietnam.

États impliqués. D'une façon similaire à l'ALENA, le CPTPP implique à la fois des États développés (l'Australie, le Canada, le Singapour...) et en voie de développement (le Brunei, le Vietnam, le Pérou et d'autres). Néanmoins, dans le CPTPP, les disparités économiques et sociales entre les États impliqués sur les négociations sont plus marquées. De plus, pendant ce processus et après les élections présidentielles de 2016, les États-Unis ont décidé de se retirer de l'accord (initialement appelé TPP, qui comprenait presque 40% de l'économie mondiale) en raison du risque de relocalisation des emplois américains vers les pays membres avec des salaires moins élevés.⁷⁴

Motivations. Le CPTPP a pour objectif d'établir des réductions presque totales des droits de douane entre les États intégrés mais aussi prévoir des mesures spécifiques pour les petites et moyennes entreprises ainsi que des standards en matières connexes comme l'environnement.⁷⁵ D'autre part, il y avait aussi des motivations réellement politiques derrière cet accord, notamment les tentatives des États-Unis (au moment de l'administration Obama) d'établir un pouvoir compensateur dans la région du Pacifique pour faire face à la croissance de l'économie chinoise.⁷⁶

Types de dispositions. Le désengagement des États-Unis du TPP original était, paradoxalement, un coup de chance pour les États signataires parce qu'il a nivelé les règles du jeu concernant la participation et la prise des décisions résultant en un accord considéré comme innovant dans un nombre important de matières, y compris l'environnement.⁷⁷ En ce qui concerne ce dernier, le CPTPP inclut un chapitre dédié à la protection environnementale, ce qui fait de cet accord un ARLE général au sens de l'OCDE qu'on utilise dans cet article.⁷⁸ Les États signataires poursuivent un double objectif dans les dispositions environnementales du CPTPP : créer des mesures contraignantes pour les parties et éviter que la préservation de l'environnement soit réduite en faveur du commerce.⁷⁹ Ce dernier objectif a une importance majeure car il situe l'environnement sur un pied d'égalité avec les autres priorités du CPTPP.

Gouvernance. Le CPTPP est aussi innovateur par les moyens institutionnels prévus dans l'accord. Il y a des provisions spécifiques en matière de résolution de disputes et des mécanismes de coopération entre les États, ainsi que des références à des accords internationaux de protection, mais parfois la disposition la plus novatrice est la possibilité d'utiliser des mécanismes volontaires et flexibles pour accroître la protection à condition qu'ils ne posent aucune rigidité au commerce entre les États signataires.

En résumé, le CPTPP constitue un exemple singulier dans l'échantillon proposé. Le changement

⁷⁴ South China Morning Post, "Explained: The CPTPP Trade Deal", *South China Morning Post*, 16 février 2019, <https://www.scmp.com/week-asia/explained/article/2186475/explained-cptpp-trade-deal>, consulté le 6 juillet 2021.

⁷⁵ Praduma Bickram Rana et Xianbai Ji, "CPTPP: New Key Player in International Trade", *RSIS Commentary* no. 011 (2019): 1-2.

⁷⁶ South China Morning Post, *op. cit.*

⁷⁷ Rana et Ji, *loc. cit.* ; Takemasa Sekine, "The United States Reasserts Trade Rule-Making through USMCA and Challenges CPTPP", *Asia Pacific Bulletin* no. 448 (2018): 1-2.

⁷⁸ OCDE, "Environment and Regional Trade Agreements", *op. cit.*, pp. 32-36.

⁷⁹ New Zealand Ministry of Foreign Affairs and Trade, "Environment", <https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/environment/>, consulté le 06 juillet 2021.

de la position des États-Unis dans l'accord a également marqué un changement profond dans la dynamique des négociations. L'accord est passé d'un projet purement commercial à un processus d'intégration plus large, dans lequel l'environnement est situé à égalité avec le commerce.

5. CETA : la référence européenne

Le CETA (l'accord de commerce entre le Canada et l'Union européenne) a été un ARLE controversé dès le début des négociations à cause des doutes et manque d'information sur les effets environnementaux, parmi d'autres. L'un des sujets les plus controversés du CETA est l'inclusion de l'arbitrage en tant que système de résolution des conflits. Sur ce point, la Cour de Justice de l'UE s'est prononcée sur l'intégration de l'arbitrage dans le système juridique européen.⁸⁰ Même si la Cour de Justice a jugé les dispositions d'arbitrage de l'accord compatibles avec les traités de l'UE, un contrôle juridique a dû être effectué pour s'assurer que ces dispositions n'enfreignaient pas l'acquis communautaire.⁸¹

Etats impliqués et motivations. Le CETA réduit les barrières commerciales entre deux des puissances économiques les plus développées du monde. En dépit des résultats variables des études empiriques,⁸² nous pourrions espérer que le CETA puisse réduire les émissions futures en favorisant l'efficacité des deux économies vers des solutions moins polluantes (ce qu'on appelle l'effet technique).⁸³ Toutefois, l'accord a trouvé des résistances dans l'opinion publique et la réponse populaire au travers de manifestations a été entendue dans toute l'UE.⁸⁴ Il faut en conséquence s'interroger sur le contenu du CETA et pourquoi ses dispositions ont mobilisé citoyens et organisations.

Types de provisions et gouvernance. Il y a deux préoccupations majeures sur les dispositions environnementales du CETA : Premièrement, il manque un compromis réel sur la protection de l'environnement, le chapitre 22 de l'accord⁸⁵ ne contient pas d'engagements juridiquement contraignants allant plus loin que l'Accord de Paris, notamment sur le changement climatique.⁸⁶ D'autre part, l'ICS (« Investment Court System ») prévu dans l'accord comme instance d'arbitrage entre investisseurs et États est considéré comme un risque d'intrusion d'intérêts privés

⁸⁰ Foodwatch, "The Impact of CETA on the Environment, Climate and Health", <https://www.foodwatch.org/en/campaigns/free-trade-agreements/the-impact-of-ceta-on-the-environment-climate-and-health/>, consulté le 06 juillet 2021.

⁸¹ Commission européenne, "European Court of Justice confirms compatibility of Investment Court System with EU Treaties", *European Commission news archive*, 30 avril 2019, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2014>, consulté le 26 février 2021.

⁸² Nemati, Hu et Reed, *op. cit.*, pp. 1-4, 17.

⁸³ Xing Yao et al., *op. cit.*, pp. 1-4.

⁸⁴ European Public Service Union, "Protests against CETA continue in advance of vote in European Parliament", 24 janvier 2017, <https://www.epsu.org/article/protests-against-ceta-continue-advance-vote-european-parliament>, consulté le 6 juillet 2021.

⁸⁵ Commission européenne, "CETA : Chapter by Chapter", http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm, consulté le 6 juillet 2021.

⁸⁶ Jean-Luc Angot et al., *L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé* (Paris : Service Public, 2017), 4-7.

des industries polluantes sur les réglementations environnementales de l'UE. Enfin, l'absence dans l'accord d'interdiction des subventions pour les industries polluantes comme les combustibles fossiles est également un facteur préoccupant.

Il semblerait que l'on utilise un critère de comparaison plus exigeant pour examiner les dispositions du CETA qu'avec celles des autres accords de l'échantillon. Cependant, l'UE est un acteur incontournable de la politique environnementale, caractérisée par des mesures ambitieuses contre le changement climatique (parmi d'autres). Par conséquent, le standard d'exigence doit être aussi élevé quand il s'agit de comparer les provisions environnementales des accords entre l'UE et le reste du monde.

En somme, le CETA reste un exemple polémique comme accord commercial en ce qui concerne la protection environnementale. L'intégration commerciale de deux pays développés semble plus complexe que quand il s'agit des pays moins développés (voir l'exemple du CPTPP). Les règles de l'UE en matière environnementale, plus strictes surtout après l'adoption du Pacte vert européen, mettent l'agenda commercial européen sous pression pour qu'il soit cohérent avec l'agenda vert européen. Le système d'arbitrage prévu dans le texte de l'accord, commun dans les juridictions anglo-saxonnes, est vu comme un risque d'assouplissement des mesures du côté européen.

6. UE-MERCOSUR : la dimension globale de la protection environnementale

Nous finissons l'analyse comparée avec une référence au débat plus récent sur la protection environnementale dans les ARLEs : celui qui a lieu au sein des institutions européennes à propos de la mise en œuvre de l'accord entre l'UE et le MERCOSUR. Cet accord est l'un des plus importants de la politique commerciale européenne. Cependant, il a pris une vingtaine d'années à être négocié. Ces clauses ont aussi rencontré le mécontentement de l'opinion publique européenne précisément à cause de ses conséquences environnementales. Après les longues négociations, un accord de principe pour assurer la ratification de l'accord a été atteint en juin 2019.⁸⁷ Cet accord de principe est maintenant en question au sein de la commission du commerce international du Parlement européen.

Les représentants européens restent divisés sur un accord qui est vu comme un succès des négociations commerciales pour les uns et une entreprise incompatible avec la dimension extérieure du Pacte vert européen pour les autres.⁸⁸ Ce dernier courant de pensée conçoit l'UE comme la référence en termes de croissance économique durable dans le monde et met en doute

⁸⁷ Parlement européen, "Legislative train schedule - EU-MERCOSUR association agreement", <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-mercosur-association-agreement>, consulté le 26 février 2021.

⁸⁸ Parlement européen, "EU-Mercosur: MEPs divided on the trade deal", communiqué de presse, 25 février 2021, pp. 1-2.

que l'accord UE-MERCOSUR soit compatible avec cette idée.⁸⁹ En effet, la mise en œuvre de l'accord n'est toujours pas claire et elle a été récemment discutée lors d'une réunion ministérielle informelle à Berlin en 2020 entre les représentants des deux parties.⁹⁰ Le résultat de la discussion a été un compromis informel s'accordant à appliquer l'accord en respectant les limites environnementales fixées par l'Accord de Paris. Néanmoins, seulement trois mois plus tard (mars 2021), le parlement autrichien a décidé d'opposer la ratification de l'accord à cause des doutes quant à sa compatibilité avec le Pacte vert européen.⁹¹ C'est un exemple des tensions entre les agendas commercial et vert de l'UE.

Etats impliqués et motivations. Le MERCOSUR est le bloc commercial le plus important de l'Amérique du Sud. Le poids économique de ses quatre membres fondateurs (l'Argentine, le Brésil, le Paraguay et l'Uruguay) et des deux États qui y ont accédé (le Venezuela et la Bolivie) en font la cinquième économie du monde.⁹² Les gains du commerce pour les États du MERCOSUR sont significatifs, l'UE étant l'une des régions clés pour les flux commerciaux de ses membres.⁹³ La motivation pour les pays du MERCOSUR de négocier un tel accord avec l'UE est en conséquence plutôt économique. Du côté européen, il y aurait aussi des implications économiques comme la protection des appellations d'origine protégée ou l'ouverture des marchés publics aux entreprises européennes.⁹⁴ Cependant, l'accord est aussi considéré comme une opportunité pour aller au-delà du commerce et renforcer la présence géopolitique de l'UE dans la région sud-américaine,⁹⁵ un aspect souligné par la présidence portugaise du Conseil de l'UE.⁹⁶

Types de provisions et gouvernance. Les clauses environnementales de l'accord UE-MERCOSUR sont regroupées dans un chapitre spécifique lié au développement durable. Ces dispositions ont été incluses sous le principe que le développement commercial ne peut pas empêcher l'application des engagements de l'Accord de Paris. Les parties ont aussi négocié l'inclusion d'une procédure spéciale pour le règlement des litiges comme mécanisme de mise en œuvre.⁹⁷ Ce mécanisme a été fortement critiqué pour son manque de force coercitive car il ne fournit pas d'instruments applicables en cas de différend entre les parties.⁹⁸

⁸⁹ Commission européenne, "The external dimension of the Green Deal", <https://ec.europa.eu/newsroom/intpa/items/673950>, consulté le 26 février 2021.

⁹⁰ Commission européenne, "EU-Mercosur statement on Sustainable Development at EU27-LAC Informal Ministerial Meeting", 14 décembre 2020.

⁹¹ EurActiv, "Austria vetoes Mercosur deal saying it goes against EU Green Deal", 8 mars 2021, <https://www.euractiv.com/section/economy-jobs/news/austria-vetoes-mercocur-deal-saying-it-goes-against-eu-green-deal/>, consulté le 24 avril 2021.

⁹² MERCOSUR, "MERCOSUR in brief", <https://www.mercosur.int/en/about-mercocur/mercocur-in-brief/>, consulté le 26 février 2021.

⁹³ Max Mendez-Parra et al., *Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur* (London: London School of Economics, 2020), 15.

⁹⁴ Parlement européen, "Legislative train schedule", *op. cit.*

⁹⁵ Maria Belén Garcia, "The European Union-Mercosur Agreement is Not a Threat to EU Environmental Policy", *Trade Experettes*, <https://www.tradeexperettes.org/tradeexperettes-blog/the-european-union-mercocur-agreement-is-not-a-threat-to-eu-environmental-policy>, consulté le 27 février 2021.

⁹⁶ Céu, *op. cit.*

⁹⁷ Commission européenne, "EU-MERCOSUR Trade Agreement - Trade and Sustainable Development", 2020, p. 2.

⁹⁸ Francesca Colli, "The EU-Mercosur agreement: towards integrated climate policy?", *EGMONT Royal Institute for International Relations European Policy Brief* no. 59 (2019): 3.

L'enjeu environnemental de l'accord UE-MERCOSUR est surtout lié à la différence, même asymétrique, des structures de production entre les deux parties. Alors que l'UE exporte vers le MERCOSUR principalement des produits hautement élaborés (médicaments, avions, composants pour véhicules automobiles), le MERCOSUR a spécialisé ses exportations dans les produits agroalimentaires tels que le soja ou la viande bovine.⁹⁹ C'est précisément l'expansion de ces produits qui suscite le plus d'inquiétudes environnementales. Le soja et la viande bovine sont liés à une consommation élevée de ressources naturelles et à une déforestation accrue¹⁰⁰ : une partie des incendies de forêt en Amazonie a été causée par l'activité humaine visant à libérer des terres pour la production de ces produits.¹⁰¹

Au cours des négociations, une évaluation de l'impact sur le développement durable a été menée par la London School of Economics afin de déterminer l'impact environnemental de l'accord. À l'aide de techniques de modélisation macroéconomique, le rapport a conclu que l'accord ne devrait avoir qu'un impact négligeable sur les émissions de CO₂.¹⁰² Cependant, le modèle économique utilisé pour prédire les effets environnementaux de l'expansion de ces produits a été également remis en question par des études récentes pour en avoir sous-estimé les conséquences sur l'Amazonie.¹⁰³

Comme nous l'avons montré plus haut, l'accord UE-MERCOSUR est un exemple essentiel à considérer quant aux clauses de protection environnementale dans les accords commerciaux. La raison est claire : il peut être le premier grand accord commercial qui ne sera pas ratifié par l'UE en raison de ses effets environnementaux. En outre, l'UE est confrontée à un dilemme dans la ratification de cet accord : si elle continue à promouvoir l'accord tel qu'il est actuellement, sa crédibilité en tant qu'acteur du changement dans la diplomatie climatique sera remise en cause. Il y aura aussi un risque élevé de contredire le message d'action extérieure du Pacte vert. En revanche, si l'accord n'est finalement pas ratifié par les États Membres, l'UE risque de perdre sa force comme acteur géopolitique.

Conclusions

L'étude comparée des clauses de protection environnementale de l'ALENA, CPTPP, ASEAN, CETA et UE-MERCOSUR révèle des différences significatives dans les quatre variables proposées : États impliqués, motivations, types de provisions et gouvernance. Il est constaté que les différences d'objectifs des accords et la dynamique des négociations ont une influence significative sur le résultat final des accords.

⁹⁹ Luciana Ghiotto et Javier Echaide, "Analysis of the agreement between the European Union and the Mercosur", Greens/EFA, 2019, pp. 17-20.

¹⁰⁰ Climate Action Network Europe, "EU-Mercosur: climate costs higher than economic benefits, new report shows", <https://caneurope.org/eu-mercotur-climate-costs-higher-than-economic-benefits-new-report-shows-2/>, consulté le 27 février 2021.

¹⁰¹ Colli, *op. cit.*, pp. 3-4.

¹⁰² Mendez-Parra et al., *op. cit.*, pp. 83-85.

¹⁰³ Ghiotto et Echaide, *op. cit.*, pp. 21-24.

L'hétérogénéité des ARLEs dans la protection environnementale dépend aussi de facteurs géopolitiques : les positions individuelles de chaque État et leur prédisposition à coopérer, ainsi que l'histoire même des accords peut conditionner les négociations. En ce sens, l'ASEAN illustre comment l'environnement peut être utilisé comme vecteur d'intégration économique entre États qui appartiennent à un même accord depuis longtemps. Nous avons aussi constaté que l'aspect environnemental prend plus d'importance quand les accords incluent des pays développés avec réglementations environnementales strictes (spécialement l'UE).

Nous avons aussi trouvé des différences importantes dans la chronologie des accords. D'un côté, l'ASEAN a traité la question environnementale à une étape ultérieure de l'intégration commerciale. C'est plutôt logique : ces négociations ont eu lieu dans les années soixante, quand il n'y avait pas une pression aussi significative dans le débat public sur la question environnementale. Autrement, dans tous les autres accords que nous avons examinés, l'environnement a été traité dès le début des négociations, même avec une importante divergence dans chaque exemple. Dans les cas les plus récents, comme l'accord UE-MERCOSUR, la protection environnementale est devenue un sujet tellement important qu'il risque de faire échouer un accord négocié pendant une vingtaine d'années. L'environnement ne peut plus être ignoré comme facteur décisif à protéger dans le processus de rédaction et négociation des accords commerciaux.

L'environnement, en conclusion, a trouvé sa place dans les ARLEs de l'échantillon proposé de manière particulièrement divergente. Malheureusement, les négociations commerciales entre États semblent encore loin de reconnaître le rôle essentiel de la protection environnementale dans les ARLEs. Le changement climatique et les impacts potentiellement négatifs liés à la libéralisation commerciale de certains produits ne sont pas encore au centre du débat. Comme montré par la problématique de la mise en œuvre de l'accord UE-MERCOSUR, l'UE est confrontée à une ambition géopolitique basée sur la signature d'ARLEs stratégiques qui semblent parfois en contradiction avec ses ambitions climatiques (plus fortes) dans le cadre du Pacte vert. Un équilibre délicat doit être trouvé par les autorités européennes pour assurer la cohérence entre des agendas politiques (commercial et climatique) différents et potentiellement contradictoires. L'agenda commercial doit être effectivement intégré dans l'ambition climatique européenne. Les pouvoirs publics européens doivent s'assurer que le niveau d'ambition mené par les réglementations environnementales au sein de l'UE est aussi respectée dans les actions commerciales de l'UE dans le monde. Il est essentiel pour la crédibilité du projet européen que l'UE continue à être le référent mondial de l'ambition climatique, même si cela entraîne des relations commerciales plus complexes.

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How the ‘Brussels Effect’ Could Shape the Future Regulation of Algorithmic Discrimination

*Fabian Lütz*¹

Abstract: The ‘Brussels effect’ is the phenomenon of globalised regulation triggered by the EU which conveys the content or the spirit of EU law beyond the EU jurisdiction through legal, political, or economic means. This article explores the Brussels effect to assess the reach of EU gender equality law regarding the future regulation of algorithmic discrimination. In the algorithmic age, where gender-based discriminations are increasingly occurring due to the use of AI within and outside the EU, the future of EU gender equality law depends more than ever on its capacity to promote gender equality globally through the external dimension of the EU. By scrutinising and reviewing available European and international policy documents, draft legislation on AI regulation and relevant literature, the article sketches out elements of an analytical framework and avenues for further research regarding how the Brussels effect could shape the future regulation of algorithmic gender-based discrimination.

First, it will be argued that the ‘Brussels effect’ can contribute to a global reach of EU gender equality law regarding the regulation of algorithmic discrimination. Second, the article discusses the global reach of local rules and the phenomenon that Artificial Intelligence (AI) blurs the lines between local jurisdictions when it comes to effective enforcement of algorithms to prevent discriminations. Third, the article will examine the EU’s role in shaping law worldwide by setting legal or political standards. Considering the interconnectedness of the world and the impact of discriminatory algorithms beyond national jurisdictions, the EU could play its role as rule and standard setter by ensuring a level playing field of minimum protection against algorithmic discrimination with a global reach.

Keywords: Algorithmic discrimination, Gender equality, Brussels effect, AI regulation, Biases and gender stereotypes

¹ Ass. iur. Fabian Lütz, Maître en droit (Paris), LL.M. (Bruges). PhD Candidate (Université de Lausanne). Legal Officer European Commission (2015-2020). Research interests: EU, International, Non-discrimination, Gender Equality and Competition Law; AI and Behavioral Economics.

Introduction

Artificial Intelligence (AI) and algorithms are increasingly used to solve problems and to automate decisions (or support human-made decisions) that have previously been taken exclusively by humans.² AI is defined as “the science and engineering of making intelligent machines”³ and an algorithm as “a formally specified sequence of logical operations that provides step-by-step instructions for computers to act on data and thus automate decisions.”⁴

EU equality law – often considered as the “EU’s flagship contribution to social policy”⁵ – has been incorporated in the EU Treaties since 1957.⁶ More specifically, EU gender equality law prohibits direct and indirect gender-based discriminations. A direct discrimination occurs “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”.⁷ An indirect discrimination occurs “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.⁸

The algorithmic age triggers the question whether the use of algorithms increases or diminishes such discriminatory behaviour and if the current EU framework can adequately address algorithmic discrimination.

Rather than simply overcoming potential human biases in the decision-making process and ensuring a neutral, objective, and fair decision outcome, algorithms might reproduce, perpetuate or increase discriminatory outcomes and patterns of stereotypes and biases of the “real” world.⁹ In such cases, algorithmic decision-making does not only lead to the same or worse discriminations, but it is also “happening” in an opaque (“black-box”)¹⁰ and uncontrolled way.¹¹

² See for example, Brian Christian, *The Alignment Problem: Machine Learning and Human Values* (New York: W. W. Norton & Company, 2020), pp. 7 and 11.

³ Andrew McAfee and Erik Brynjolfsson, *Machine, Platform, Crowd: Harnessing Our Digital Future* (New York: W. W. Norton & Company, 2017), p. 67; the standard textbook on AI speaks of “building intelligent entities”, Stuart J. Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach* (London: Pearson Education Limited, 2021), p. 19.

⁴ Solon Barocas et al, “Data & Civil Rights: Technology Primer”, *Data & Civil Rights Conference, 2014*, [HTTP://WWW.DATACIVILRIGHTS.ORG/PUBS/2014-1030/TECHNOLOGY.PDF](http://www.datacivilrights.org/pubs/2014-1030/TECHNOLOGY.PDF). In essence, algorithms are “a step-by-step procedure for solving a problem or accomplishing some end”, see “Algorithm”, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/algorithm>.

⁵ Mia Rönnmar, “Labour and equality law”, in *European Union Law*, ed. Steve Peers and Catherine Barnard (Oxford: Oxford University Press, 2017), 598-627, 2nd ed.

⁶ Article 119 EEC of the Treaty of Rome (now Article 157 TFEU).

⁷ Article 2(1)(a), (b) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36.

⁸ *Ibid.*

⁹ Katarina Zweig, *Ein Algorithmus hat kein Taktgefühl: Wo künstliche Intelligenz sich irrt, warum uns das betrifft und was wir dagegen tun können* (Munich: Heyne Verlag, 2019), pp. 212-220.

¹⁰ For the term “Black Box” and an insightful description of the opaque nature of algorithms, see Frank Pasquale, *The Black Box Society* (Cambridge: Harvard University Press, 2015).

¹¹ Sometimes described as “Leviathan algorithmique” (algorithmic Leviathan); see the description on the impact of machine learning on humans, Éric Sadin, *L'intelligence artificielle ou l'enjeu du siècle: anatomie d'un antihumanisme radical* (Paris: L'échappé, 2018).

Considering the borderless nature of AI and the emerging need for adequate regulation, the ‘Brussels effect’ could influence and shape the future regulation of algorithmic discrimination.

Algorithms are only as neutral as the underlying data they use or are trained on, which is often the “entry gate” for biases and discrimination. For the purposes of this analysis, the article proposes a working definition of algorithmic gender discrimination that occurs when one person is treated less favourably by an algorithm on grounds of sex than another is, has been or would be treated in a comparable situation (direct algorithmic discrimination) or where the use of algorithms in the decision-making process would put persons of one sex at a particular disadvantage compared with persons of the other sex¹² (indirect algorithmic discrimination).

The political, regulatory, and informal power of the European Union (EU) has often been described as the ‘Brussels effect’.¹³ With different nuances, the essence of this concept can be described as the phenomenon of globalised regulation triggered by the EU, either *de facto* or *de jure* by conveying the content or the spirit of EU law beyond the EU Member States through legal means, political influence or through market mechanisms.¹⁴ In that sense, the EU single market project gained importance and led to an “increasingly external dimension”¹⁵ which made the EU become a sort of “global regulatory hegemon”¹⁶ also described as “Market Power Europe”¹⁷. Regarding (gender) equality, the EU has been qualified as a “protector and promotor of equality”¹⁸ and the question is whether the EU can leverage this role regarding gender-based algorithmic discrimination.

Framing the analysis around the Brussels effect¹⁹, this article identifies the potential of EU gender equality (GE) law regarding the future of regulating algorithmic discrimination, by assessing the potential influence of EU law in terms of the political, legal and market dimension.²⁰ In the algorithmic age²¹, where discrimination is increasingly occurring online, the future of the EU depends on its capacity to defend the principle of equality between women and men globally via the external dimension of the EU.²² It is argued that the Brussels effect can contribute to a global reach of GE law regarding regulating algorithmic discrimination. Competition law’s ‘effects doctrine’ is an example where EU law produces effects beyond EU borders, and which could serve as model to capture violations of European anti-discrimination (AD) law that are caused by algorithms within or outside the EU. Even though significant progress still needs to be achieved in

¹² This definition is modelled on the legal definitions of direct and indirect discrimination used in EU Gender Equality Law, such as in Article 2(1)(a),(b) of Directive 2006/54/EC.

¹³ Anu Bradford, “The Brussels Effect”, *Northwestern University Law Review* 107, no. 1 (2012): 1-67; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press, 2020).

¹⁴ For a more detailed description of the Brussels effect, see Bradford, “The Future of the Brussels Effect”, in *The Brussels Effect: How the European Union Rules the World*, *op. cit.* The Brussels effect, as coined by Anu Bradford, can be compared to the similar “California effect”, discussed by David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge: Harvard University Press, 2009).

¹⁵ Bradford, *The Brussels Effect: How the European Union Rules the World*, *op. cit.*

¹⁶ *Ibid.*

¹⁷ Chad Damro, “Market Power Europe”, *Journal of European Public Policy* 19, no. 5 (2012): 682-699.

¹⁸ Thomas Giegerich, *The European Union as Protector and Promoter of Equality* (New York: Springer, 2020).

¹⁹ Bradford, *The Brussels Effect: How the European Union Rules the World*, *op. cit.*

²⁰ The article reviews selected international and European policy documents and literature.

²¹ Gilles Dowek, *The Age of Algorithms* (Cambridge: Cambridge University Press, 2020).

²² See notably Articles 2 and 3(3) of the Treaty on European Union (TEU), Article 21 of the Charter of Fundamental Rights (CFR) and Article 8 TFEU tasking the Union to eliminate inequalities and promoting equality between men and women in all of its activities (which spells out the concept of ‘gender mainstreaming’).

GE in general²³ and traditional AD frameworks around the world are far from being fit for purpose, it is the right time to reflect and address algorithmic discrimination and its impacts on GE.²⁴

Union policy is shaped and defined not only by the legal EU acquis but also by policy documents, such as the European Commission's Work Programme²⁵ and political guidelines²⁶. The Gender Equality Strategy (GES)²⁷ is a policy document that defines the policy agenda for EU GE and is, alongside the legislative framework and its enforcement, a cornerstone of EU law and policy. It identifies not only the importance of mainstreaming GE in all areas of EU policy, but also that GE shall be a guiding principle in EU external action.²⁸ In the same vein, risks associated with algorithmic discrimination are identified in the GES.²⁹

This article will discuss the impact of the EU in shaping GE Policy globally regarding the regulation of algorithmic biases and discrimination. In this context, based on legal and policy documents and literature, the article will firstly sketch out the theoretical framework and show on which levels the Brussels effect enables the EU to influence the international debate on GE. Secondly, the article observes that AI blurs the lines between local and global regulation and advocates for a global rather than local coordinated regulatory effort. Against this background, the article argues that the EU is well placed to regulate AI and its discriminatory impacts. Thirdly, some avenues will be sketched out regarding how such a potential future regulation could be designed with a view to ensuring GE not only in but also beyond the EU. It will be argued that regulating AI systems by the force of law is the *conditio sine qua non* to address biases and discriminatory outcomes, which can be complemented by different approaches but not replaced by milder forms of regulation.

1. How the Brussels Effect Contributes to the Global Reach of EU Gender Equality Law

This section explains how the Brussels effect enables the EU to shape the behaviour of firms and states beyond its jurisdiction and nudge them to adhere and adopt certain rules and standards. To build the theoretical framework for the analysis, the relevant Treaty provisions, legal texts, and official policy documents in the area of EU gender equality will serve to illustrate the political, legal, and economic angles of the Brussels effect.

²³ See for example EIGE Gender Equality Index that tries to measure progress in Gender Equality: European Institute for Gender Equality, *Gender Equality Index*, 2020, <https://eige.europa.eu/gender-equality-index/2020>.

²⁴ A recent film "Coded Bias" shows the impacts of AI on race and gender. See Women Make Movies, *Coded Bias*, 2020, <https://www.wmm.com/sponsored-project/codedbias/>.

²⁵ European Commission, "Commission Work Programme 2021: A Union of vitality in a world of fragility", 19 October 2020, https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb9a5401aa75ed71a1.0001.02/DOC_1&format=PDF.

²⁶ Ursula von der Leyen, "A Union that strives for more. My agenda for Europe: Political Guidelines for the next European Commission 2019–2024", 2019, https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf.

²⁷ European Commission, "A Union of Equality: Gender Equality Strategy 2020–2025", 5 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>.

²⁸ *Ibid.*

²⁹ *Ibid.*

The EU defines itself as a “Union of Equality”³⁰. The Gender Equality Strategy, which sets the political agenda of the European Commission for 2020–2025, identifies key political goals within the Union, but also identifies GE as a foreign policy concern and introduces “gender equality and women’s empowerment across the world”³¹ as a key objective: “Gender inequality is a global problem. Gender equality and women’s empowerment is a core objective of EU external action.”³² Under the heading “A stronger Europe in the world”, the EC President stated, “I want Europe to strive for more by strengthening our unique brand of responsible global leadership”³³, and announced that she will lead “a geopolitical Commission”³⁴. According to the above-mentioned policy documents and as evidenced by available donor information³⁵, the EU contributes in all its actions to achieve GE worldwide, including the Sustainable Development Goals, in particular SDG 5 (‘Achieve gender equality and empower all women and girls’)³⁶.

Regarding its foreign policy, the EU also adopted a framework to promote gender equality worldwide. These successive so-called EU Gender Action Plans (GAP) strategise how GE and women’s empowerment should be reflected in external relations. In November 2020, the third EU Gender Action Plan (GAP) III was adopted for 2021–2025³⁷. The GAP III reflects the above-mentioned GES and the Political Guidelines of the EC President.³⁸ Qualified as “an ambitious agenda for gender equality and women’s empowerment in EU external action”, the GAP III aims to strive towards a gender equal world – and includes GE as a foreign policy objective.³⁹ Despite highlighting the possibility of “gender biases through Artificial Intelligence”⁴⁰, the GAP offers no in-depth analysis of the nexus between AI and non-discrimination⁴¹ or concrete political ideas on the impact of AI on non-discrimination. The EU also contributes to the work of many international organisations⁴² that shape the legal and political rule-making across the globe.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 17.

³² *Ibid.*, p. 17.

³³ Von der Leyen, “Political Guidelines for the next European Commission 2019–2024”, *op. cit.*, p. 17.

³⁴ Lili Bayer, “Meet von der Leyen’s ‘geopolitical Commission’”, *Politico Europe*, 4 December 2019, <https://www.politico.eu/article/meet-ursula-von-der-leyen-geopolitical-commission/>.

³⁵ OECD, “European Union institutions”, in *Development Co-operation Profiles* (Paris: OECD Publishing, 2020); Donor Tracker, “Gender Equality”, <https://donortracker.org/sector/gender-equality>; OECD, “Aid in Support of Gender Equality and Women’s Empowerment: Donor Charts”, 2019, <https://www.oecd.org/dac/financing-sustainable-development/development-finance-topics/Aid-to-gender-equality-donor-charts-2019.pdf>, p. 13.

³⁶ United Nations, “Goal 5: Achieve Gender Equality and Empower All Women and Girls”, <https://sdgs.un.org/goals/goal5>.

³⁷ European Commission, “EU Gender Action Plan III – An Ambitious Agenda for Gender Equality and Women’s Empowerment in EU External Action”, 25 November 2020, https://ec.europa.eu/international-partnerships/system/files/join-2020-17-final_en.pdf.

³⁸ See Von der Leyen, “Political Guidelines for the next European Commission 2019–2024”, *op. cit.* The implementation of the GAP III applies “to the Commission services and the EEAS, covering interventions and actions at country, regional/multi-country, and international levels”: European Commission, “Joint Staff Working Document: Objectives and Indicators to frame the implementation of the Gender Action Plan III (2021–25)”, SWD(2020)284 final, p. 21.

³⁹ It also includes a brief section on digitalisation and refers to discriminations as a result of the digital divide.

⁴⁰ European Commission, GAP III, *op. cit.*, p. 20.

⁴¹ Which is not surprising, considering that it was published before the EC AIA proposal.

⁴² For example, the International Labor Organization or the World Trade Organization (WTO) which usually do not include social considerations; see Benoit Frydman, *Petit manuel pratique de droit global*, (Brussels: Académie royale de Belgique, 2014), p. 64. However, trade and gender are on the agenda of multilateral organisations: see WTO, “Women and Trade: The role of trade in promoting gender equality”, https://www.wto.org/english/res_e/publications_e/women_trade_pub2807_e.htm; OECD, “How can trade contribute to women’s empowerment?”, <https://www.oecd.org/trade/topics/trade-and-gender/>; UNCTAD, “Trade and Gender: Opportunities and Challenges for Developing Countries”, 2004, <https://unctad.org/system/files/official->

However, the EU's global actorness to promote gender equality is confined to some limits by the lack of legal enforcement powers beyond the EU jurisdiction. Where legal enforcement is not possible, influence can only be exerted via political and economic means; one powerful tool of the EU is the shaping of policies worldwide via its role as a financial donor.⁴³ The strength of the EU is therefore powered and limited by its political persuasion and the economic attractiveness of the EU Single Market. Bradford⁴⁴ has developed a theoretical foundation of the Brussels effect based on five elements: market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility. Arguing on this basis, this article refers to some of these different elements throughout the text but will do so by looking and schematising those ideas by distinguishing three angles of the Brussels effect: political, legal, and economic. Whereas the political impact refers to traditional public diplomacy and political agency, legal impact refers to the EU's traditional enforcement and regulatory powers via EU legislation and policy. The economic impact refers to the attractiveness of the EU Single Market and works as an economic incentive for private actors and states to adopt behaviour and standards to comply with and access the EU Single Market without any specific legal obligation or political influence being exercised.

1.1. Political Impact

Political impact can be defined as the leverage and influence that the EU can exercise through the framework of public diplomacy and representation in political and multilateral fora over states and private actors and make them adopt European values, standards, or laws without exercising economic or legal power.⁴⁵ The EU exercises its political impact regarding GE in international and multilateral fora, such as the UN⁴⁶, WTO⁴⁷, G7⁴⁸, G20⁴⁹ and ILO⁵⁰. The EU also advances its policy objectives in the yearly UN conference of the Commission on the Status of Women

document/edm20042_en.pdf; World Bank, "Trade & Gender",
<https://www.worldbank.org/en/topic/trade/brief/trade-and-gender>; ITC, "Women and Trade",
<https://www.intracen.org/itc/women-and-trade/>.

⁴³ See Section 2.3.

⁴⁴ Bradford, *The Brussels Effect: How the European Union Rules the World*, *op. cit.*

⁴⁵ See for example Anu Bradford, "Exporting standards: The externalization of the EU's regulatory power via markets", *International Review of Law and Economics* 42 (2015), 158-173, who speaks of "political agency" in this regard.

⁴⁶ The EU describes the relationship between EU and United Nations (UN) as follows: "The European Union and the United Nations are natural partners. We are the world's leading proponents and defenders of a multilateral and rules-based global governance system. Together, we respond to global crises, threats and challenges which cannot be addressed by individual nations acting alone, and require cooperation and coordination based on universal values and rules.", see European External Action Service, "EU-UN: Global Partners", 23 June 2021, https://eeas.europa.eu/headquarters/headquarters-homepage/50880/eu-un-partnership-delivers_en.

A factsheet details the EU-UN relationships as global partners and highlights the cooperation and coordination based on universal values and rules, see European External Action Service, "EU-UN: Global Partners", February 2021, https://eeas.europa.eu/sites/default/files/eu_un_partnership_2021-02-16_0.pdf, p. 1.

⁴⁷ WTO, "The European Union and the WTO",

https://www.wto.org/english//thewto_e/countries_e/european_communities_e.htm.

⁴⁸ European Commission, "Role of the G7", https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g7_en.

⁴⁹ Juha Jokela, "The High-Level Representation of the EU in the G20", *Studia Diplomatica* 65 (2012), 21-30.

⁵⁰ Already in 1958, the EU signed its first cooperation agreement with the ILO, reflecting common values, principles and strategic objectives: ILO, "European Union- ILO Cooperation", 2019, https://www.ilo.org/pardev/donors/WCMS_350516/lang--en/index.htm.

(CSW)⁵¹, which is the principal global intergovernmental body⁵² exclusively dedicated to the promotion of GE and the empowerment of women⁵³. UN Women plays a vital role in advancing GE in the world.⁵⁴ Acting alongside the Member States (MS), the EU is putting on the agenda gender equality policy and non-discrimination.

Political impact and agenda-shaping occurs also in the framework of the G7, an informal forum of heads of governments⁵⁵. In addition to Germany, France and Italy, the EU has also been represented in all G7 work sessions since 1981⁵⁶ and can thereby influence the gender equality debate. One example is the recent G7 Gender Equality Advisory Council process, adopting Recommendations for advancing GE and the empowerment of girls and women⁵⁷ as well as a Call to Action⁵⁸. The EU's voice is heard via its representatives and its MS⁵⁹. Not being part of the G7 as such but an independent body, it calls on the G7 members and other countries to join the Biarritz Partnership by adopting and implementing progressive legislative frameworks for GE. Unfortunately, neither the report nor the call to action mentions the challenges in relation to technological advances such as AI and its impacts on GE.⁶⁰

Gender equality is increasingly on the EU's trade policy agenda. Authors have identified a nexus⁶¹ between trade and gender⁶². To some extent, GE and non-discrimination increasingly play a role in trade negotiations⁶³ between the EU and third countries, which gives the EU some leverage to ensure observance of the principle of non-discrimination in countries with which it

⁵¹ UN Women, "Commission on the Status of Women", <https://www.unwomen.org/en/csw>.

⁵² It was established in 1946, as a functional commission of the Economic and Social Council (ECOSOC). See United Nations ECOSOC resolution 11(II) of 21 June 1946, https://www.un.org/women-watch/daw/csw/pdf/CSW_founding_resolution_1946.pdf.

⁵³ The impact of new technologies including AI frequently appear on the agenda of CSW and have been discussed during 2020 and will be again on the agenda in 2023. For 2023, for example, the priority theme is "Innovation and technological change, and education in the digital age for achieving gender equality and the empowerment of all women and girls". See UN Women, *op. cit.*

⁵⁴ Its close links to the EU manifest itself in the UN Women office in Brussels and by its participation in the Advisory Committee for Gender Equality of the EC as an observer. See European Commission, "Advisory committee on equal opportunities for women and men", https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/who-we-work-gender-equality/high-level-group-gender-mainstreaming-and-advisory-committee-equal-opportunities-women-and-men_en#advisorycommitteeequalopportunitiesforwomenandmen.

⁵⁵ In 2018, the G7 Gender Equality Advisory Council was created under the Canadian Presidency.

⁵⁶ European Commission, "Role of the G7", *op. cit.*

⁵⁷ Élysée, "Biarritz Partnership for Gender Equality: Recommendations of the Gender Equality Advisory Council for Advancing Gender Equality and the Empowerment of Girls and Women and Call to Action", 2019, <https://www.elysee.fr/admin/upload/default/0001/05/cfb1e2ba2b9aa09c1660f1b6df2cabb815eccc2.pdf>.

⁵⁸ *Ibid.*

⁵⁹ Élysée, "Publication of the Report of the G7 Gender Equality Advisory Council", 2019, <https://www.elysee.fr/en/g7/2019/08/20/publication-of-the-report-of-the-g7-gender-equality-advisory-council>. The Advisory Council has for example identified 79 good practices in GE laws in 4 sectors (violence, economic empowerment, education and health, discrimination) and in all regions of the world.

⁶⁰ The only reference made is to the STEM sector.

⁶¹ The nexus refers to the relationship trade and gender equality, such as when trade expands, sectors intensive in female labour are hugely impacted and the gender wage gap tends to widen and female labour force participation tends to fall. See for example Philip Sauré and Hosny Zoabi, "International Trade, the Gender Wage Gap and Female Labor Force Participation", *Journal of Development Economics* 111, Issue C, (2014), 17-33.

⁶² One example is the EU-Chile free trade agreement. See European Commission, "Countries and regions: Chile", <https://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/>.

⁶³ The EU is regularly monitoring the implementation of trade agreements and analyses the leverage of trade and investment to achieve sustainable development goals. See European Commission, "Report on the Implementation of EU Trade agreements, 1 January 2019 – 31 December 2019", COM(2020)705 final, <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-705-F1-EN-MAIN-PART-1.PDF>, p. 28.

trades.⁶⁴ The International Labor Organization (ILO) also plays a major role as forum to contribute to GE.⁶⁵ The EU participates in discussions and negotiations at the institutional meetings of the ILO in Geneva in the framework of both the International Labour Conference and the Governing Body.⁶⁶

Regulatory efforts with regard to AI can also be supported by gender supportive policies and positive action measures, such as increasing the proportion of women in the STEM (science, technology, engineering, mathematics) sector, notably computer scientists and programmers. The digital agenda is not only human-made, but also mostly man-made. In this context, it needs to be noted that worldwide, around half of all women have no access to the internet and digital technologies (“gender gap in internet access”).⁶⁷ Additionally, many women have less time to engage with digital technologies. Closing the digital gender gap and encouraging women and girls to acquire STEM skills are therefore among the EU’s priorities to ensure GE also beyond the EU.⁶⁸ Serving as a political role model and defending EU values and the principle of non-discrimination not only offline but also online can also serve as a best practice around the globe.

Despite being less effective than legal or economic leverages, the political angle of the Brussels effect plays an important role in the policy dialogue and public diplomacy of the EU, notably in terms of agenda setting and with a more mid- to long-term view to gradually achieving the implementation of EU values. Its importance lies in facilitating and promoting regulatory ideas and it can also complement any economic and legal impacts intended by the EU to reinforce the Brussels effect.

1.2. Legal impact

The legal impact refers to the EU’s traditional enforcement and regulatory powers via EU legislation as interpreted by the Court of Justice of the European Union (CJEU). MS have the legal obligation to transpose directives into national law and regulations are directly applicable. EU legislative acts sometimes produce effects not only within but also beyond the EU jurisdiction.⁶⁹ Equally, the obligation of candidate countries to adopt the *EU acquis* is a clear example thereof.

⁶⁴ For a critical analysis pointing out the tension between the EU’s commercial and social interests, see Lachian McKenzie and Katharina L. Meissner, “Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU–Singapore FTA”, *Journal of Common Market Studies* 55, no. 4 (2017) 832-849. See also Guillaume Van der Loo, “‘Mixed’ feelings about the EU–Mercosur deal: How to leverage it for sustainable development”, Brussels: Egmont Institute, April 2021, <https://www.egmontinstitute.be/mixed-feelings-about-the-eu-mercotur-deal-how-to-leverage-it-for-sustainable-development/>.

⁶⁵ It has offices in Brussels and has been closely cooperating with the EU since 1958.

⁶⁶ The EU often plays a key role in the adoption of conventions, recommendations and resolutions by cooperating closely with emerging economies, developing countries and social partners, for example during the adoption of the June 2008 ILO Declaration on Social Justice for a Fair Globalization or the recent ILO Convention C190 on Violence and Harassment.

⁶⁷ For concrete data, see World Wide Web Foundation, “The gender gap in Internet access: Using a women-centred method”,

<https://webfoundation.org/2020/03/the-gender-gap-in-internet-access-using-a-women-centred-method/>

⁶⁸ See for example European Parliament, “Resolution of 21 January 2021 on closing the digital gender gap: women’s participation in the digital economy” (2019/2168(INI)), 21 January 2021, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0026_EN.html.

⁶⁹ See European Commission, “Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts”, COM (2021)206 Final; European Commission, “Communication from the Commission to the European

In light of Article 21(1) TEU, which provides that the EU's actions on the international scene "shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world", contributing to GE worldwide is a key part of EU foreign policy.⁷⁰ In this context, the EC adopted the 2020–2024 Action Plan (AP) for Human Rights and Democracy which underlines the EU's commitment to promoting and protecting these values worldwide.⁷¹ The AP specifically aims to "step up action to combat all forms of discrimination including on grounds of sex".⁷² It makes specific reference to the need to harness opportunities and address challenges in relation to new technologies such as AI.⁷³ More specifically, it aims to "engage with governments, civil society, businesses and UN agencies to consider how to enforce human rights frameworks in the digital age."⁷⁴ Finally, the AP also makes specific reference to the AI White Paper.⁷⁵

On 21 April 2021, the EC adopted a proposal for an Artificial Intelligence Act (AIA). This proposal is accompanied by a political Communication that states that it forms part of the "European Union's efforts to be an active player in international and multilateral fora in the field of digital technologies and a global leader in the promotion of trustworthy AI, and to ensure consistency between the EU's external actions and its internal policies".⁷⁶ It results that the AIA will be key in putting the EU not only to the forefront in terms of political agenda setting, but also in terms of shaping markets based on binding regulatory provisions foreseeing the application of the rules to firms located outside the EU.

Companies that want to trade with the EU need to respect environmental, consumer or non-discrimination standards. This is most notably the case for data protection or competition law standards affecting international firms that trade within the EU Single Market or which affect EU consumers. EU competition law is equipped with the tools to capture anti-competitive behaviour that finds its source outside the jurisdiction of the EU, but which has effects within the EU market, the so-called extraterritorial (effects) doctrine.⁷⁷ In practice, many non-EU firms have been fined by the EC for anti-competitive behaviour under the EU Treaties.⁷⁸ Even though the CJEU has not ruled affirmatively the effects doctrine under EU law, the General Court in *Intel* opened the possibility under international law to allow for a "qualified effects" doctrine.⁷⁹

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Fostering a European Approach to Artificial Intelligence*, COM(2021)205 Final.

⁷⁰ See notably Article 3(5) TEU obliging the Union to uphold and promote its values (which includes gender equality and non-discrimination) as well as to contribute to the protection of human rights.

⁷¹ European Commission, "EU Action Plan on Human Rights and Democracy 2020-2024", JOIN(2020)5 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020JC0005&rid=3>.

⁷² *Ibid*, p. 3.

⁷³ *Ibid*, p. 13: "Promoting human rights and democracy in the use of digital technologies, including Artificial Intelligence".

⁷⁴ *Ibid*, p. 12.

⁷⁵ *Ibid*, 13: "Promote EU action, and support global and regional efforts to ensure respect for human rights and democratic principles in the development of AI, building on the EU's own developing approach to ethical AI".

⁷⁶ European Commission, "Fostering a European approach to Artificial Intelligence", *op. cit.*, p. 4.

⁷⁷ Richard Whish and David Bailey, *Competition Law* (Oxford: Oxford University Press, 2015), 526-531, 8th ed.

⁷⁸ See for example the €2.2 billion fine for Google: European Commission, "Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 - Google Search (Shopping))", C(2017)4444.

⁷⁹ Court of Justice of the European Union, Judgement of 12 June 2014, *Intel v Commission*, Case T-286/09, EU:T:2014:547.

For legal effects to materialise beyond the borders of the EU Single Market, a legal framework must exist. For AI regulation there is currently only the draft AIA Regulation. As has been highlighted for many different domains such as chemicals and data protection by Bradford⁸⁰, a European legal framework exercises a certain attractiveness and combined with the market mechanism that plays out with the European Single Market, firms would be obliged to obey certain minimum standards if they want to sell on the EU market, but also *de facto* if they produce products that are “sellable” in multiple markets. The scope of the draft AIA includes provisions that model a legal impact in line with the Brussels effect, by enlarging the scope of the regulatory regime for AI beyond the EU Single Market. It notably states that the Regulation would apply to “providers placing on the market or putting into service AI systems in the Union, irrespective of whether those providers are established within the Union or in a third country” as well as “providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union”.⁸¹ In other words, the AIA would introduce an obligation for non-EU companies to comply with the EU standards in relation to AI and non-discrimination, when selling in the EU and when any AI system is used in the EU and has an impact on EU citizens. This broad-reaching norm imposes compliance obligations on EU and non-EU firms alike if an AI system produces potential discriminatory risks within the EU.

1.3. *Economic impact*

The economic impact refers to the attractiveness of the EU Single Market, which incentivises private actors and states to adopt behaviour and standards to comply with and access the EU Single Market without a specific legal obligation or political influence being exercised.⁸² The attractiveness of the EU’s Single Market⁸³ with harmonised rules for 27 countries, notably in terms of the market size for potential investments, is a feature considered by firms worldwide. Complying with EU rules or standards enables firms to sell in the EU and access around 450 million consumers. Chances of EU standards being adopted and incorporated into products by firms worldwide are therefore relatively high to reduce administrative and regulatory costs. By producing one product that fits all or the most important markets, firms become more competitive. Creating a product that respects high (non-discrimination) standards for consumers could therefore be an attractive choice to enable firms to sell on different markets. In that way, the market mechanism could lead firms to automatically adopt the higher standards, observing the principle of non-discrimination. However, this would only be required for selling in the EU Single Market. Such a push towards “EU-flavoured” gender equality law is certainly supported and incentivised by generous EU funding for projects in the area of gender equality law, which represented for example in 2018 a commitment to allocate 63% of the bilateral aid to gender equality and women’s empowerment.⁸⁴

⁸⁰ Bradford, “The Brussels Effect: How the European Union Rules the World”, *op. cit.*, pp. 132 (data protection) and 193 (chemicals).

⁸¹ European Commission, “Artificial Intelligence Act”, *op. cit.*, Article 2(1).

⁸² Bradford refers for example to “market size” but specifies that “only large economic can become source of global standards” and adds that market size alone is not sufficient. See Bradford, “Brussels Effect: How the European Union Rules the World”, *op. cit.*, p. 26.

⁸³ See European Commission, “The European Single Market”, https://ec.europa.eu/growth/single-market_en: “The single market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services. A functioning single market stimulates competition and trade, improves efficiency, raises quality, and helps cut prices. The European single market is one of the EU’s greatest achievements. It has fuelled economic growth and made the everyday life of European businesses and consumers easier”.

⁸⁴ OECD, “European Union institutions”, *op. cit.*

Highly competitive markets could also favour the adoption of a high standard⁸⁵ implementing the principle of non-discrimination in products and services because consumers around the world are inspired by high consumer protection standards in the EU, and could ask for products with the same guarantee of non-discriminatory AI.⁸⁶ The market could thus produce the same outcome as a European rule *de facto* by creating a consumer demand for non-discriminatory AI.

Concluding, the political impacts of the Brussels effect are rather indirect and take longer to materialise. Legal and economic impacts produce tangible effects via financing or adoption of legal standards more directly, equally in the short and the long-term perspective.

2. From Local to Global Reach: Regulating Algorithmic Discrimination

AI blurs the lines between local jurisdictions that struggle to ensure the effective enforcement against algorithmic discriminations. In other words, even if the EU is equipped with a legal framework ensuring non-discriminatory algorithms, this would probably not prevent all discrimination from occurring within the EU and for EU citizens. The question is to what extent EU law would be able to capture AI systems that are operated from other jurisdictions but have potentially discriminatory effects for Union citizens. One solution could be to use the competition law effects doctrine type of legal reasoning to capture potential discriminatory behaviour that shows effects within the EU and on EU citizens. Another, more interventionist approach would consist of regulation that allows AI to be marketed and used in the EU only in case of a green light from a regulatory authority dedicated to grant market authorisations for AI. If AI is considered a risk for human rights⁸⁷ and the principle of non-discrimination, one could envisage a scenario similar to chemicals or pharmaceuticals, where products have to undergo a regulatory authorisation procedure before entering the EU market. Any future EU regulation has the potential to either serve as blueprint to be imitated by other countries or to nudge countries in a certain policy direction to achieve gender equality and avoid algorithmic discrimination.

2.1. EU Algorithmic Regulation as Blueprint for the World: Following in the Footsteps of the EU GDPR

⁸⁵ Standards could also be set by European standard-setting organisations such as CEN-CENELEC, which tries to follow an inclusive standard setting approach by applying a gender lens. See for example CEN-CENELEC's reply to the EC White Paper on AI. They can then become a *de facto* standard, see Simon Den Uijl, *The Emergence of De Facto Standards* (PhD Dissertation, Erasmus University Rotterdam, 2015).

⁸⁶ However, there is some critical literature regarding ethical principles ("fair-trade") and competitiveness that argues firms with ethical principles can only be competitive if they differentiate and also take into account other features beyond "fairness". See Eefje de Gelder et al, "Market Competition and Ethical Standards: The Case of Fair Trade Mainstreaming", *Review of Social Economy* 79, no. 2 (2019), 1-31.

⁸⁷ A risk not necessarily to life as is the case for AI systems used in driverless vehicles but which has certainly similar impacts.

The General Data Protection Regulation (GDPR)⁸⁸ is known beyond the EU jurisdiction and regarded as an example of worldwide standard-setting⁸⁹ inspiring regulation, affecting firms worldwide. Indeed, EU privacy law, even if not the standard world-wide, seems to be in the process of becoming a widely copied and imitated standard⁹⁰ that market players voluntarily adhere to for their products and services. This is an example of EU law being considered as a well-recognised legal regime that is followed and which could inspire the approach for EU flavoured algorithmic discrimination regulation. A first step in this direction seems to be taken by the EU proposal for the Artificial Intelligence Act which foresees a scope that captures firms, behaviours and impacts within and outside of the EU jurisdiction. Similar to competition law, EU law would apply even for third-country companies established outside the EU, if “outputs produced by the [AI] systems are used in the Union”.⁹¹ As the foregoing analysis of the legal, political, and economic attractiveness of the European Union and the associated Brussels effect has shown, there is an opportunity for the EU to shape the regulation of algorithmic discrimination beyond the EU’s borders, as is the case for EU privacy law.

Such a globally coordinated approach or a political consensus emerging as a result of the Brussels effect would better capture discriminations crossing borders when AI is used. Albeit slowly, regulatory ideas equally “cross borders” and regulators cooperate and imitate rules to ensure a fair and non-discriminatory use of AI. Once the EU has adopted a legislative proposal, this can be the start in bringing the concrete policy debate beyond the EU even before adoption by co-legislators. Such a process can be observed in accession negotiations for future EU MS that already try to adhere to forthcoming or future standards before they are even adopted.⁹² Finally, it can shape the debate and inspire countries worldwide, when the EU introduces the cornerstones of the AI and Gender debate via its representation in international fora.

2.2. An Imitation and Inspiration Game: Should the EU Lead in Shaping the Regulation of Algorithmic Discrimination?

A balanced process of inspiration, imitation and coordination could improve the regulation of algorithms around gender-based discrimination. The preamble of the Treaty on European Union recalls that the EU draws inspiration “from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights

⁸⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

⁸⁹ For approaches to regulate AI from a data protection and discrimination perspective see, Philipp Hacker, “Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination under EU Law” *Common Market Law Review* 55 (2018), 1143–1186.

⁹⁰ See for example, Jonathan Keane, “From California to Brazil: Europe’s privacy laws have created a recipe for the world”, *CNBC*, 8 April 2021, <https://www.cnn.com/2021/04/08/from-california-to-brazil-gdpr-has-created-recipe-for-the-world.html>; Catherine Barrett, “Are the EU GDPR and the California CCPA becoming the de facto global standards for data privacy and protection?” *Scitech Lawyer* 15, no. 3 (2019), 24–29.

⁹¹ European Commission, “Artificial Intelligence Act”, *op. cit.*, Art. 2(1).

⁹² Article 49 TEU. For the procedure and requirements, see European Union, “Treaty on the European Union – Joining the EU”, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114536>. See in general on this EU conditionality, Heather Grabbe, “European Union Conditionality and the Acquis Communautaire”, *International Political Science Review* 23, no. 3 (2002), 249–268.; European Commission, “Conditions for Membership”, https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en.

of the human person, freedom, democracy, equality and the rule of law”.⁹³ A Union that recalls these values and confirms its “attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”⁹⁴ needs to ensure that in the algorithmic age, these values are also ensured when decisions are increasingly taken not by humans but in the framework of automated decision making (ADM). The GES equally identifies AI as a strategic technology and advocates women to play a role in its development.⁹⁵ It further observes that “while AI can bring solutions to many societal challenges, it risks intensifying gender inequalities. Algorithms and related machine-learning, if not transparent and robust enough, risk repeating, amplifying or contributing to gender biases that programmers may not be aware of or that are the result of specific data selection.” This observation holds true not only for the EU, but worldwide. There could be positive impacts generated by the Brussels effect, with the publication of the Communication⁹⁶ and the draft AIA⁹⁷ setting out the European approach to AI grounded in EU values and fundamental rights, including non-discrimination and GE.

In addition, the “founders” of the EU did not only acknowledge (gender) equality as a value to be pursued but also considered it to be a “universal” value. The EU therefore promotes equality not only internally but also externally. Having in mind these Treaty-based roots and anchors of gender equality, the influence associated with the Brussels effect and the new challenges and opportunities, the EU should regulate biased algorithms and prevent gender-based discrimination from occurring when using AI systems.

Consequently, any future AIA could not only serve as *blueprint* in regulating AI and non-discrimination but also it foresees concrete rules that shape and favour the use of non-discriminatory AI systems beyond the EU.

2.3. How the EU is Nudging the World into Gender Equality: The Way Forward

The EU is in a good position to shape the debate and the creation of rules regulating AI to ensure a high level of protection for GE, not only in the EU but beyond. The Brussels effect revealed the different avenues on which the power of the EU could be used for good, to nudge states and actors to pursue the road of regulating towards non-discriminatory AI systems. In that sense, Giegerich for example has argued that “the EU and Member States have done too little to promote global and regional human rights treaties which prohibit discrimination” and suggests that “the Union should improve on its role as a protagonist of equality both internally and externally, leading by example and prudent policies, thus doing a service to humanity.”⁹⁸ One clear nudge that EU institutions use to foster gender equality worldwide is by providing major financial aid for projects outside the EU in the area of gender equality. This financial nudge does not only

⁹³ Consolidated version of the Treaty on European Union, PREAMBLE, OJ C 202, 7.6.2016, p. 15–16.

⁹⁴ *Ibid.*

⁹⁵ European Commission, “A Union of Equality: Gender Equality Strategy”, *op. cit.*, p. 17.

⁹⁶ European Commission, “Fostering a European approach to Artificial Intelligence”, *op. cit.*

⁹⁷ European Commission, “Artificial Intelligence Act”, *op. cit.* In essence, the proposal for a Regulation on AI is a horizontal legal act based on the opportunities and risks of AI. It therefore distinguishes between AI that does not need regulation, prohibitions of certain AI systems (Art. 5) and risk-based regulation where certain AI systems are classified as “high-risk” (Art. 6) whereby either cumulative criteria of Art 6(1) need to be fulfilled or it constitutes an AI system listed in Annex III. For high-risk systems specific requirements (such as compliance, reporting, data, transparency) need to be observed (Art. 8 – 14).

⁹⁸ Giegerich, *op. cit.*, p. 1.

accompany and reinforce political goals but can be regarded as an incentive in its own right. Even though these observations can be endorsed in principle, against the background of the EU's role in shaping data-protection beyond EU borders, an optimistic view would argue that when it comes to regulating algorithmic discrimination, the EU will play its role. The EC's draft AIA takes the fundamental rights approach to regulating AI systems seriously and considers the principle of non-discrimination. The prominent role taken up by the EU to defend high standards in data protection in the EU and beyond paves an optimistic setting in which the European approach to regulation of data and AI systems which includes to prevent discriminatory outcomes of AI systems, is on a good way.

3. Towards Global Reach of EU Gender Equality Law and Shaping Algorithmic Discrimination

How does the world become more EU gender equality flavoured? And how does the flavour of EU GE become so attractive that the GE principles are endorsed globally because of its positive impacts for society? Based on the foregoing explanations and in the absence of specific rules governing algorithmic discrimination at EU level, the following chapter addresses the importance of acting now to shape the global discussion on how to regulate AI and enforce the principle of non-discrimination. This section will therefore first enunciate on the questions of why regulation is needed and what types of regulation could address the problem of discriminatory outcomes of ADM. It will then discuss the hypothetical future EU law export and the template role of the EU as shaping and regulating algorithmic discrimination beyond the EU and briefly sketch out some of the possible ways forward.

3.1. Regulatory Approaches by Design and by Law

This sub-section will briefly outline (a.) some reflections on why the use of algorithms does not solve the problems of decision-making errors ("biases") encountered by humans and (b.) describe some of the regulatory approaches that could be envisaged.

3.1.1. Reflections on Why Regulation is Needed

AI or ADM could be described in a simplified way as AI being the vehicle, the algorithm being the engine and the data being the fuel for it to run smoothly. Without data as the fuel, the algorithm stops working. And without the right fuel, the engine will not run smoothly, that is, it will not produce accurate and correct results. Algorithms pose numerous challenges for regulators worldwide, notably in terms of discriminatory impacts.

In order to run smoothly and produce good and accurate results, the algorithm needs (a lot of) data. However, the type of data that is used to build and train the algorithm is decisive for the quality and at the same time opens the door for discriminations.⁹⁹ Huge amounts of accurate and representative data are essential. If data is incorrect, inaccurate, incomplete ("Triple I") or

⁹⁹ Katarina Zweig, *Ein Algorithmus hat kein Taktgefühl*, *op. cit.*, pp. 212-213.

simply not available, this could result in different treatments for different groups and potential discriminations. Discrimination can therefore occur when no data is available, when data is available but certain groups are less represented (for example women, the so-called “Gender Data Gap”) but also when specific data is left out on purpose (sensitive data such as gender is not taken up in the data) or when the algorithm is self-learning in an unsupervised way. If, for example, less data is available on female computer scientists, an algorithm used for recruitment¹⁰⁰ will produce less adequate and accurate results for a firm and potentially discriminate against women¹⁰¹. Consequently, not only AI systems and algorithms as such but also the underlying data could be potentially subject to scrutiny or regulatory oversight. The literature has discussed some technical solutions that could help ensure a fairer, more transparent, and potentially less discriminatory algorithms.¹⁰²

The question of “why to regulate” shall be explained with an example from recruitment/employment where AI is used to search the ideal external candidate or to promote an ideal internal candidate. Let’s imagine that a company uses an algorithm that fully automates the pre-selection of job applicants as well as video and voice analysis during interviews. Potential entry doors for discriminatory outcomes on the basis of gender could result in this example from the kind of data that is provided by the applicant (the algorithm draws discriminatory conclusions), or the inaccurate, unavailable¹⁰³, incomplete¹⁰⁴ or non-representative data on which the algorithm was trained. Even if sensitive or protected characteristics are not used in ADM¹⁰⁵, by correlating different data-points, the algorithm could infer for example the gender of an applicant which could potentially lead to discriminatory effects.¹⁰⁶

3.1.2. Reflections on the Type of Regulation

The market itself will not ensure that algorithms do not discriminate. Self-regulation is no answer as long as there is no clear demand by consumers who will prefer AI systems that ensure the respect of the principle of non-discrimination. A competitive market would be needed to ensure the best outcomes for consumers in terms of price and quality but also in terms of respect of the principle of non-discrimination. Considering that AI systems product markets typically

¹⁰⁰ Generally on recruitment algorithms, Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, (Largo: Crown, 2016), 105-122.

¹⁰¹ Amazon used such a discriminatory AI for recruitment but subsequently stopped the AI. See Jeffrey Dastin, “Amazon scraps secret AI recruiting tool that showed bias against women”, *Reuters*, 11 October 2018, <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G>.

¹⁰² See for example, Bruno Lepri et al, “Fair, Transparent, and Accountable Algorithmic Decision-Making Processes”, *Philosophy & Technology* 31 (2018): 611-627.

¹⁰³ Often this situation is referred to as the gender data gap, see Mayra Buvinic and Ruth Levine, “Closing the Gender Data Gap”, *Significance* 13, no. 2 (2016): 34-37.

¹⁰⁴ The absence of data for women is relevant for policy both in the offline and online world, but particularly due its working for AI, see section “No data, bad data”, *Ibid.*, p. 34.

¹⁰⁵ Under Article 22(1) of the GDPR, data subjects “have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her” which is for example not applicable according to Article 22(2b) when “authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests” or in the case of explicit consent (Art. 22(2)(b)). A future EU AI legislation, such as the AIA, could be considered as guaranteeing such suitable measures to protect the rights of EU citizens.

¹⁰⁶ Katarina Zweig, *Algorithmische Entscheidungen: Transparenz und Kontrolle* (Berlin: Konrad-Adenauer-Stiftung, 2019); Katarina Zweig, *Ein Algorithmus hat kein Taktgefühl*, *op. cit.*, pp. 215-218.

have a rather oligopolistic or monopolistic market structure¹⁰⁷, such an approach currently seems unpromising.¹⁰⁸ As a result, due to the lack of competitive pressure, regulation and additional costs, firms have no incentives to produce non-discrimination friendly products and services unless obliged by the law.

Therefore, regulatory options range from incorporating the idea of non-discrimination in the AI systems from the design stage onwards or to regulate by law. A combination of regulation at the design stage, by building elements of the principle of non-discrimination into the code of the algorithm and at the same time foreseeing legal obligations and oversight of the algorithm by regulators, is possible. Drawing on economics and competition law insights, a decisive factor for regulating AI that potentially discriminates (on the basis of sex) is the competitive landscape of the product and services market. If there is enough competitive pressure that allows either the market to adapt or consumers to choose from a variety of different products and services (opting for non-discriminatory AI for example), the need for regulation is not off the table, but less urgent. The more monopolistic the market for AI systems is, the more regulation is needed in principle. In terms of timing, regulation can occur before the AI product enters the market (*ex ante*) or once it is on the market (*ex post*). Equally, a mix of *ex ante* and *ex post* regulation is possible and could also be envisaged depending on the type of product or on the expected harm/risk that is associated with a product or service. For example, if a product creates important or irreversible harm for the lives of consumers, *ex ante* regulation could be envisaged, whereas small risks or reversible harm could be regulated via an *ex post* model of regulation.

The difficulty here is how to classify discriminations on the basis of sex. If a woman is not (pre-)selected for a job due to a discriminatory algorithm, would this be considered a huge or a small risk/harm and is this reversible? Such answers are not easy. What is clear is that a violation of a fundamental principle of the EU should be regarded as significant harm, whether reversible or not,¹⁰⁹ and should be classified as a risk to regulate.¹¹⁰ Finally, besides regulating AI, algorithms can also play a vital role in assisting the regulator to detect gender-based discriminations and to better enforce the non-discrimination rules.¹¹¹

3.2. Exporting EU Gender Equality Law to Prevent Algorithmic Discrimination

The Artificial Intelligence Act (AIA)¹¹² – if adopted by co-legislators – could be a candidate to be imitated or exported beyond the EU. The first step of the legislative procedure has only started, and it may take some time until a potential Regulation would become binding EU law. The Communication accompanying the legislative proposal explains how it intends to create EU global

¹⁰⁷ See for example, Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (Oxford: Oxford University Press, 2020).

¹⁰⁸ The public and academic debate is relatively recent and not much progress in terms of regulations has occurred.

¹⁰⁹ Risks or harm in relation to the labour market can have significant life-changing impacts, especially if those decisions are taken in an opaque manner difficult to understand and when harm is done difficult to compensate. See for example in relation to using ADM for administrative decision-making, Maryam Haeri et al, "Denkanstöße zum Einsatz von ADM-Systemen in der öffentlichen Verwaltung", *Technische Universität Kaiserslautern*, 2020.

¹¹⁰ For a risk matrix developed by Zweig, foreseeing 5 different regulatory stages taking into account different factors, see Katarina Zweig, *Ein Algorithmus hat kein Taktgefühl*, *op. cit.*, pp. 234-245.

¹¹¹ Despite its importance, this aspect will not be discussed here in detail. For an overview, see for example from a computer science perspective, Jon Kleinberg et al, "Discrimination in the Age of Algorithms", *Journal of Legal Analysis* 10 (2018): 113-174.

¹¹² European Commission, "Artificial Intelligence Act", *op. cit.*

leadership with a revised coordinated plan on AI, implicitly alluding to the Brussels effect of EU regulation.¹¹³

The agenda around the world, could be shaped by the draft AIA as well as the academic, institutional and public debates how to regulate AI to ensure GE. The sooner the discussion starts, the more inclusive and fruitful the debate can be and the more likely it is that a broad consensus can be found how to shape AI respecting human rights.

Legal scholars have observed that if standards incorporated in EU law are transferred beyond the EU's jurisdiction, one could speak of an "externalisation" or rules export often through the market mechanism without the interference of political or regulatory power.¹¹⁴ Other scholars have been more critical of the use of norm export but acknowledge nevertheless an effect that EU law and policy have in shaping regulation beyond the jurisdiction of the EU.¹¹⁵ In any case, European ideas and values are being exported which influence and shape the regulatory scene worldwide. Whether the norms are directly exported and taken up in other jurisdictions or merely modelled or inspired by EU law does not alter the impact that is usually described by the Brussels effect. In this area, other soft law and non-binding instruments exist to shape GE values beyond the EU, such as the ones taken up in the Joint Staff Working Document accompanying the GAP III¹¹⁶, where EU institutional and strategic objectives and indicators are laid down. These concrete objectives should be achieved via gender mainstreaming, funding and programs to be implemented in light of the GAP III and are measured with indicators. The EU wants to lead by example in this regard.

Conclusion

There is an undeniable need for regulation of algorithmic discrimination both for the EU and worldwide. Preferably this should be done in the form of binding rules, as the market alone will not be able to ensure sufficiently the respect of the principle of non-discrimination. Therefore, the EU as a global actor pursuing a human rights-based approach in all its activities is well placed to serve as a regulatory model for AI particularly with regard to its impacts on GE. In that regard, the Brussels effect could contribute to a situation where more and more women and men around the world profit from a protective framework against discrimination including algorithmic discrimination. Political impacts of the Brussels effect are supportive and helpful to argue the case of regulating AI systems beyond the EU, but not sufficient to this end. Only the economic impact stemming from the EU Single Market's attractiveness together with the legal impacts of binding EU legislation – with a first good proposal for a Regulation with the AIA – will ensure that the principle of non-discrimination is respected in and beyond the EU when AI systems are used.

Products and services with discriminatory impacts are already used around the world on a daily basis and current laws and regulators in the EU and beyond often are not equipped with the right

¹¹³ European Commission, "Fostering a European approach to Artificial Intelligence", *op. cit.*, pp. 7-9.

¹¹⁴ Anu Bradford, "Exporting standards", *op. cit.*

¹¹⁵ See for example, Joanne Scott, "Extraterritoriality and Territorial Extension in EU Law", *The American Journal of Comparative Law* 62, no. 1 (Winter 2014): 87-126. (Notably explains global reach of EU law in the context of current debates about the rise of the EU as a global regulatory power and takes a critical approach to the phenomenon of EU norms export).

¹¹⁶ European Commission, "Joint Staff Working Document: Objectives and Indicators to frame the implementation of the Gender Action Plan III (2021-25)", *op. cit.*, p. 21.

tools. The proposal for an EU AIA¹¹⁷ (and the Digital Services Act¹¹⁸ and Digital Markets Act¹¹⁹) shows that the EU is on a good way to follow in its own footsteps with regard to the bold approach taken in data-protection law, and to pursue a regulatory approach to AI in the area of GE law that preserves rights of both women and men when they are confronted with AI systems that take decisions that impact their lives.

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¹¹⁷ Despite being a horizontal legislative instrument, the Communication mentions the EU Gender Equality Strategy and the proposal for a Regulation refers 19 times to issues relevant to gender equality Law: "gender" (1 mention), "non-discrimination" (16 mentions) and "women" (2 mentions). It also mentions recruitment systems a potential object of "risk-based" regulation by classifying labour market relevant recruitment and promotion systems as "high-risk".

¹¹⁸ European Commission, "Proposal for a Regulation of the European Parliament and the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC", COM(2020)825 final.

¹¹⁹ European Commission, "Proposal for Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)", COM(2020)842 final.

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From Burden-Sharing Justice to Harm-Avoidance Justice: Reimagining the EU's Approach to Climate Justice

Kevin Le Merle¹

Abstract: With the climate crisis set to become the defining issue of our generation, it appears vital to reimagine the ethical principles that underpin the EU's climate action policy. The concerted political action necessary to limit the harmful effects of climate change will have high mitigation, adaptation, and compensation costs. The question of how that cost should be distributed is a question of global redistributive justice, which has led to the development of an entire sub-field of moral-political philosophy – climate justice. I will show how an ethical framework of equal relative sacrifice measured in terms of human well-being can become the new foundation for effective climate-change justice that realistically considers the scope and potential existential threat of climate change and expends energy seeking to avoid further harm rather than assigning responsibility. The EU can no longer afford to have a less than 'all hands on deck' approach towards climate change. Ethics should not stand in the way of effective climate action but support it. This begs the inter-related questions: What is the moral and normative motivation for a switch to harm-avoidance justice? Can the Ability to Pay Principle (ATP) or Polluter Pays Principle (PPP) fulfil the imperatives set out by a harm-avoidance justice framework? This paper explores which principles of burden-sharing justice translate into harm-avoidance justice and normatively evaluates the two principles ATP and PPP in view of such a switch.

Keywords: Climate justice, climate change, European Green Deal, Polluter Pays, Ability to Pay

Introduction

With the climate crisis set to become the defining issue of our generation, it appears vital to reimagine the ethical principles that underpin the EU's climate action policy. Climate change can

¹ Kevin Le Merle is a Schuman trainee for the Industry, Research, and Energy Committee at the European Parliament where he is currently working on the Fit for 55 package/climate policy. He is also the founder of Lingua Natolina – a multilingual and hybrid publication featuring art, literature, journalism, and academia.

be likened to a modern-day tragedy of the commons, where it is in each country's immediate self-interest to act against the long-term common good by releasing high levels of greenhouse gases.² Anthropogenic greenhouse gases prove to be a key player in inducing climate change.³ One of the main reasons for this tragedy of the commons would be the high emission cost of economic growth necessary to create wealth in most modern societies.⁴ Just like in Lloyd's pamphlet, actors are collectively depleting a common good (the amount of acceptable emissions) for increased marginal individual benefit rather than stewarding it for a larger total and collective benefit (avoiding further climate-change-related harm).⁵ The scope of this tragedy risks affecting the livelihood of more people than Lloyd's cow-herder example could anticipate.⁶ As such, the concerted political action necessary to limit the harmful effects of climate change will have high mitigation, adaptation, and compensation costs.⁷ The question of how that cost should be distributed is of global redistributive justice, which has led to the development of an entire sub-field of moral-political philosophy – climate justice.

Thus far, the European Union has championed a burden-sharing justice approach to climate justice in its international relations.⁸ Think notably of the Paris Agreement. Simon Caney explains that for theories of climate change justice to be deemed valid, their implementation needs to enable effective climate action.⁹ This 'sustainability condition' signifies that if the environmental cost of implementing a climate change justice theory is too high, it should be discarded.¹⁰ As such, I will show how an ethical framework of equal relative sacrifice measured in terms of human well-being can become the new foundation for effective climate-change justice that realistically considers the scope and potential existential threat of climate change and expends energy seeking to avoid further harm rather than assigning responsibility.

The EU can no longer afford to have a less than 'all hands on deck' approach towards climate change. Ethics should not stand in the way of effective climate action but support it. This begs the inter-related questions: What is the moral and normative motivation for a switch to harm-avoidance justice? Can the Ability to Pay Principle (ATP) or Polluter Pays Principle (PPP) fulfil the imperatives set out by a harm-avoidance justice framework?

² Anil Agarwal and Sunil Narain, *Global Warming in an Unequal World: A Case of Environmental Colonialism* (New Delhi: Centre for Science and Environment, 1991), 13.

³ Robert Watson et al., "Summary for policymakers", in *Climate change 2001: Synthesis Report: Contribution of Working Groups I, II and III to the third Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Robert Watson and the Core Writing Team (Cambridge: Cambridge University Press, 2001), 5.

⁴ He Hu, Xiao-Hong Zhang, and Li-Li Lin, "The Interactions Between China's Economic Growth, Energy Production and Consumption and The Related Air Emissions During 2000–2011", *Ecological Indicators* 46 (2014): 38-51.

⁵ William Forster Lloyd, *Two Lectures on the Checks to Population* (Oxford: Oxford University, 1833): 45-48.

⁶ Nigel Arnell, "Climate Change and Water Resources: A Global Perspective", in *Avoiding Dangerous Climate Change*, ed. Hans Joachim Schellnhuber, Wolfgang Cramer and Nebojsa Nakicenovic (Cambridge: Cambridge University Press, 2006), 167.

⁷ Simon Caney, "Climate Change and the Duties of the Advantaged", *Critical Review of International Social and Political Philosophy* 13, no. 1 (2010): 203-228; Carl Knight, "What is Grandfathering?", *Environmental Politics* 22, no. 3 (2013): 423.

⁸ Paris Agreement to the United Nations Framework Convention on Climate Change, 16-1104.

⁹ Simon Caney, "Just Emissions", *Philosophy & Public Affairs* 40, no. 4 (2012): 293.

¹⁰ *Ibid.*

This paper explores which principles of burden-sharing justice translate into harm-avoidance justice and normatively evaluates the two principles ATP and PPP in view of such a switch. The fundamental question remains that of identifying who should pay for the costs of climate change.

The political impetus created by the European Green Deal has in many ways been strengthened by the critical juncture engendered by the COVID-19 pandemic. Influential political figures ranging from Emmanuel Macron to Ursula von der Leyen take the COVID-19 pandemic as an opportunity to push further climate action more forcefully. Rather than building back the old, they are building a new and greener world.¹¹ This has taken shape democratically under the guise of the European Climate Pact, which invites citizens to offer their input on climate issues.¹² The heightened awareness of climate change issues in the general population offers the necessary political opportunity to understand climate change as the existential threat that it truly is.¹³ In such a context, new political imaginaries of climate justice can emerge.

1. Climate Justice: Paradigms and Principles

In climate justice, two overarching paradigms of redistributive justice contend for space: burden-sharing justice and harm-avoidance justice.¹⁴ In Caney's words, burden-sharing justice is about:

*"focusing on how the burden of combating the problem should be shared fairly among the duty-bearers. An agent's responsibility, then, is to do her fair share."*¹⁵

In political discourse and key policy documents, burden-sharing justice has taken the centre stage. An example of this would be the Paris Agreement, with Nationally Determined Contributions, and its focus on historical responsibility.¹⁶ This explains why Caney associates classical principles of climate justice with burden-sharing justice. Two central principles of climate ethics recur in the literature: ATP, according to which those with the highest capacity to pay should pay a larger share, and PPP, according to which those who caused climate change should pay for its mitigation.¹⁷ Caney views both ATP and PPP as principles of burden-sharing justice.¹⁸ However, according to Caney, there is a second form of climate justice – harm-avoidance justice:

¹¹ European Commission, "Communication : The European Green Deal", 2019; Environnement Magazine avec AFP, "Relance : Le Gouvernement Annonce des Investissements pour la Transition Écologique", *Environnement Magazine*, 1 July 2020, <https://www.environnement-magazine.fr/politiques/article/2020/07/15/129656/relance-gouvernement-annonce-des-investissements-pour-transition-ecologique>.

¹² European Commission, "European Climate Pact", 2019.

¹³ Eurobarometer, *Special Eurobarometer 490 on Climate Change*, 2019.

¹⁴ Simon Caney, "Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens", *Journal of Political Philosophy* 22, no. 2 (2014): 125.

¹⁵ *Ibid.*

¹⁶ Paris Agreement, *op. cit.*

¹⁷ Caney, "Climate Change and the Duties of the Advantaged", *op. cit.*, p. 204.

¹⁸ Caney, "Two Kinds of Climate Justice", *op. cit.*, pp. 125-126.

“takes as its starting point the imperative to prevent climate change, and [...] works back from this to deduce who should do what. Its focus is primarily on ensuring that the catastrophe is averted (or at least minimised within reason). This perspective is concerned with the potential victims—those whose entitlements are threatened—and it ascribes responsibilities to others to uphold these entitlements.”¹⁹

While Caney indicates that ATP and PPP are of the remit of burden-sharing justice, we can argue that ATP could also function as a guiding principle of harm-avoidance justice.

There is one primary reason for moving away from burden-sharing justice in favour of harm-avoidance justice. Burden-sharing justice does not guarantee the success of climate action. It has often led the developing world to adopt free-riding behaviours counter-productive to global climate-change mitigation measures, therefore, threatening future generations’ entitlements in the name of having a lesser historical responsibility. During the Copenhagen Summit, the failure of the Kyoto Protocol was attributed to the failure to encompass the fastest developing economies.²⁰ This led to resistance against explicitly enshrining PPP in subsequent agreements by the Obama administration.²¹

Climate change can be and is being constructed as an existential threat.²² And for a good reason. From the UNFCCC’s baseline, we can understand that climate change broadly refers to the negative consequences of anthropogenic greenhouse gas emissions, which (alongside other factors) cause historically unprecedented levels of global warming.²³ The shift in global mean temperatures and consequent Arctic ice cap melting lead to a rise in the global mean sea level. However, although they are the two major aggregate indicators of climate change, the impact of climate change does not limit itself to a change in temperature and sea level.²⁴ Just a couple of years ago, bushfires half the size of Belgium wreaked havoc on the east coast of Australia.²⁵ The record for the hottest day is being broken day after day.²⁶ Across the Pacific, the United States of America

¹⁹ *Ibid.*

²⁰ Bo Yan et al. “The EU’s Engagement with China in Global Climate Governance”, in *Multilateralism in the 21st Century: Europe’s Quest for Effectiveness*, ed. Caroline Bouchard, John Peterson and Nathalie Tocci (London: Routledge, 2013).

²¹ *Ibid.*

²² Environnement Magazine avec AFP, “Relance”, *op. cit.*

²³ UNFCCC, *Framework Convention on Climate Change*, 1992; Catrinus J Jepma and Mohan Munasinghe, *Climate Change Policy* (Cambridge: Cambridge University Press, 1998): 27; World Meteorological Organisation, “The State and the Variations of Greenhouse Gases in the Atmosphere”, 2019.

²⁴ Jepma and Munasinghe, *op. cit.*, pp. 27-33.

²⁵ Nick Evershed, Andy Ball and Naaman Zhou, “How Big Are the Fires Burning on the East Coast of Australia? Interactive Map”, *The Guardian*, 24 January 2020, <https://www.theguardian.com/australia-news/datablog/ng-interactive/2019/dec/07/how-big-are-the-fires-burning-on-the-east-coast-of-australia-interactive-map>.

²⁶ Graham Readfearn, “Australia Records its Hottest Day Ever – One Day After Previous Record”, *The Guardian*, 19 December 2019, <https://www.theguardian.com/australia-news/2019/dec/19/419c-australia-records-hottest-ever-day-one-day-after-previous-record>.

has suffered through extreme hurricanes in the past two decades.²⁷ The increase in extreme weather conditions and its implications are largely imputable to anthropogenic climate change.²⁸ These examples powerfully illustrate the repercussions of climate change. However, its systemic consequences are sometimes more insidious.²⁹ The eco-systems and natural habitats that humankind rely on (for the production and consumption of vital goods and services) risk gradual damage and destruction that would only become noticeable once tipping points have been reached (by that stage, the damage is irreversible).³⁰ Climate change poses the risk of compromising humanity's fresh-water resources and jeopardising food safety.³¹ This could lead to the collapse of human civilisation as we know it and possible mass extinction.³² So far, according to Dr Duffy, senior climate advisor to the U.S. government during the Obama administration, the world emission rates are almost exactly following those present in the simulation model RCP 8.5 designed as a worst-case scenario.³³

If the expected catastrophic harms of climate change come to pass, considerations of justice will become secondary. Distribution of costs only matters if there is a future in which to distribute those costs. A precedent for prioritising survival over ethics can be found across realist and neorealist theories of IR.³⁴ Yet, here thanks to harm-avoidance justice, we can reconcile the imperative for survival with a form of justice. Any theoretical framework of climate justice that guides political action and fails to be outcome-oriented could lead to catastrophic harm. Harm-avoidance justice is outcome-oriented and should be the privileged avenue for critical reflection in climate ethics. A simple example can serve as a premise for our subsequent discussion. If the hull of a ship gets pierced, figuring out who pierced the ship and making them responsible for fixing it matters less than making sure the ship does not sink. Therefore, because of the high existential stakes involved in responding to climate change, the normative principles that underpin policy responses must be up to par.³⁵ This justifies reimagining climate justice according to harm-avoidance justice. This does not mean shutting and ignoring the moral validity of frameworks of burden-sharing justice. It means relegating burden-sharing justice to a secondary position and only accepting its principles insofar as they enable us to avoid catastrophic harm in line with harm-avoidance justice.

This explains why we should only keep those principles of burden-sharing justice that can translate into harm-avoidance justice. ATP doubles as a harm-avoidance justice principle, while PPP

²⁷ Robert Muir-Wood, *The Cure for Catastrophe: How We Can Stop Manufacturing Natural Disasters* (London: One World Publications, 2016): 235-237.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Jepma and Munasinghe, *op. cit.*, p. 61; Muir-Wood, *op. cit.*, p. 240.

³¹ Arnell, *op. cit.*, pp. 167-175; Jepma and Munasinghe, *op. cit.*, pp. 45-46.

³² Caney, "Just Emissions", *op. cit.*, p. 255.

³³ Bob Berwyn, "The Worst-Case Scenario for Global Warming Tracks Closely with Actual Emissions", *Inside Climate News*, 3 August 2020, <https://insideclimatenews.org/news/03082020/climate-change-scenarios-emissions/>.

³⁴ Louiza Odysseos, "Dangerous Ontologies: The Ethos of Survival and Ethical Theorizing in International Relations", *Review of International Studies* 28, no. 2 (2002): 403-405.

³⁵ William J. Ripple et al., "World Scientists' Warning to Humanity: A Second Notice", *Bioscience* 67, no. 12 (2017): 1026-1028.

does not. In this framework, ATP can provide a sound moral and instrumental argument if it strives towards equal relative sacrifice. On the other hand, PPP appears relegated to a secondary moral principle that stands the test of reason only if its result overlaps with that of ATP. It fails to meet the instrumental test of the 'human extinction' hypotheses, the key in making it a harm-avoidance justice principle.

2. Ability to Pay and Equal Relative Sacrifice

I will normatively evaluate ATP and devise a formulation in line with the dual constraint of harm-avoidance justice and global poverty. It can be argued that poor countries should bear a lesser share of climate change only in absolute terms and only insofar as the ATP strives towards the outcome of 'equal sacrifice' in relative terms. If we are speaking in absolute terms, it seems unreasonable to ask poor countries to bear an equal share of the costs of climate change. As Caney states, "eradicating great poverty is an ethical concern of paramount importance".³⁶ Burdening a country like Mozambique (415USD GDP per capita) with an equal absolute cost (whatever the amount) as France (38,476USD GDP per capita) would have the immoral effect, hindering its attempts to eradicate poverty.³⁷ Further, if this negative impact on poverty were to be minimised or cancelled, the effective funds levied to combat climate change would end up being nil or very low. This can be broadly understood as levelling down the problem, usually associated with egalitarianism.³⁸ In absolute terms, then, of course, poor countries should bear a lesser share of the costs of climate change. The main reason is the value attached to human rights.³⁹ For many decision-makers, fighting climate change has the objective of protecting populations and minimising harm, if the policies used to fight it become an attempt on the integrity of people's human rights to food, shelter, water and an overall minimal standard of living, it becomes immoral and counterproductive to pursue them.⁴⁰ This would be the sufficientarian argument, which stresses "the maintenance of an absolute minimal standard below which justice has not been met".⁴¹ A more demanding version of the same argument can be put forward by referring to prioritarian values, which seek to maximise the overall well-being (with extra-weight attributed to the well-being of less well-off individuals) rather than accept a bare minimum.⁴² Therefore, because of the immorality of increasing poverty (that leads to unacceptably low levels of well-being), ATP must justify that poor countries bear a lesser burden in absolute terms.⁴³

³⁶ Simon Caney, "Justice and the Distribution of Greenhouse Gas Emissions", *Journal of Global Ethics* 5, no. 2 (2009): 128.

³⁷ World Bank Group, "GDP per capita", 2019.

³⁸ Derek Parfit, "Equality or priority?" in *The Ideal of Equality*, ed. Matthew Clayton and Andrew Williams (London: Palgrave, 2000), 102.

³⁹ Simon Caney, "Human Rights Responsibilities, and Climate Change", in *Global Basic Rights*, ed. Charles R. Beitz and Robert E. Goodin (Oxford: Oxford University Press, 2009), 227-228.

⁴⁰ Simon Caney, "Climate Change, Human Rights and Moral Thresholds", in *Climate Change and Human Rights*, ed. Stephen Humphreys (Cambridge: Cambridge University Press, 2009), 11-13.

⁴¹ Megan Kime, "Theories of Global Justice: Relational and Non-Relational Approaches" (PhD Dissertation, University of Sheffield, 2009), 17.

⁴² Edward A. Page, "Distributing the Burdens of Climate Change", *Environmental Politics* 17, no. 4 (2008): 565.

⁴³ Henry Shue, "Global Environment and International Inequality", *International Affairs* 75, no. 3 (1999): 543.

However, this claim can be further qualified in relative terms. It could still hold that poor countries should bear an equal burden in relative terms. Based on the inherent justice of equality, some suggest that the cost should be proportionally equal (for example, 10% of GDP for every country).⁴⁴ Shue demonstrates that, while at first, flat rates seem fair, “they do so largely because they look at only the first part of the story and ignore how things turn out in the end.”⁴⁵ A cost equal to a tenth of income might not threaten well-being in wealthy countries but will certainly plunge some median economies into poverty and ravage poor economies, causing misery and death. The ultimate costs associated with the 10% of GDP will be far higher in a poor country than in a wealthy one.⁴⁶ This also applies as a general rule for any flat rate.⁴⁷ However, this is not to say that poor countries should bear a lesser burden in relative terms, only that proportionality is the wrong measure of this burden, as its outcome does not pass the ‘poverty’ argument. For equality to be appealing, it must be an equality of outcome in the subjective cost of respective efforts. Few would condone placing an equal burden on two individuals with differing strengths.

The ability to pay can still be an argument for equally shared costs (in relative terms) if understood in the light of David Miller’s ‘equality of sacrifice’ principle.⁴⁸ Moreover, by understanding the ‘ability to pay’ argument in this way, the most prominent moral criticism that it faces dissolves. One can no longer claim the ATP is morally unfair because it promotes unequal treatment. Unlike Miller, I am not suggesting that equal sacrifice means an equal reduction in per capita emissions.⁴⁹ In fine, the measure of policy effectiveness should be human well-being. The set amount of per capita emissions can entail very different levels of well-being depending on the carbon efficiency of a country’s energy system. By stretching Miller’s concept beyond what he means, we end up with the fairest version of ability to pay – each country bears equal costs, in the sense that populations should sacrifice as much of living standards as they can afford to combat climate change. An endemically poor country would not be asked to bear any cost since its population has not reached a minimum living standard from which it could sacrifice.⁵⁰ However, beyond that, each country, poor or rich, would sacrifice the same.

Of course, policy instruments would need to be devised to calculate how climate-change-related sacrifice or cost could be made to have differentially similar impacts on poor, median and wealthy countries’ respective populations. Progressive rates operate along with the same rationale and appear to be a promising way to achieve equal sacrifice. In the words of Henry Shue, “the great strength of progressive rates, by contrast, is that they tend to accommodate final outcomes”.⁵¹ There is no reason why this final outcome should not be equality of sacrifice. In

⁴⁴ *Ibid.*, p. 537.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 538.

⁴⁷ *Ibid.*

⁴⁸ Miller, David, *Global Justice and Climate Change: How Should Responsibilities Be Distributed? The Tanner Lectures on Human Values* (Beijing: Tsinghua University, 2008), 125.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Shue, “Global Environment and International Inequality,” *op. cit.*, p. 528.

absolute terms, this would distribute the share of the costs more heavily on wealthy countries and yet, in relative terms, would uphold the value of equality. Equality of sacrifice should be measured in terms of well-being in a prioritarian fashion rather than according to purely economic measures while also bearing a bare minimum threshold in mind.⁵² This way, poor countries could be required to shoulder a share of the costs when it does not directly conflict with the eradication of human misery (taken as what is below the bare minimum).⁵³ For instance, Mauritius can be considered a poor nation (it is below the median GDP per capita), and yet ranks high on the HDI.⁵⁴ It can, therefore, be envisioned that bearing an equal share of climate-change-related costs (related to the principle of equal sacrifice, hence relative), depending on internal distributive policies, will not necessarily decrease the well-being of its population to an unjustifiable extent. Decreased well-being is expected in all countries considering the high costs of mitigation, adaptation and compensation and the radical economic U-turn entailed by climate change. At the moment, the logic of infinite growth inherent to modern capitalism drives a consistent increase in global emissions, and the world is now at 163.5% of 1990 rates.⁵⁵ However, as stated by Sinnott-Armstrong and Howarth, stabilising atmospheric concentrations of carbon dioxide to acceptable levels would require permanent emission reductions of roughly 60-80%.⁵⁶ This is not a reduction in the average increase of emissions (which enables continued economic growth), but a reduction of total emissions. Therefore, it is not 'the nations with the most resources' that should bear a higher cost but 'the nations with excess capacity' that can afford to do so without impacting levels of well-being to an unjustifiable extent.⁵⁷

A further ethical counter needs to be addressed. One might ask why equality is a morally desirable outcome in the first place. The most important criticism on this front would be that it appears unfair to make someone pay for a problem they did not cause.⁵⁸ For instance, it is possible to imagine a wealthy country with low emissions, especially once the transition to renewable energies has been achieved successfully. However, even without such an empirical case, it appears unfair to tax Norway, which ranks 5th in terms of the ratio of GDP to carbon dioxide emissions, on the same terms as the United States, which ranks 80th on the same scale.⁵⁹ Surely, we should put some stock in a country's responsibility and differentiated contribution to the problem of climate change. However, as the next section will outline, this is not as evident as it might first appear. Simon Caney proposes the following example "if someone sitting next to you at a table suddenly becomes seriously ill and you're well placed to help, then we tend to think that you should do so."⁶⁰ Moreover, referring back to the tragedy of the commons, it can be argued

⁵² Page, *op. cit.*, p. 565.

⁵³ Henry Shue, "Subsistence Emissions and Luxury Emissions", *Law & Policy* 15, no. 1 (1993): 45.

⁵⁴ World Bank Group, "GDP per capita", 2019.

⁵⁵ Myron J. Gordon and Jeffrey S. Rosenthal, "Capitalism's Growth Imperative", *Cambridge Journal of Economics* 27, no. 1 (2003): 25-48; Jonathan T. Park, "Climate Change and Capitalism", *Consilience*, no. 14 (2015): 189-206.

⁵⁶ Walter Sinnott-Armstrong and Richard B. Howarth, *Perspectives on Climate Change: Science, Economics, Politics, Ethics (Advances in the Economics of Environmental Resource, V. 5)*, (JAI Press: Elsevier Science, 2005), xi.

⁵⁷ Page, *op. cit.*, p. 561.

⁵⁸ Caney, "Climate Change and the Duties of the Advantaged", *op. cit.*, pp. 216-217.

⁵⁹ International Energy Agency, "CO2 Emissions from Fuel Combustion – Highlights", 2009.

⁶⁰ Caney, "Climate Change and the Duties of the Advantaged", *op. cit.*, pp. 216-217.

that equal entitlement to a resource (the planet) or collective ownership (implicit in cosmopolitan frameworks) comes with an equal responsibility to look after it.⁶¹ Additionally, we might consider that many countries will feel the effects of climate change and, therefore, have a vested interest in mitigating climate change regardless of historical responsibility. This radical climate action is more pressing for the dire empirical circumstances, as described below.

3. ATP and the Sustainability Condition

An instrumental justification of why countries should bear an equal share of the costs of climate change (in relative terms according to the principle of equal sacrifice) will further this ethical point. Simon Caney explains that the normative starting point of any climate change justice theory requires that it “does not have environmental impacts that undercut its ability to realize its own principles”.⁶² In general terms, this ‘sustainability condition’ means that if a theory of distributive justice concerning climate change appears fair, but its application fails to prevent an avoidable level of harmful climate change, it can no longer be held valid.⁶³ I will show how ATP fulfils the sustainability condition, whereas PPP, discussed later, fails to do so. This will involve a discussion of empirical facts. To ensure that a principle of justice holds in the face of a climactic emergency it might be useful to consider worst-case scenarios. A principle of justice that still holds and remains faithful to the desired outcome in the worst empirical circumstances will also remain true in better cases, although the opposite is uncertain.

While most political philosophers seem to agree on the reality of the dangers associated with climate change, few seem to stress that it has the potential of marking the end of human civilisation if concerted, radical political action is not taken immediately.⁶⁴ So far, in the history of the earth, 90% of all species have gone extinct; humanity might not be the exception.⁶⁵ According to Daniel H. Rothman, human activity will have reached a critical threshold where “all scenarios for cumulative uptake at the century’s end either exceed or are commensurate with the threshold for catastrophic change.”⁶⁶ The currently underway sixth extinction (also known as the Anthropocene extinction) might very well annihilate humanity.⁶⁷ The work of McKibben and Wilcox further corroborate the likelihood of climate-related omnicide.⁶⁸ Even if this hypothesis were to be discarded as empirically invalid scaremongering, acting upon its assumption would avoid the lesser, known, disasters associated with climate change in the scientific consensus. Further, it is acting upon the assumption of the validity of the hypothesis of catastrophe that would prevent

⁶¹ Agarwal and Narain, *op. cit.*, p. 13.

⁶² Caney, “Just Emissions”, *op. cit.*, p. 293.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p. 255.

⁶⁵ Daniel Rothman, “Thresholds of Catastrophe in the Earth System”, *Science Advances* 3, no. 9 (2017): 1.

⁶⁶ Rothman, *op. cit.*

⁶⁷ Ripple et al, *op. cit.*

⁶⁸ Bill McKibben, *Falter: Has the Human Game Begun to Play Itself Out?* (New York: Henry Holt and Co, 2019), 55; Richard Brian Wilcox, “The Ecology of Hope: Environmental Grassroots Activism in Japan” (PhD Dissertation, Union Institute & University, College of Graduate Studies, 2004), 55.

that very catastrophe and avoid human extinction. The stakes seem high enough to justify the adoption of such an idea. This is the stance Stanford Professor J. P. Dupuy advocates in his book *For an Enlightened Doomsaying*. He explains that it might be the only way to break the current complacency of public opinion and through democratic processes transform fear into action.⁶⁹

Using ATP would not only be fair but also the most efficient way of distributing the costs of climate change in a way that avoids harm. It does not only sidestep the impracticalities of finding causal historical liability (which PPP does) but allows for the best possible action, as it does not exempt poor countries from participating in the effort if they can do so.⁷⁰ A country, and its population, will care little for a medium- or long-term existential threat if it cannot ensure short-term survival.⁷¹ In an existential threat crisis, it appears rational that what is most efficient should have priority over what is distributionally fair. Therefore, in response to people who hold that ATP is unfair because a country should not clean up another country's mess, it can be further argued that increasing the likelihood of survival trumps the imperative of burden-sharing justice.⁷² David Miller also accepts that "an exception [to justice] might occur if it became clear that the world was rapidly approaching a crucial tipping point such that unless further cuts in gas emissions were made quickly, an environmental disaster would follow."⁷³ As I have argued previously, we cannot afford to act as though that point has not yet been reached.

4. PPP and the Sustainability Condition

As briefly suggested above, it might be tempting to advance the 'contribution to problem' principle (treated analogously to PPP in this paper) as a reason why poor countries should bear a lesser share of the costs of climate change (or as an objection to the equal outcome rationale of ATP).⁷⁴ Indeed, wealthy (viz. developed) countries caused approximately "75% of total anthropogenic CO₂ emissions from 1750 to 2005" and should be held accountable for the costs of fixing or preventing the harm they are or will perpetrate indirectly on present and future generations.⁷⁵ Edward Page uses this argument to justify that developed countries should bear the brunt of climate-change-related costs.⁷⁶ Moreover, Henry Shue emphatically advances that "all over the world parents teach their children to clean up their own mess", outlining the intuitive appeal of PPP to common sense.⁷⁷ However, it fails to withstand moral and practical scrutiny. PPP loses its intuitive appeal as soon as it no longer supports the claim that poor countries should bear a lesser share of the costs of climate change. The most characteristic example is Ukraine. Ukraine is part of the top 10 nations historically responsible for climate change per its

⁶⁹ Jean-Pierre Dupuy, *Pour un Catastrophisme Éclairé ; Quand L'impossible est Certain* (Paris: Seuil, 2002), 3-5.

⁷⁰ Caney, "Climate Change and the Duties of the Advantaged", *op. cit.*, p. 206.

⁷¹ Shue, "Global Environment and international Inequality", *op. cit.*, p. 543.

⁷² *Ibid.*, p. 545.

⁷³ Miller, *op. cit.*, p. 153.

⁷⁴ Page, *op. cit.*, p. 556-557.

⁷⁵ *Ibid.*, p. 558.

⁷⁶ *Ibid.*

⁷⁷ Shue, "Global Environment and International Inequality", *op. cit.*, p. 533.

cumulative emissions between 1850 and 2007, despite being ranked 84th in terms of wealth. It might be countered that Ukraine, as a sovereign and independent political entity did not exist throughout that historical period, however, if anything, this only strengthens the point being made: if it appears unfair to calculate cumulative emissions by linking them to geographical territory, how does PPP stand a chance of being efficiently and convincingly applied? PPP has merits when it comes to preventing pollution and seeking compensation from registered companies who have a traceable history of polluting for profit but its application to the ‘imagined communities’ of nation-states appears less plausible.⁷⁸ It risks holding future generations accountable for the sins of their forefathers, so to speak.

It is also possible to imagine a country’s economy faltering to the point of falling below the poverty line despite being a historically important emitter.⁷⁹ It would be counter-productive, even downright immoral, to further burden such a country with the costs of climate change in terms of the fallout counted in well-being. If PPP only holds moral sway if it corroborates the idea that poor countries should bear a lesser share of the burden, then it stands as an excessively weak ethical argument that should be discarded entirely to successfully avoid harm. David Miller highlights that “we should be looking for principles of fairness that are independently valid, not just ones that give us the answers we were hoping to get in the first place”, suggesting that the moral appeal of PPP might solely reside in the fact that it might overlap with a country’s ability to pay.⁸⁰ This overlap, as shown by the example of Ukraine, is far from perfect. By *reductio ad absurdum* (the use of the case of an imaginary country that is poor yet a high emitter), it can be devised that PPP is invalid as a moral argument since it only appears moral insofar as its consequence overlaps with the moral argument of ATP. The idea that a country did not contribute as much to climate change appears normatively irrelevant to justify poor countries pay less. The truly moral argument remains a country’s ability to pay. Here the Beneficiary Pays Principle (BPP) can briefly be cited as a principle that uses historical responsibility in a forward-looking way. Those that have benefitted from emissions could be made responsible for paying the costs of climate mitigation. Yet, this is appealing largely because it also overlaps with ATP with the added sense of retribution present in PPP.

Even if PPP were accepted as morally relevant, it can be argued that avoiding the likelihood of a worst-case scenario outlined in the previous section calls for a forward-looking principle rather than a backwards-looking one.⁸¹ PPP remains stuck in the burden-sharing paradigm, whereas ATP, as we formulated it, emancipates itself and also serves the goal of harm-avoidance with its focus on human well-being. 73% of global emission growth can be assigned to developing and

⁷⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991, Revised and extended ed.), 7.

⁷⁹ Duncan Clark, “Which Nations Are Most Responsible for Climate Change?”, *The Guardian*, 21 April 2011, <https://www.theguardian.com/environment/2011/apr/21/countries-responsible-climate-change>; Anthony Shorrocks, James Davies and Rodrigo Lluberas, *Global Wealth Report 2021*, 102.

⁸⁰ Miller, *op. cit.*, p. 124.

⁸¹ Caney, “Climate Change and the Duties of the Advantaged”, *op. cit.*, pp. 214-216.

least-developed economies in 2004.⁸² In 2008, China was responsible for two-thirds of the increase in global emissions, although its “cumulative and current per capita emissions [were] still a fraction of the cumulative and per capita emissions of North Americans and Europeans.”⁸³ In the light of this, putting aside ATP, PPP would require that the historically responsible nations would pay costs that also need to compensate for the projected emissions of developing countries that cannot yet be held liable for their future climate impact. Considering the developing world’s emissions will rise exponentially and surpass those of the current developed world for obvious demographic reasons, this might not be a realistic demand.⁸⁴ This could cause developed countries to sacrifice levels of well-being to an unjustifiable extent while the poor countries that have the capacity for change remain exempt from significant participation in fighting climate change because of cumulatively low emissions. Poor countries will continue increasing emissions on the basis that they are not yet responsible for a large share of net emissions and are entitled to the same levels of development as wealthy nations. PPP fails to meet the ‘sustainability condition’, as it would allow run-away climate change from emerging economies, even where this does not necessarily promote human well-being. GDP has long been targeted as disconnected from human well-being, hence the advent of the Human Development Index. Of course, this is not a wholesale rejection of PPP. PPP plays a key role in domestic landscapes when it comes to bringing polluting companies and individuals to heel or amend their long-term behaviour. However, when it comes to international justice, PPP appears misguided. This is even more relevant when considering that not all the citizens of nation-state imagined communities feel a sense of filial obligation for the highly polluting companies held by their predecessors and responsible for their respective country’s high cumulative emissions. In brief, PPP cannot double as a harm-avoidance justice principle.

Conclusion

In brief, the formulation of ATP given in this paper can double as a harm-avoidance justice principle while still respecting the morality of burden-sharing justice. ATP gives a sound moral basis by refusing trade-offs between climate harm and other harm. If implemented it would not worsen the well-being of badly-off populations in favour of climate action but construct climate action as motivated by protecting the population’s well-being. PPP, on the other hand, could overburden certain countries and yet, fail to result in effective climate action. A good illustration of this is that of a sinking ship. Imagine a vessel with a crew of twenty and twenty buckets. If a sailor pierces the hull of the ship, and the ship is filling with water at a pace faster than one man can scoop out, it would seem irrational to argue that the sailor who pierced it should fix it alone. If we do, we can be sure the ship will sink. Intuitively, everyone should do as much as they

⁸² Michael R. Raupach et al., “Global and Regional Drivers of Accelerating CO₂ Emissions”, *Proceedings of the National Academy of Sciences* 104, no. 24 (2007): 10288.

⁸³ Caney, “Climate Change and the Duties of the Advantaged”, *op. cit.*, p. 126.

⁸⁴ *Ibid.*

physically can, with the caveat of maintaining a minimal level of well-being. If someone on the boat has two broken arms or lacks a bucket, no one would blame them for failing to help.

This paper has argued along prioritarian and sufficientarian lines that poor countries should bear a lesser share of the costs of climate change in absolute terms. However, it is possible to also accept an ability to pay argument along egalitarian lines, meaning that poor countries should equally sacrifice in terms of the relative cuts to well-being entailed by the lifestyle changes required by climate policies. ATP proves to be an argument that withstands ethical scrutiny and simultaneously rises to the challenge of a likely worst-case scenario. Many questions such as how far hybrid models, a beneficiary pays, or grandfathering approach could be considered acceptable and desirable for harm-avoidance justice remain unanswered.⁸⁵ Significant research would also be needed to improve well-being measures and quantify equal relative sacrifice across complex domestic socio-economic locales. This falls outside the scope of this paper, which considered paradigms of climate justice and its principles on an international scale. PPP has been criticised in terms of international climate justice. However, it remains of seminal importance in domestic political landscapes, where companies and individuals need to be held accountable for their actions. Finally, the European Green Deal's political driving force, made all the more salient by the critical juncture created by the COVID-19 pandemic, has created the space for more radical climate action to take place. This paper has demonstrated the need for these imaginaries to construct climate change as an existential threat and reverse-engineer principles of climate justice to ensure they meet the sustainability condition.

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⁸⁵ Caney, "Climate Change and the Duties of the Advantaged", *op. cit.*, p. 219; Shue, "Global Environment and International Inequality", *op. cit.*, pp. 536-537; Page, *op. cit.*, p. 562; Knight, *op. cit.*, p. 410.

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Le Cas Curieux du Médiateur Partial : Perceptions de l'UE en tant que Médiateur dans le Conflit Israélo-Palestinien

Julia Vassileva¹

Résumé : Il n'est pas toujours évident de savoir comment la partialité (perçue) d'un médiateur affecte les négociations. Si certains affirment que la neutralité du médiateur est essentielle, d'autres ont avancé un argument contraire, affirmant qu'en fait, un médiateur perçu comme partial envers une partie pourrait être plus efficace. À travers une étude de cas sur le rôle de l'UE et les perceptions des parties au conflit israélo-palestinien, ce papier soutient que la perception de partialité de l'UE peut faciliter les négociations, et peut aider l'UE à amener les parties à la table des négociations, étape cruciale dans toute négociation. L'argumentaire est développé de la façon suivante : La partie I explique le rôle de la perception de la partialité d'un médiateur dans les négociations ; la partie II aborde la question de la partialité dans les relations personnelles, en examinant les événements passés mais aussi les évolutions récentes de la zone en 2021 ; la partie III traite des préjugés liés aux problèmes, tandis que la partie IV aborde les préjugés perçus liés au processus et leurs effets. La dernière partie conclue en élargissant sur les implications des arguments présentés ici sur le rôle futur de l'UE dans les négociations.

Mots-clés : Médiation de paix de l'UE, Médiateur partial, Perceptions de l'UE, Conflit Israélo-palestinien, Moyen-Orient

1. Introduction : être ou ne pas être partial ?

Quel est le rôle du parti pris dans les négociations et que signifierait le fait que l'Union européenne (UE) soit perçue comme un médiateur partial dans le conflit israélo-palestinien (CIP) ? La médiation de l'UE dans le conflit israélo-palestinien n'a pas été aussi active que celle d'autres acteurs mais l'UE a néanmoins déployé des efforts considérables en matière de médiation des

¹ Julia Vassileva holds a law degree from the University of Vienna, an MPhil in International relations from the University of Oxford, and an MA in EU International relations and Diplomacy studies from the College of Europe in Bruges, with a research focus on peace mediation and foreign policy.

conflits,² en général mais aussi spécifiquement dans le CIP. Josep Borrell, le plus haut diplomate de l'UE, a récemment déclaré que si l'UE devait jouer le rôle de médiateur à l'avenir, il faudrait notamment que les Israéliens et les Palestiniens l'acceptent, ce qui « sera difficile, mais pas impossible ».³ L'argument avancé dans ce texte est que la perception de partialité de l'UE envers certains acteurs, combinée à son impartialité procédurale jusqu'à présent, peut être un avantage pour agir en tant que médiateur et amener ces parties à la table des négociations. L'article analysera pourquoi l'UE peut être perçue comme partielle dans le CIP. Cette analyse sera combinée avec l'argument présent dans la littérature selon lequel un parti pris pourrait être positif pour le rôle du médiateur. Ainsi, il sera démontré comment et pourquoi l'UE peut être perçue comme partielle, mais qu'un tel parti pris ne doit pas avoir d'effets négatifs sur son rôle de médiateur.

La médiation est un processus par lequel une partie tierce assiste deux ou plusieurs parties lors de leurs négociations, dans le but de trouver un compromis.⁴ Un médiateur neutre n'a pas de préjugés, il n'a pas intérêt à influencer les résultats des négociations dans un sens ou dans un autre.⁵ La neutralité a été associée à la crédibilité d'un médiateur,⁶ en facilitant l'obtention d'informations auprès des parties et en renforçant la légitimité des solutions proposées.⁷ En général, on estime que la neutralité détermine l'efficacité d'un médiateur.

Cependant, la relation entre le biais et l'efficacité du médiateur exige un examen plus approfondi.⁸ En particulier, comme cet article l'affirme, un biais (perçu) peut l'aider à conclure des accords : en effet, pour qu'un médiateur soit efficace, les parties doivent avoir l'impression que « le médiateur dit la vérité », et donc, seuls les médiateurs qui sont « de votre côté » seront considérés comme « dignes de confiance s'ils conseillent la retenue ».⁹ Selon certains, la partialité peut s'avérer utile pour le médiateur,¹⁰ parce qu'un médiateur partial peut sembler plus crédible à l'une des parties au conflit, et reçoit donc plus de confiance ; d'autre part, un médiateur est, bien entendu, censé être digne de confiance et fiable pour les deux parties au processus.¹¹ Concevant la médiation comme une extension de la négociation, le médiateur agit lui-même comme

² Ole Elgström et al., "Perceptions of the EU's Role in the Ukraine-Russia and the Israel-Palestine Conflicts: A Biased Mediator?", *International Negotiation* 23, no. 2 (2018): 299-318, 300.

³ Davis VanOpdorp, "Top EU diplomat wants European strategy for Middle East peace", *Deutsche Welle*, 12 février 2020, <https://www.dw.com/en/top-eu-diplomat-wants-european-strategy-for-middle-east-peace/a-52374004>.

⁴ Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge: Cambridge University Press, 2018), 45.

⁵ Isak Svensson, "Research on Bias in Mediation: Policy Implications", *Penn State Journal of Law and International Affairs* 2 (2013): 17, cité par Ho-Won Jeong, *International Negotiation: Process and Strategies* (Cambridge: Cambridge University Press, 2016), 212.

⁶ Zeev Maoz et Lesley Terris, "Credibility and strategy in international mediation", *International Interactions* 32, no. 4 (2006): 409-440, 411.

⁷ Marieke Kleiboer, *The Multiple Realities of International Mediation* (Boulder: Lynne Rienner Publishers, 1998), 29.

⁸ Jeong, *op. cit.*, p. 213.

⁹ Andrew Kydd, "Which Side Are You On? Bias, Credibility, and Mediation", *American Journal of Political Science* 47, no. 4 (2003): 597-611, 597.

¹⁰ Saadia Touval et William Zartman, *International Mediation in Theory and Practice* (Boulder: Westview Press, 1985).

¹¹ William Zartman, "Introduction Bias, Prenegotiation and Leverage in Mediation", *International Negotiation* 13, no. 3 (2008): 305-310, 305.

un acteur, peut avoir des « intérêts indirects »¹² et n'est donc pas toujours totalement impartial. La recherche quantitative sur la négociation de paix montre en particulier que « les processus de médiation biaisés sont plus susceptibles que les processus de médiation neutres de conduire à des arrangements institutionnels élaborés ».¹³

À la vue de ces diverses recherches, une exploration approfondie des concepts de partialité et de perception de la partialité par les parties à une négociation semble cruciale. Cette étude de cas sur le rôle de l'UE dans le CIP illustre l'importance de ces concepts dans la pratique. Une étude de cas analytique individuel est limitée étant donné qu'elle ne permet pas de réfuter les propositions théoriques¹⁴ et que ces conclusions ne sont pas généralisables ; néanmoins, l'examen d'un cas de négociation de ce type « démontre la valeur des perspectives théoriques pour comprendre les cas dans leurs contextes ».¹⁵

Pour analyser les perceptions des efforts de médiation et de la partialité de l'UE, ce papier s'appuie sur les travaux d'Elgström et al. qui présentent une étude de la perception du rôle de l'UE par les parties au CIP, en introduisant une distinction entre la partialité relationnelle, la partialité de résultat et la partialité de processus. Cependant, l'article apporte également une contribution théorique individuelle. Il soutient qu'un parti pris perçu peut signifier que les parties au conflit font confiance au médiateur et le voient de leur côté ; cependant, il est également important de faire une distinction conceptuelle entre le parti pris perçu et l'impartialité. Le fait d'être biaisé peut être bénéfique, mais il est important que le médiateur soit perçu comme impartial dans le sens où il ne se comporte pas de manière déloyale dans le processus de médiation. Les aspects procéduraux sont importants pour éviter que l'une des parties ne se sente traitée injustement et ne donne l'impression d'un manque de professionnalisme dans le processus.

Le papier explore ces catégories en collectant des données sur les perceptions de l'UE dans chacune d'entre elles. En catégorisant ces données par le biais de l'approche « People-Problem-Process » (Personnes-Problème-Processus) de Lempereur et Colson,¹⁶ l'argumentaire montre l'avantage que l'UE peut avoir dans ce cas particulier en raison de la partialité perçue par les deux parties de la CIP.

2. Personnes : Les relations entre le médiateur et les parties

La partialité relationnelle est définie comme une partialité qui « peut reposer sur l'étroitesse des liens actuels et/ou antérieurs qu'un médiateur entretient avec les parties au conflit ».¹⁷ Comme

¹² Thomas Princen, *Intermediaries in International Conflict* (Princeton: Princeton University Press, 2014), 23.

¹³ Isak Svensson, "Who Brings Which Peace? Neutral Versus Biased Mediation and Institutional Peace Arrangements in Civil Wars", *Journal of Conflict Resolution* 53, no. 3 (2009): 446-469, 446.

¹⁴ Daniel Druckman, "Case-Based Research on International Negotiation: Approaches and Data Sets", *International Negotiation* 7, no. 1 (2002): 17-37, 18.

¹⁵ *Ibid.*

¹⁶ Alain Lempereur et Aurélien Colson, *The First Move* (New York: Wiley, 2010), 29-59.

¹⁷ Elgström et al., *op. cit.*, p. 302.

dans toute négociation, il est important de réfléchir aux relations qui existent.¹⁸ Dans ce contexte, j'examine le rôle des relations entre le médiateur (l'UE) et les parties à la négociation, Israël et l'Autorité palestinienne (AP), en partant du principe que la culture et les liens culturels sont importants dans les négociations,¹⁹ tout comme les identités et la psychologie. Tous ensemble, ils peuvent contribuer à la perception d'un parti pris, ce qui peut avoir des effets positifs sur le rôle de l'UE en tant que médiateur.

En ce qui concerne les perceptions israéliennes, on peut affirmer que le rôle de l'UE est perçu comme plutôt ambigu. Elgström et al. constatent que le sentiment général parmi les élites israéliennes est qu'il existe des sentiments anti-israéliens, que l'UE est « unilatérale envers les Palestiniens », tandis que « les préoccupations israéliennes sont ignorées ».²⁰ L'UE est perçue comme ayant un « déficit de légitimité externe »,²¹ ce qui indique une relation plutôt « antagoniste ». Ainsi, il pourrait y avoir une première indication que le biais pourrait affecter négativement l'UE en tant que médiateur.

Toutefois, dans ce contexte, l'importance des liens culturels entre l'UE et Israël entre en scène – des liens culturels qui montrent que l'UE pourrait avoir un fort intérêt à soutenir la partie israélienne. Par exemple, dans un discours prononcé devant le Conseil des ministres de l'UE en juillet 2003, l'ancien ministre israélien des affaires étrangères, Silvan Shalom, a déclaré : « Israël et l'Europe partagent un héritage culturel et social commun, des valeurs similaires, [...] Ces fondements communs sont plus profonds et durables que toute différence politique spécifique ».²² Cela suggère que les liens culturels entre l'Israël et l'Europe pourraient indiquer un parti pris positif de l'UE à son égard. Certains États membres (EM) de l'UE sont perçus comme des médiateurs importants et peuvent influencer le mandat de l'UE lors de futures négociations. En particulier, l'Allemagne est considérée comme un partenaire important d'Israël. En raison de la responsabilité perçue de l'État allemand envers le peuple juif, la « partialité relationnelle » envers Israël peut être visualisée à travers le cas allemand.²³ Il en va de même pour l'Autriche, où le gouvernement actuel a adopté une relation très amicale et stable avec Israël, bloquant par exemple un appel conjoint des pays de l'UE à Israël pour qu'il abandonne ses projets d'annexion en Cisjordanie en mai 2020.²⁴ Une fois encore, cela montre que le mandat de l'UE dépend de ses États membres et de leur biais potentiel. Cela signifie qu'en dépit de la perception apparemment négative de l'UE par le public israélien, il est très clair que l'UE a des liens culturels étroits avec

¹⁸ Lempereur et Colson, *op. cit.*, p. 32.

¹⁹ Ole Elgström, "National Culture and International Negotiations", *Cooperation and Conflict* 29, no. 1 (1994): 289-301.

²⁰ Elgström et al., *op. cit.*, p. 312.

²¹ Guy Harpaz et Asaf Shamis, "Normative Power Europe and the State of Israel: An illegitimate Eutopia?", *Journal of Common Market Studies* 48, no. 3 (2010): 579-616, 579.

²² Silvan Shalom, *Address before the European Union Council of ministers*, Bruxelles, 21 juillet 2003, consulté le 22 mars 2021, <https://mfa.gov.il/mfa/pressroom/2003/pages/address%20by%20fm%20silvan%20shalom%20before%20the%20european%20un.aspx>, cité par Harpaz et Shamis, *op. cit.*, p. 589.

²³ Elgström et al., *op. cit.*, p. 312, voir aussi Jefferson Chase, "German-Israeli Relations: What you need to know", *Deutsche Welle*, 17 avril 2018, <https://www.dw.com/en/german-israeli-relations-what-you-need-to-know/a-41800745>.

²⁴ *Kurier*. "Keine Vorverurteilung: Österreich blockiert EU-Aufruf gegen Israel", *Kurier*, 19 mai 2020, <https://kurier.at/politik/ausland/keine-vorverurteilung-oesterreich-blockiert-eu-aufruf-gegen-israel/400846922>.

Israël et qu'elle le soutient de diverses manières. C'est le cas de certains États membres. En ce sens, l'UE peut être perçue positivement par les Israéliens au niveau personnel/culturel, comme étant de leur côté. Cela augmente la crédibilité de l'UE dans le contexte. Cela signifie également que l'UE a été fréquemment citée comme un médiateur important dans le CIP, en particulier par la partie israélienne.²⁵

Du point de vue palestinien, certains États membres sont identifiés comme étant du côté des Palestiniens, notamment la France, l'Irlande et la Suède.²⁶ Dans le cas de l'Irlande, par exemple, certains récits politiques et historiques conduisent à un sentiment d'identité partagée entre les Irlandais et les Palestiniens, qui peut être lié à la perception de parallèles historiques ; par exemple, la partition de l'Irlande par la Grande-Bretagne qui s'est retirée et la situation en Irlande du Nord.²⁷ L'équilibre des forces entre Israël et les Palestiniens est perçu comme similaire à ce système, d'où la sympathie de la politique étrangère irlandaise envers l'AP. On peut y voir un parti pris de certains EM en faveur de l'AP. Là encore, cela pourrait avoir une influence sur la relation et le mandat de l'UE pour les négociations futures.

La question du rôle de l'UE en matière de médiation dans le conflit israélo-palestinien est devenue encore plus pertinente au vu des développements dans la région au printemps 2021, où l'on craignait le début d'une nouvelle Intifada. La violence était forte des deux côtés, avec pour toile de fond le différend sur les terres de Sheikh Jarrah. La communauté internationale s'est montrée très préoccupée, et divers acteurs sont intervenus et ont lancé des appels à la fin de la violence. En se concentrant sur la réaction de l'UE à la situation au Moyen-Orient, on peut dire que l'UE est restée impartiale, ce qui est connu pour être important dans la médiation de paix. Josep Borrell a déclaré que « Le rétablissement d'un horizon politique vers une solution à deux États reste maintenant de la plus haute importance. L'UE est prête à soutenir pleinement les autorités israéliennes et palestiniennes dans ces efforts. »²⁸

Cependant, il reste à vérifier si la perception de la partialité de l'UE a joué un rôle dans la situation. Certains ont évoqué « le parti pris honteux de l'Europe »²⁹, « la minimisation des actions israéliennes » et la mise en cause du Hamas.³⁰ Un exemple est le sifflement du drapeau israélien par la chancellerie fédérale autrichienne³¹ et les déclarations de divers autres États membres se rangeant du côté d'Israël. La partie israélienne s'en est félicitée, donnant l'impression qu'Israël

²⁵ Shalom, *op. cit.*

²⁶ Rory Miller, "Why the Irish Support Palestine", *Foreign Policy*, 23 juin 2010, consulté le 22 mars 2021, <https://foreignpolicy.com/2010/06/23/why-the-irish-support-palestine-2/>.

²⁷ Joe Cleary, *Literature, Partition and the Nation-State: Culture and Conflict in Ireland, Israel and Palestine* (Cambridge: Cambridge University Press, 2002), 4.

²⁸ Service européen pour l'action extérieure, "Israel/Palestine: Statement by the High Representative Josep Borrell on the ceasefire", 21 mai 2021, consulté le 2 juillet 2021, https://eeas.europa.eu/headquarters/headquarters-homepage/98821/israelpalestine-statement-high-representative-josep-borrell-ceasefire_en.

²⁹ Martin Konecny, "Europe's shameful bias on Israel-Palestine", *Middle East Eye*, 19 mai 2021, <https://www.middleeasteye.net/opinion/israel-palestine-europe-shameful-bias>.

³⁰ *Ibid.*

³¹ Der Standard, "Kurz ließ aus Solidarität israelische Flagge auf Bundeskanzleramt hissen", *Der Standard*, 14 mai 2021, <https://www.derstandard.at/story/2000126638296/kurz-liess-aus-solidaritaet-israelische-flagge-auf-bundeskanzleramt-hissen>.

reçoit le soutien des États membres en qui elle peut avoir confiance (une perception biaisée qui renforce la confiance).

D'autre part, certains États membres ont condamné les actions d'Israël, notamment l'Irlande, où le parlement irlandais a condamné « l'annexion de facto » des territoires palestiniens par Israël.³² De plus, en Irlande, mais aussi ailleurs, de nombreuses manifestations pro-palestiniennes ont été organisées par le public.³³ Cela a laissé entendre que certains États membres de l'UE se rangeaient du côté des Palestiniens, créant ainsi l'impression d'un parti pris pour le côté palestinien et d'un soutien à leur cause. Cela a donné l'impression que ces États membres leur sont favorables, ce qui a permis d'instaurer la confiance et de les soutenir.

Le biais favorable perçu de certains États membres de l'UE envers l'une ou l'autre partie pourrait avoir influencé le rôle de l'UE dans le processus de paix. Cela signifie que les parties se sont senties soutenues par certains États membres de l'UE, générant ainsi une confiance envers l'UE. Dans le processus de médiation, même si l'UE n'a pas contribué explicitement au cessez-le-feu, les appels de l'UE à mettre fin à la violence ont été entendus et mis en œuvre.

3. Problème : motivations et solutions

Ici, il est question de la partialité des résultats, c'est-à-dire que le médiateur « favorise délibérément un acteur en conflit dans ses propositions de règlement, ou que le soutien du médiateur à certains principes semble favoriser une partie et ses positions actuelles par rapport à une autre » ; la « dimension problème » concerne les motivations des acteurs, les solutions possibles autour de la table et en dehors, et les raisons qui justifient ces solutions.³⁴ Cette partie concerne donc les motivations, les problèmes de fond et les questions à résoudre.

En ce qui concerne les motivations de l'UE qui pourraient la faire apparaître comme partielle, il convient de souligner les liens économiques étroits qu'elle entretient avec Israël. En 1975, ils ont signé leur premier accord de coopération. L'UE est le principal partenaire commercial d'Israël, occupant la première place dans les importations et la deuxième dans les exportations du pays.³⁵ Pour l'UE, Israël est également l'un des principaux partenaires commerciaux de la région méditerranéenne. L'UE investit dans le financement de la recherche et Israël est le premier pays non européen pleinement associé aux programmes-cadres de recherche et de développement technologique de l'UE.³⁶ Dans tous ces domaines importants, l'UE coopère avec Israël et est fortement motivée par le maintien de bonnes relations. L'UE pourrait donc être perçue

³² Al Jazeera, "Ireland condemns Israel's 'de facto annexation' of Palestine", *Al Jazeera*, 27 mai 2021, <https://www.aljazeera.com/news/2021/5/26/ireland-recognises-israels-de-facto-annexation-of-palestine>.

³³ *Ibid.*

³⁴ Lempereur et Colson, *op. cit.*, p. 35.

³⁵ Sharon Pardo, "Between Attraction and Resistance: Israeli Views of the European Union", dans *External Perceptions of the European Union as a Global Actor*, ed. Sonia Lucarelli et Lorenzo Fioramonti (New York: Routledge, 2010), 71.

³⁶ *Ibid.*

comme biaisée. Le biais dû aux liens économiques est important. En particulier, les liens économiques ont compensé les tensions politiques entre Israël et l'UE,³⁷ en ce qui concerne le CIP. Cela signifie que même si l'UE n'a pas de parti pris visible en faveur d'Israël dans le langage politique, les liens économiques forts peuvent indiquer que l'UE a un intérêt considérable à maintenir de bonnes relations avec Israël.

En ce qui concerne les solutions sur la table, du côté des Palestiniens, l'UE soutient en principe un État palestinien indépendant, donc une solution à deux États – ce qui est apprécié par les Palestiniens.³⁸ Le 17 décembre 2014, le Parlement européen a adopté sa première résolution sur le statut d'État palestinien, déclarant qu'il « soutient en principe la reconnaissance du statut d'État palestinien et la solution à deux États, et estime que ceux-ci devraient aller de pair avec le développement des pourparlers de paix, qui devraient être avancés ».³⁹ Cet engagement en faveur de la solution à deux États n'a pas été abandonné malgré certaines divergences entre les objectifs déclarés de l'Union et son comportement dans la pratique.⁴⁰ L'UE a également mis en place des actions comparables à la recherche de solutions loin de la table des négociations : par exemple, elle a appelé à une « paix juste » dans sa première déclaration officielle dès 1971;⁴¹ elle a reconnu les droits du peuple palestinien en 1973, et le droit des Palestiniens à l'autodétermination en 1980. Elle a également soutenu d'autres autorités, comme les États-Unis et d'autres États, dans leurs efforts de médiation. Pour justifier sa position, l'UE a, à plusieurs reprises, invoqué le droit international et la jurisprudence sur le CIP. En termes d'engagements financiers de l'UE, il faut noter que l'UE fait des dons considérables en matière d'aide humanitaire aux Palestiniens, les soutenant de diverses manières, notamment en Cisjordanie, à Jérusalem-Est, mais aussi à Gaza.⁴² Les Palestiniens pourraient donc percevoir un penchant positif de l'UE pour leur cause et être plus disposés à accepter l'UE comme médiateur. Les fortes incitations financières montrent le soutien à un État palestinien. Associés aux divers efforts déployés pour parler d'une "solution à deux États", les Palestiniens ont de bonnes raisons de penser que l'UE a un préjugé favorable à leur égard et que l'inclure en tant que médiateur dans le conflit profitera à leur position. Comme indiqué au point II, même dans le contexte des tensions et des développements récents, l'UE continue de souligner l'importance d'une solution à deux États pour la région.⁴³

³⁷ Del Sarto, Raffaella A., "Plus ça change...? Israel, the EU and the Union for the Mediterranean." *Mediterranean Politics* 16, no. 1 (2011): 117-134, 119.

³⁸ Elgström et al., *op. cit.*, p. 314.

³⁹ Bruno Martins, "'A Sense of Urgency': The EU, EU Member States and the Recognition of the Palestinian State", *Mediterranean Politics* 20, no. 2 (2015): 281-287, 281, référence à la résolution du Parlement européen du 17 décembre 2014 sur la reconnaissance de l'État palestinien (2014/2964).

⁴⁰ Nathalie Tocci, "Firm in Rhetoric, Compromising in Reality: The EU in the Israeli-Palestinian Conflict", *Ethnopolitics* 8, no. 3-4 (2009): 387-401, 387.

⁴¹ Anders Persson, *The EU and the Israeli-Palestinian Conflict 1971-2013: In Pursuit of a Just Peace* (London: Lexington, 2014), 145.

⁴² Commission européenne, Direction générale pour la protection civile et les opérations d'aide humanitaire européennes, "Palestine", consulté le 19 avril 2021, https://ec.europa.eu/echo/where/middle-east/palestine_fr.

⁴³ Service européen pour l'action extérieure, *op. cit.*

4. Processus : le temps d'être impartial

La dernière catégorie, dite la partialité processuelle, fait référence au fait que le médiateur favorise l'une des parties pendant le processus de négociation, par exemple en donnant des informations privilégiées à une partie⁴⁴ ou agir de manière plus secrète envers l'une ou l'autre des parties. Cela concerne également l'organisation, les méthodes de travail et l'agenda du médiateur. En termes de procédure, il est important que le médiateur reste équilibré et qu'il ne favorise pas une partie par rapport à l'autre. À cet égard, il est important que l'UE soit restée neutre dans le processus de paix.

Malgré les nombreux efforts qu'elle a déployés, dans le cadre du CIP, l'UE a été qualifiée par certains de « médiateur problématique ». ⁴⁵ L'une des raisons de cette situation pourrait être la domination des États-Unis en tant que médiateur⁴⁶ en raison de la « relation de soutien »⁴⁷ qu'elle a avec Israël. Cette alliance n'a cessé de se resserrer depuis la fondation de l'État d'Israël en 1948, les États-Unis dépensant aujourd'hui environ 3 milliards de dollars par an en assistance militaire et en aide économique à Israël.⁴⁸

Mais au total, l'UE a également participé à des médiations. Le débat sur la manière dont l'UE peut contribuer au processus de paix au Moyen-Orient est en cours depuis la conférence de Madrid de 1991.⁴⁹ Avec Madrid, l'Europe a influencé la logistique des pourparlers de paix en fournissant un lieu de réunion. Elle a également plaidé en faveur de la participation de l'Organisation de libération de la Palestine (OLP) et du droit des Palestiniens à l'autodétermination, qui ont été exprimés dans la déclaration de Venise de 1980 et ont été acceptés par la suite comme principes fondateurs du processus de paix.⁵⁰ Les initiatives et les engagements de l'UE ont certainement influencé le contexte et les parties de la négociation, et doivent donc être considérés comme des activités de médiation active.⁵¹ Il est dans l'intérêt de l'UE d'être active dans le processus de médiation de paix au cours des dernières décennies. Ainsi, l'UE a une histoire de médiation dans ce contexte, ce qui en fait un acteur expérimenté.

En 2000, dans le contexte de l'Intifada, l'UE a commencé à jouer un rôle plus actif dans l'organisation et la communication des pourparlers de paix et a joué un rôle visible de médiation. En 2002, elle est devenue membre du Quartet pour le Moyen-Orient (MEQ) avec les Nations unies,

⁴⁴ Elgström et al., *op. cit.*, p. 302.

⁴⁵ Persson, *op. cit.*, p. 25.

⁴⁶ Elgström et al., *op. cit.*, p. 307.

⁴⁷ Toby Dodge, "US Foreign Policy in the Middle East", dans *US Foreign Policy*, ed. Michael Cox et Doug Stokes (Oxford: Oxford University Press, 2018), 184.

⁴⁸ Michael Hudson, "The United States in the Middle East", dans *International Relations of the Middle East*, ed. Louise Fawcett (Oxford: Oxford University Press, 2016), 289.

⁴⁹ Volker Perthes, "The Advantages of Complementarity: US and European Policies Towards the Middle East Peace Process", *The International Spectator* 35, no. 2 (2000): 41-56, 42.

⁵⁰ Elgström et al., *op. cit.*, p. 306.

⁵¹ Elgström et al., *op. cit.*, p. 307.

les États-Unis et la Russie. Bien que le MEQ soit resté plutôt inefficace, il a été suggéré qu'il pourrait être élargi et remodelé pour établir un nouveau consensus international sur le CIP.⁵² Le Quartet a soutenu le processus par le biais d'une feuille de route pour la paix, qui comprenait une assistance et une facilitation des discussions entre les parties. L'UE est représentée au sein du Quartet par le Haut Représentant (HRVP), qui dialogue également avec les pays tiers et les acteurs du processus de paix au Moyen-Orient.⁵³ En outre, l'UE est devenue active au sein d'un organe important, composé de 15 membres, qui sert de « mécanisme de coordination au niveau politique pour l'aide au développement des Palestiniens »⁵⁴ – le « Ad Hoc Liaison Committee » (AHLC), qui a été créé en 1993. L'AHLC est coparrainé par l'UE et les États-Unis, la HRVP de l'Union accueillant les sessions de printemps de l'AHLC à Bruxelles. En termes de communication, lors de ses efforts de médiation dans la guerre de Gaza de 2008-2009, l'UE a utilisé différentes stratégies de médiation,⁵⁵ comme l'exercice de pressions et de conditionnalités à l'encontre d'Israël. En revanche, elle avait une politique de non-contact avec le Hamas,⁵⁶ qu'elle a maintenu à nouveau lors de la guerre de 2014 à Gaza. Sa principale stratégie en 2014 a en effet été de soutenir et de faciliter le processus de médiation mené par l'Égypte.⁵⁷ Cela correspond à une position équilibrée à l'égard des parties.

Avec ces autres acteurs, l'UE a tenté de jouer un rôle diplomatique important dans le CIP, en s'efforçant toujours de maintenir sa neutralité et de ne pas favoriser une partie plutôt qu'une autre en termes de procédure. L'UE a notamment toujours souligné que le processus de paix devait être mené par les parties elles-mêmes et que le rôle des acteurs internationaux consistait davantage à faciliter le processus qu'à prendre position. Dans l'ensemble, l'UE a apporté des contributions considérables en tant que médiateur dans le cadre du CIP. L'UE ne semble pas avoir fait preuve d'un parti pris exceptionnel envers l'une ou l'autre des parties en termes de processus. Ce fait pourrait être à l'avantage de l'UE à l'avenir : comme indiqué précédemment, il est crucial que le médiateur se conduise de manière équitable dans le processus, malgré un parti pris potentiel du médiateur pour des acteurs ou des solutions.

Conclusions

Cet article a tenté d'analyser les raisons potentielles pour lesquelles l'UE pourrait être perçue comme biaisée par les deux parties du CIP. En combinaison avec la littérature qui affirme que la

⁵² Nathalie Tocci, "The Middle East Quartet and (In)effective Multilateralism", *The Middle East Journal* 67, no. 1 (2013): 28-43, 28.

⁵³ *Ibid.*

⁵⁴ Service européen pour l'action extérieure, "EU practical & financial support for the Middle East peace process", 15 juin 2016, consulté le 22 mars 2021, https://eeas.europa.eu/diplomatic-network/middle-east-peace-process/337/middle-east-peace-process_en.

⁵⁵ Hugh O'Donnell, "The European Union as a Mediator in Israel-Palestine: Operations Cast Lead and Protective Edge", *EU Diplomacy Paper* 01/2016 (2016): 9.

⁵⁶ Patrick Müller, *EU Foreign Policymaking and the Middle East Conflict: The Europeanization of National Foreign Policy* (New York: Routledge, 2012).

⁵⁷ O'Donnell, *op. cit.*, p. 17.

perception de la partialité d'un médiateur peut être bénéfique au processus de médiation, l'article a tenté d'esquisser le rôle de l'UE dans le processus et les pistes potentielles pour l'avenir.

En ce qui concerne la perception d'un parti pris de l'UE par Israël, l'article a analysé les liens culturels, historiques et économiques importants que l'UE entretient avec Israël. En particulier, Israël pourrait percevoir certains États membres comme ayant un parti pris positif envers leur État et leur position, par exemple l'Autriche ou l'Allemagne. Cela pourrait aider l'UE lorsqu'elle agit en tant que médiateur, car elle pourrait se voir confier cette tâche. La partie israélienne pourrait considérer l'UE comme un allié, à l'instar des États-Unis, et être plus disposée à accepter une médiation de l'UE.

D'autre part, l'UE pourrait être également perçue comme partielle envers les Palestiniens sur diverses questions. Certains ont constaté que l'attitude de l'UE à l'égard d'Israël est perçue comme assez hostile, ce qui pourrait amener les Palestiniens à considérer le rôle de l'UE comme favorable aux Palestiniens. Après tout, l'UE a déclaré à de nombreuses occasions son engagement en faveur d'une solution à deux États et son soutien à leurs droits. Elle a également pris des engagements financiers importants, notamment en matière d'aide humanitaire, en faveur des Palestiniens. De manière cruciale, certains EM sont connus pour être assez pro-palestiniens, comme le montre l'exemple de l'Irlande. Par conséquent, les Palestiniens ont tout intérêt à percevoir l'UE comme biaisée à leur égard dans les dimensions relationnelles et substantielles. Dans le cadre d'un processus de médiation, ils pourraient faire confiance à l'UE car ils la considèrent comme biaisée à leur égard. Ayant reçu le soutien de l'UE sous diverses formes au cours des dernières années, les Palestiniens pourraient souhaiter que l'UE serve d'acteur de médiation, car ils lui font confiance.

Si les effets positifs d'une perception de partialité dans la médiation de paix ne sont pas reconnus, l'UE négligerait un grand avantage dont elle dispose dans le CIP. Les deux parties ont une raison de la considérer comme biaisée à leur égard. La perception d'un parti pris de l'UE pourrait signifier que l'UE a la possibilité de gagner la confiance des deux parties de manière égale et ainsi devenir encore plus efficace dans les négociations dans cette région. En outre, l'UE a l'avantage important d'être restée équitable dans le processus, ce qui pourrait permettre aux parties de venir plus facilement à la table des négociations à l'avenir. Le fait d'être perçu par les deux parties du conflit comme étant à la fois partial et équilibré est une position unique qui pourrait faire de l'UE un médiateur important à l'avenir.

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