

February 2023

Edition n°14

European Studies Review

Brave New World? The EU's Battle to Regulate AI
Investment Screening and Diffusion of Military Artificial Intelligence: Hitting the Target?
Game of Drones: Towards EU Unity on the Use of Armed Drones

SCHUMANN INSIGHT(S):

A Critical Juncture for a more 'Autonomous' EU?

Could Germany's Past Ostpolitik
Undermine Its Future Position As

A Regional Leader?



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by Shane Goodman¹

Introduction

ON May 11, 1997, the World Chess Grandmaster Gary Kasparov was defeated in a highly publicised chess match by an artificial intelligence (AI) system known as “Deep Blue”.² This moment has since come to define the beginning of the rise of AI. Since the nascent years of the 1990s, AI has only grown in skill, capability, and expertise.³ Nowadays, AI is an integral part of everyday life, and it has been given much publicity recently due to the sudden explosion in popularity of AI chatbots like ChatGPT and image generation AIs such as Dall-E.⁴ However, this is merely the tip of the iceberg regarding the daily use of AI, with the technology providing many benefits to society.⁵ Currently, AI is being utilised in industries as diverse as healthcare, banking, and telecommunications. For example, AI systems have proven more accurate than human doctors at identifying

and diagnosing certain diseases.⁶ Even in white-collar industries such as the legal profession, it has been predicted that AI systems will perform 70% of tasks currently performed by lawyers in just five years.⁷ As a result of the radical changes it will bring about, some term the advent of AI the “Fourth Industrial Revolution”.⁸

While the advantages posed by AI are undeniable, the transformative nature of AI also comes with pertinent risks and dangers, including significant privacy concerns. The European Commission has stated that AI systems could be used to de-anonymise data sets or could be used for mass surveillance purposes.⁹ Furthermore, there are examples of discriminatory practices by AI, for instance, in job applications.¹⁰ The dangers of insufficient human oversight of AI tragically came to the fore with two Boeing 737 crashes in 2018/19, where the AI may have

1 Shane Goodman is a staff writer at the *European Studies Review*. He is currently an MA Candidate in EU International Relations and Diplomacy at the College of Europe, Bruges.

2 Rajiv Chandrasekaran, “Kasparov Proves No Match for Computer,” *Washington Post*, May 12, 1997, <https://www.washingtonpost.com/wpsrv/tech/analysis/kasparov/kasparov.htm>.

3 Rebecca Reynoso, “A Complete History of Artificial Intelligence,” *G2*, May 25, 2021, <https://www.g2.com/articles/history-of-artificial-intelligence>.

4 Cade Metz, “The New Chatbots Could Change the World. Can You Trust Them?,” *New York Times*, November 10, 2022, <https://www.nytimes.com/2022/12/10/technology/ai-chat-bot-chatgpt.html>.

5 Darrell West and John Allen, “How artificial intelligence is transforming the world,” *Brookings Institute*, April 24, 2018, <https://www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/>.

6 Alvin Powell, “AI Revolution in Medicine,” *The Harvard Gazette*, November 11, 2020, <https://news.harvard.edu/gazette/story/2020/11/risks-and-benefits-of-an-ai-revolution-in-medicine/>.

7 Mark Deem and Peter Warren, *AI on Trial* (London: Bloomsbury Professional, 2022), 11.

8 Utpal Chakraborty, Amit Banerjee, Jayanta Kumar Saha, Niloy Sarkar and Chinmay Chakraborty, *Artificial Intelligence and the Fourth Industrial Revolution* (New York: Jenny Stanford Publishing, 2022).

9 European Commission, *White Paper on Artificial Intelligence: A European approach to excellence and trust*, February 19, 2020, https://ec.europa.eu/info/sites/default/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf.

10 Lara Fleck, Nicholas Rounding and Pelin Özgül, “Artificial Intelligence in hiring: friend or foe?,” *Maastricht University*, May 31, 2022, https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/93934872/aiconomics_policybrief02_eng.pdf.

overridden the pilots' decisions.¹¹ Despite the fast-paced nature of AI innovation over the past twenty-five years, no appropriate legal framework exists. However, with the emergence of the proposed European Artificial Intelligence Act (AI Act), this might soon change. This article explores the effect that the AI Act could have both within the EU's single market and outside the EU through the so-called "*Brussels effect*." Firstly, the EU's legislative journey towards an AI Act will be discussed. Secondly, the most essential elements of the Act will be analysed, with a particular focus on the Act's proposed tier-based classification system, its definition of an "*AI system*" and the territorial scope of the Act. Finally, the international significance of the Act will be explained using the Brussels effect framework.

Towards an AI Act

On April 21, 2021, the European Commission published its proposal for a draft regulation on Artificial Intelligence.¹² The draft AI Act, due to be adopted by the end of 2023, will be the "*world's first legal framework for AI*".¹³ This was a landmark moment in the fight to regulate AI. The first step towards the AI Act can be found

in the European Council's conclusions of October 2017, which stated that the EU urgently needed to address AI and related technologies and invited the Commission to put forward "*a European approach to artificial intelligence*".¹⁴ The following year, the Commission published its AI Strategy.¹⁵ In 2019, the accession of the von der Leyen Commission would put AI in the spotlight. In her opening speech, the President of the Commission stated that one of the central themes of her tenure would be to ensure a "*Europe fit for the digital age*".¹⁶ The same year, German Chancellor Angela Merkel called for a "*GDPR for AI*".¹⁷ In 2020, the Commission released its AI White Paper, which was subsequently followed by the official proposal for a Regulation in April 2021.¹⁸

The proposed Regulation has since been reviewed by the European Parliament and the Council, with the latter institution adopting its common position on the draft legislation on December 6, 2022.¹⁹ The Parliament is due to vote on the Regulation by the end of March 2023.²⁰ The trilogue stage, where representatives from the Council, Parliament, and Commission convene to find a final compromise on a legislative text, is then due to begin in

- 11 Alexander Freund, "Boeing crash: Can machines make better decisions than people?," *DW*, March 15, 2019, <https://www.dw.com/en/boeing-crash-can-machines-make-better-decisions-than-people/a-47920904>.
- 12 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, Brussels, 21 April 2021.
- 13 Fritz-Ulli Pieper, "The AI Act - does this mark a turning point for the regulation of artificial intelligence? An overview," *Taylor Wessing*, November 24, 2021, <https://www.taylorwessing.com/en/interface/2021/ai-act/the-ai-act--does-this-mark-a-turning-point-for-the-regulation-of-artificial-intelligence-an-overview>.
- 14 European Council, *Conclusions of the Presidency*, October 19, 2017, <https://www.consilium.europa.eu/media/21620/19-euco-final-conclusions-en.pdf>.
- 15 European Commission, *Communication from the Commission: Artificial Intelligence for Europe* COM(2018) 237 final, Brussels, 25 April 2018.
- 16 European Commission, *Speech by President-Elect von Der Leyen in the European Parliament Plenary on the Occasion of the Presentation of Her College of Commissioners and Their Programme*, November 27, 2019.
- 17 Janosch Delcker and Jakob Hanke Vela, "Merkel calls for overarching EU regulation on artificial intelligence," *PoliticoPro*, June 28, 2019, <https://subscriber.politicopro.com/article/2019/06/merkel-calls-for-overarching-eu-regulation-on-artificial-intelligence-3509590>.
- 18 European Commission, *White Paper: On Artificial Intelligence - A European approach to excellence and trust*, COM(2020) 65 final, Brussels, February 19, 2020.
- 19 Council of the European Union, *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 - General approach*, 2021/0106(COD), Brussels, November 25, 2022.
- 20 Sidley, "Proposal for EU Artificial Intelligence Act Passes Next Level – Where Do We Stand and What's Next?," *Sidley*, 12 December 2022, accessed January 16, 2023, <https://www.sidley.com/en/insights/newsupdates/2022/12/proposal-for-eu-artificial-intelligence-act-passes-next-level>.

April 2023.²¹ As this is a priority piece of legislation for the EU, one can expect it to be passed through relatively quickly, with the Regulation possibly coming into effect as soon as 2024.

What Is in the Act?

One of the principal features of the Act is its hierarchical tier-based risk classification system. Within this system, the Act establishes four categories of AI, ranging from a minimal to an unacceptable level of risk. Most AIs fall into the minimal risk category, such as reCAPTCHA, AI-supported video games, or the spam filter on an email server. These AIs are used by the public multiple times a day and are generally benign.²² As such, these minimal-risk AIs are not subject to any regulation under the Act, but AI operators are encouraged to sign up for a voluntary code of conduct, which will be developed by the Commission in consultation with relevant stakeholders.²³

Many AI systems also fall into the limited risk category, like chatbots. In such a case, regulation is kept to a minimum, but the operator is legally required to make it clear to consumers that the AI being interacted with is not a real person.²⁴ Failure to comply with this could lead to stringent financial penalties of up to 6% of global revenue or €30 million, whichever is higher.²⁵

The third category comprises high-risk systems, which involve AIs that have a substantial effect on people's lives by posing a significant risk to personal safety,

livelihoods, or human rights.²⁶ This could be anything from AI systems involved in the operation of critical infrastructure to the use of AI in recruitment to filter CVs.²⁷ These high-risk AIs would be subject to strict transparency requirements and conformity assessments to ensure that they meet the standards set by EU product liability legislation. A certain degree of human oversight is also required.

Fourthly and finally, the proposed AI Act prohibits AI systems that allow public authorities to utilise "*social scoring systems*" such as the social credit system in China. Likewise, the use of real-time biometrics by law enforcement agencies in public spaces is banned, with some limited exceptions. The most impactful ban could be the prohibition on deploying "*subliminal techniques*" or the exploitation of vulnerabilities present in specific groups in society that cause harm.²⁸ It remains to be seen how a ban on subliminal techniques could play out.

Defining AI and the Territorial Scope

The AI Act has not yet been fully adopted, and as a result, the specific *minutiae* of the legislation may change. Conversely, the final legislation is still highly likely to mirror the Commission's original proposal from 2021, ensuring that the main points should remain unchanged. Two aspects of the AI Act are still proving controversial and will likely be discussed at length during the trilogues: 1) the exact definition of an "*AI system*" and 2) the territorial scope of the Regulation.

²¹ *Ibid.*

²² Securiti, "European Commission's Proposed Artificial Intelligence Regulation," *Securiti*, November 1, 2022, <https://securiti.ai/blog/european-commissions-proposed-artificial-intelligence-regulation/>.

²³ Tom Whittaker, Martin Cook and Harvey Spencer, "EU AI Act - Proposed Amendments by the EU Committee on Legal Affairs," *Burges Salmon LLP*, September 30, 2022, <https://www.lexology.com/library/detail.aspx?g=0b66f885-23c0-4204-a7d3-87eb679c96b0>.

²⁴ European Commission, Proposal for an AI Act.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Council of the European Union, General Approach.

²⁸ Securiti, European Commission's Proposed Artificial Intelligence Regulation.

AI systems are currently defined in the draft Regulation as “software developed using one or more of the techniques and concepts listed in Annex I and capable of producing results such as content, predictions, recommendations or decisions that influence the environment with which they interact, in relation to a set of goals defined by humans”.²⁹ However, as this definition is quite broad, it has been subject to criticism from proponents of a more limited definition who believe that this definition will impede future innovation.³⁰ Others, however, see the broad definition as a necessity in order to “future-proof” the legislation.³¹

Interestingly, the Act also provides for an extensive territorial scope. The draft Act applies the “place of market” principle to determine the territorial scope. In other words, if a provider places an AI system on the EU-market, regardless of whether the provider is based in an EU Member State or a third country, the Act applies. Similarly, users of AI systems in third countries can rely on the AI Act if the result it produces is utilised within the EU. This extraterritorial claim expands the reach of EU law beyond the single market and could result in the AI Act having a significant effect on worldwide AI regulation through a phenomenon known as “the Brussels Effect.”

The Brussels Effect: Will the AI Act Become the New GDPR?

First coined by Anu Bradford in 2012, the Brussels Effect refers to a form of regulatory diffusion whereby laws adopted by the EU influence the adoption of similar laws in third countries.³² The extensive territorial scope of the Act is not dissimilar to one of the key features of the EU’s hallmark pieces of legislation in recent years, the General Data Protection Regulation (GDPR).³³ The GDPR came into effect in 2018 and has become the prime example of the Brussels Effect. The AI Act shares many similarities with the GDPR. Similarly to data protection legislation at the time of the GDPR’s adoption in 2016, there is currently a dearth of AI regulation globally. While jurisdictions such as Canada have begun to draft their own proposals for AI regulation, the EU’s draft AI Act is projected to have a first-mover advantage on AI regulation, particularly amongst larger markets such as the US and China.³⁴ Similarly, the EU has a high regulatory capacity. Its well-drafted laws have been trusted in the past and adopted by States with less regulatory capacity and market power, such as those in Latin America, Africa, and Oceania.³⁵ This will likely be a factor in the adoption of legislation similar to the AI Act in third countries.

²⁹ *Ibid.*

³⁰ Ada Lovelace Institute, “People, risk and the unique requirements of AI”, *Ada Lovelace Institute*, March 13, 2022, <https://www.adalovelaceinstitute.org/policy-briefing/eu-ai-act/>.

³¹ Kris Shrishak and Risto Uuk, “The EU AI law will not be future-proof unless it regulates general purpose AI systems,” *EurActiv*, May 30, 2022, <https://www.euractiv.com/section/digital/opinion/the-eu-ai-law-will-not-be-future-proof-unless-it-regulates-general-purpose-ai-systems/>.

³² 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).

³³ European Parliament, 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).

³⁴ Charlotte Siegmund and Markus Anderljung, “The Brussels Effect and Artificial Intelligence: How EU regulation will impact the global AI market,” *Centre for the Governance of AI*, August 2022, https://uploads-ssl.webflow.com/614b70a71b9f71c9c240c7a7f62fbc1c37eff7d304f0803ac_Brussels_Effect_GovAI.pdf.

³⁵ Anu Bradford, “The European Union in a globalised world: the “Brussels effect”,” *Governing Globalization 2, Revue Européenne du Droit*, August 2021, 75-79 <https://geopolitique.eu/en/articles/the-european-union-in-a-globalised-world-the-brussels-effect/>.

To assess the potential impact of the AI Act on global AI governance, a distinction must be made between a *de facto* Brussels effect and a *de jure* Brussels effect. A *de facto* Brussels effect occurs when, in order to gain access to the EU's single market, multinational companies standardise their products and services to comply with EU standards globally, as it often costs less to standardise the process on a region-by-region basis.³⁶ Meanwhile, the *de jure* Brussels effect refers to a situation whereby the government of a third country adopts similar legislation due to trust in EU legislative drafting, a lack of regulatory capacity, or EU promotion of their domestic rules through trade.

Overall, the dynamic between the AI Act and the Brussels effect has been subject to much speculation. However, the effectiveness of the Brussels effect depends on the category of AI in question. For AIs employing "*subliminal techniques*", the user will often be foreign authoritarian governments, and as such, this category of AI is unlikely to be subject to a *de jure* or *de facto* Brussels effect.³⁷ However, the limited-risk and high-risk categories are much more likely to experience the Brussels effect. A *de facto* Brussels effect is especially likely for high-risk AIs with a low cost of differentiation, such as medical devices, worker management systems, biometric categorisation, and certain legal technologies.³⁸ A *de jure* Brussels effect is more likely for jurisdictions with significant trade relations with the EU, and interestingly, China is more likely than the US or other EU allies to adopt some

of the limited-risk AI *acquis*, as they have often adopted EU-inspired legislation on product liability in the past.³⁹ It has also been argued that the growing regulatory capacity of third countries means that the EU is losing its first-mover advantage and should prioritise the enactment of the AI Act to avoid a dilution of the Brussels effect.⁴⁰ The voluntary code of conduct for more benign AIs may also be influential in setting global norms.

Conclusion

In 1997, Deep Blue's victory over Kasparov was seen as the dawn of a new age.⁴¹ In 2023, governments, businesses, and individuals are on the cusp of bringing deep learning AIs into their everyday lives. In spite of this, the industry remains almost entirely unregulated. With this in mind, the AI Act will undoubtedly be one of the Commission's landmark pieces of legislation for the 2019-24 term. Within the EU, it will regulate a rapidly developing industry that will likely bring key technological changes in the first half of the 21st Century. Its tier-based risk classification system will ensure that some of the most dangerous and insidious uses for AI are banned. Furthermore, key aspects of the Regulation could also influence the new *acquis* of AI law that is developing globally through the *de facto* and/or *de jure* Brussels effect. The adoption of the final Act in 2023 will allow for further analysis of the Brussels effect and will also bring much-needed regulation to the "*Wild West*" era of AI.⁴²

³⁶ *Ibid.*

³⁷ Siegmund and Anderljung, Brussels Effect and AI.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Alex Engler, "The EU AI Act will have global impact, but a limited Brussels Effect," *Brookings Institute*, June 8, 2022, <https://www.brookings.edu/research/the-eu-ai-act-will-have-global-impact-but-a-limited-brussels-effect/>.

⁴¹ Chandrasekaran, Kasparov Proves No Match for Computer.

⁴² Jeremy Kahn, "The sun is setting on A.I.'s Wild West," *Fortune*, April 27, 2021, <https://fortune.com/2021/04/27/the-sun-is-setting-on-a-i-s-wild-west/>.

Investment Screening and Diffusion of Military Artificial Intelligence: Hitting the Target?

by Kristin Waage¹

Introduction

FEW technologies receive as much attention today as artificial intelligence (AI), due to its potential to transform economies, societies, and military affairs. There is no agreed definition of AI,² although it is often referred to as the ability of machines to exhibit behaviour and perform actions that typically require human intelligence.³ AI has the characteristics of a general-purpose technology (such as electricity)⁴ rather than being one specific object or system. The current technological level enables AI to be applied to narrowly defined tasks

and processes,⁵ but it is nowhere near the general, cross-domain intelligence possessed by humans.⁶ However, even narrow AI promises huge commercial advantages, ranging from providing better products and services to achieving more efficient business processes,⁷ and it can potentially be an engine for economic growth.⁸ In the military realm, scholars and experts predict that military applications of AI will lead to significant changes on both tactical, operational and strategic levels.⁹ Possible applications include drones, more efficient logistics, and enhanced surveillance and intelligence capabilities.¹⁰

- 1 Kristin Waage is a student at King's College London, where she studies for a Master's degree in Science and International Security. She also holds a Master's degree in Economics and Business Administration from the Norwegian School of Economics, and the CEMS Master in International Management. Her research interests cover topics at the intersection between security, technology and economics, particularly how developments in artificial intelligence affect national and international security.
- 2 Jessica Fjeld, Nele Achten, Hannah Hilligoss, Adam Nagy and Madhulika Srikumar, *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI* (Berkman Klein Center for Internet & Society, 2020), 11.
- 3 Bernd W. Wirtz, Jan C. Weyerer and Carolin Geyer, "Artificial Intelligence and the Public Sector: Applications and Challenges," *International Journal of Public Administration* 42, no. 7 (2019): 599; Ulrich Paschen, Christine Pitt and Jan Kietzmann, "Artificial Intelligence: Building blocks and an innovation typology," *Business Horizons* 63, no. 2 (2020): 150; Department of Defense, *Summary of the 2018 Department of Defense Artificial Intelligence Strategy – Harnessing AI to Advance Our Security and Prosperity* (2018), 5.
- 4 Iain M. Cockburn, Rebecca Henderson and Scott Stern, "The Impact of Artificial Intelligence on Innovation: An Exploratory Analysis," in *The Economics of Artificial Intelligence: An Agenda*, ed. Ajay K Agrawal, Joshua Gans, and Avi Goldfarb (University of Chicago Press, 2019), 116–117; Manuel Trajtenberg, "Artificial Intelligence as the Next GPT: A Political-Economy Perspective," in *The Economics of Artificial Intelligence: An Agenda*, ed. Ajay K Agrawal, Joshua Gans, and Avi Goldfarb (University of Chicago Press, 2019), 175–186.
- 5 Paschen, Pitt, and Kietzmann, *Artificial intelligence*, 153.
- 6 Stuart Russell, *Human Compatible: Artificial Intelligence and the Problem of Control* (Allen Lane, 2019).
- 7 Bernard Marr and Matt Ward, *Artificial Intelligence in Practice: How 50 Successful Companies Used AI and Machine Learning to Solve Problems* (Wiley, 2019); Thomas H. Davenport and Rajeev Ronanki, "Artificial Intelligence for the Real World," *Harvard Business Review*, 2018; Wirtz, Weyerer, and Geyer, *Artificial Intelligence*.
- 8 Jacques Bughin, Eric Hazan, Sree Ramaswamy, Michael Chui, Tera Allas, Peter Dahlström, Nicolaus Henke and Monica Trench, *Artificial Intelligence: The Next Digital Frontier?* (McKinsey Global Institute, 2017), 37; Ajay K Agrawal, John McHale and Alexander Oettl, "Finding Needles in Haystacks: Artificial Intelligence and Recombinant Growth," in *The Economics of Artificial Intelligence: An Agenda*, ed. Ajay K Agrawal, Joshua Gans, and Avi Goldfarb (University of Chicago Press, 2019), 152.
- 9 Michael C. Horowitz, "When speed kills: Lethal autonomous weapon systems, deterrence and stability," *Journal of Strategic Studies* 42, no. 6 (2019): 764–788; Kareem Ayoub and Kenneth Payne, "Strategy in the Age of Artificial Intelligence," *Journal of Strategic Studies* 39, no. 5 (2016): 793–819; Kenneth Payne, "Artificial Intelligence: A Revolution in Strategic Affairs?," *Survival* 60, no. 5 (2018): 7–32.
- 10 Matthew Fuhrmann and Michael C. Horowitz, "Droning On: Explaining the Proliferation of Unmanned Aerial Vehicles," *International Organization* 71, no. 2 (2017): 397–418; Stephan De Spiegeleire, Matthijs Maas, and Tim Sweijts, *Artificial Intelligence and the Future of Defense – Strategic Implications for Small- and Medium-Sized Force Providers* (Hague Centre for Strategic Studies, 2017); Christian Heller, "The Future Navy—Near-Term Applications of Artificial Intelligence," *Naval War College Review* 72, no. 4 (2019): 73–100.

Over the past years, the US, UK, and several other Western countries have implemented or strengthened screening mechanisms for certain foreign investments that could pose a threat to national security,¹¹ with a common EU framework facilitating cross-border coordination.¹² Applications of commercial AI technology in foreign military organisations are often highlighted among national security concerns,¹³ with identification, tracking, advanced robotics, and cyber security constituting examples of particularly sensitive AI activities in the UK.¹⁴ While investment screening legislation does not target one specific country, Western states increasingly express concerns for Chinese investments.¹⁵ The anticipated importance of AI to military as well as economic power has intensified technological competition between major powers, especially

between the United States (with allies) and China.¹⁶ China seeks to become the global leader in AI by 2030,¹⁷ and several reports demonstrate how China seemingly directs its foreign investments to strategically important sectors to support its national ambitions.¹⁸

Studies argue that foreign technology transfer has played an important role for China's economic growth and military modernisation.¹⁹ Still, it has not been sufficient to get China on par with the US,²⁰ introducing the topic of how military technologies diffuse globally. This topic has been subject to multiple studies,²¹ even focusing specifically on AI technology.²² Moreover, restricting the spread of military-related technology has long been a common practice in international politics. For example, the

- 11 US Department of the Treasury, "The Committee on Foreign Investment in the United States (CFIUS)," 2023, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>; UK Government, "National Security and Investment Act: details of the 17 types of notifiable acquisitions," *GOV.UK*, July 20, 2022, <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions>; Sarah Erickson, "Recent Developments in EU Foreign Investment Screening," *Center for Strategic and International Studies*, April 19, 2021, <https://www.csis.org/blogs/strategic-technologies-blog/recent-developments-eu-foreign-investment-screening>; Jonathan Bonnitcha, "The return of investment screening as a policy tool," *International Institute for Sustainable Development: Investment Treaty News*, December 19, 2020, <https://www.iisd.org/itn/en/2020/12/19/the-return-of-investment-screening-as-a-policy-tool-jonathan-bonnitcha/>.
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- 13 Joseph R. Jr. Biden, "Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," *The White House*, September 15, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/>; Erickson, Recent Developments.
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- 16 Michael Auslin, "Can the Pentagon Win the AI Arms Race?," *Foreign Affairs*, October 23, 2018, <https://www.foreignaffairs.com/articles/united-states/2018-10-19/can-pentagon-win-ai-arms-race>; Heather M. Roff, "The frame problem: The AI 'arms race' isn't one," *Bulletin of the Atomic Scientists* 75, no. 3 (2019): 95–98; Paul Scharre, "Debunking the AI arms race theory," *Texas National Security Review* 4, no. 3 (2021): 121–132; James Johnson, "The end of military-techno *Pax Americana*? Washington's strategic responses to Chinese AI-enabled military technology," *The Pacific Review* 34, no. 3 (2021): 351–378.
- 17 Sarah O'Meara, "Will China lead the world in AI by 2030?" *Nature*, August 19, 2021, <https://www.nature.com/articles/d41586-019-02360-7>.
- 18 Rose Tenyotkin, April Herlevi, Alison Kaufman and Anthony Miller, *Economic Statecraft: How China Legally Accesses Foreign Technologies to Build Military Capabilities*, DRM-2020-U-027240-Final (Arlington, VA: CNA, June 2020), 18–26; John Seaman, Mikko Huotari and Miguel Otero-Iglesias, *Chinese investment in Europe: a country-level approach* (European Think-tank Network on China (ETNC), 2017).
- 19 Tai Ming Cheung, "Innovation in China's Defense Technology Base: Foreign Technology and Military Capabilities," *Journal of Strategic Studies* 39, no. 5 (2016): 728–761; John Van Reenen and Linda Yueh, *Why Has China Grown So Fast? The Role of International Technology Transfer*, CEP Discussion Paper No 1121 (London School of Economics Center for Economic Performance, 2012).
- 20 Andrea Gilli and Mauro Gilli, "Why China Has Not Caught Up Yet: Military-Technological Superiority and the Limits of Imitation, Reverse Engineering, and Cyber Espionage," *International Security* 43, no. 3 (2019): 141–189.
- 21 Michael C. Horowitz, *The Diffusion of Military Power: Causes and Consequences for International Politics* (Princeton University Press, 2010); Andrea Gilli and Mauro Gilli, "The Diffusion of Drone Warfare? Industrial, Organizational, and Infrastructural Constraints," *Security Studies* 25, no. 1 (2016): 50–84.
- 22 Michael C. Horowitz, "Artificial Intelligence, International Competition, and the Balance of Power," *Texas National Security Review* 1, no. 3 (2018): 36–57.

US-led CoCom embargo limited Soviet access to Western technology during the Cold War,²³ and the Nuclear Suppliers Group has developed a multilateral export control regime for nuclear-related transfers.²⁴ However, there are currently no studies investigating the impact of foreign investment screening regimes on the spread of cutting-edge technologies such as AI to military organisations across the world.

This paper thus investigates whether current investment screening regulations are effective tools in limiting foreign military organisations' adoption of AI.²⁵ It argues that there is a risk that current investment screening regulations are sub-optimally designed as legislators and policymakers overestimate the importance of commercial technology transfers for military AI adoption and underestimate organisational and infrastructural adoption challenges. Consequently, it advocates for further research to support improvements in investment screening and presents a framework that may guide such research.

The issues raised in this paper are important for two main reasons. First, investment screening is seen as an important tool for promoting national security, including preventing the spread of military AI, but this requires that the correct transactions be reviewed. Second, investment screening carries with it costs, and its benefits must be considered in light of these costs.²⁶ Both companies and screening committees incur direct costs from reporting and reviewing cases. Companies' investment willingness may also decline with more "*regulatory red tape*"²⁷ and delays in investment processes.²⁸ Restrictive legislation on inward foreign investments may also backfire on outward investments as some states might interpret it as "*protectionist move[s]*".²⁹ While this paper discusses the specific case of AI, its discussion may also be relevant for other sensitive and complex technologies important for national security.

Diffusion of Military AI

Several studies on the impact of AI on military affairs seem to assume that military AI will spread fast.³⁰ This

23 Michael Mastanduno, "Hegemony and Fear: The National Security Determinants of Weaponized Interdependence," in *The Uses and Abuses of Weaponized Interdependence*, ed. Daniel W. Drezner, Henry Farrell, and Abraham L. Newman (Brooking Institution Press, 2021), 72–75.

24 Lisa Langdon Koch, "Frustration and Delay: The Secondary Effects of Supply-Side Proliferation Controls," *Security Studies* 28, no. 4 (2019): 773–806.

25 Hence, this paper only discusses the military adoption of commercial AI technologies. It does not consider other reasons for investment screening of AI companies on national security grounds.

26 David A Baldwin, "The Concept of Security," *Review of International Studies* 23, no. 1 (1997): 16–17.

27 Mikko Rajavuori and Kaisa Huhta, "Investment screening: Implications for the energy sector and energy security," *Energy Policy* 144 (2020): 9.

28 The Economist, "Britain's government is trying to protect national security," *The Economist*, January 8, 2022, <https://www.economist.com/britain/2022/01/08/britains-government-is-trying-to-protect-national-security>.

29 Sophie Meunier, "Divide and conquer? China and the cacophony of foreign investment rules in the EU," *Journal of European Public Policy* 21, no. 7 (2014): 1012.

30 See e.g. James Johnson, "Artificial intelligence & future warfare: implications for international security," *Defense & Security Analysis* 35, no. 2 (2019): 159–160; Jürgen Altmann and Frank Sauer, "Autonomous Weapons Systems and Strategic Stability," *Survival* 59, no. 5 (2017): 124–128.

assumption builds on claims that AI is a dual-use technology, making it relatively cheap to develop and adopt compared to military technologies without a civilian counterpart.

A key question is, however, to what extent different AI applications actually exhibit a dual-use character.³¹ Horowitz invites us to consider two main scenarios. In the first scenario, AI has a strong dual-use character, which would make it diffuse rapidly.³² This is, for example, the current assumption in the British investment screening regulation, which states that “AI is [...] inherently dual-use and potentially easy to repurpose”.³³ In the second scenario, Horowitz challenges the assumption that AI is dual-use.³⁴ Military AI might be “unique [...] and difficult to copy”³⁵ if it requires system integration that goes beyond commercial applications.³⁶ Some scholars use the term “platform challenge” to reflect the increasing need for integration across “advanced systems, subsystems, and components” into platforms.³⁷ In addition, while civilian AI applications seemingly exist, military applications may require additional adjustments, such as “extra protection from spoofing and hacking”.³⁸ Military AI that is different from civilian applications would create the possibility of more “exclusive” military developments than in the dual-use scenario, and reduce the rate of diffusion.

Technological considerations, such as hardware, software and system integration, are but one factor that may determine to what extent military AI diffuses throughout the international system. Scholars argue that organisational and infrastructural support is more crucial for adoption than the technology in itself,³⁹ especially as military technology becomes increasingly complex.⁴⁰ Organisational factors encompass changes in military doctrines, education and skills, processes and structures that are necessary to make the organisation able to implement and use military AI.⁴¹ Infrastructural factors consist of support functions that are necessary for a new technology to function, ranging from network connection to support from other (weapon) systems.⁴² In the case of drones, organisational and infrastructural adoption capabilities have, for example, appeared to be significant barriers to rapid diffusion,⁴³ and a study highlights how they can also be so for China in its process of adopting military AI.⁴⁴

In sum, the diffusion of military AI depends on several factors. If military applications differ from civilian ones, states might find it difficult to access or mimic other states’ progress in military AI. Moreover, a lack of organisational and infrastructural support may prevent adoption even in the case of AI being dual-use. What are the implications of this insight for the effectiveness of current investment screening legislation?

31 Horowitz, Artificial Intelligence, 50.

32 *Ibid*, 50–52.

33 UK Government, National Security and Investment Act.

34 Horowitz, Artificial Intelligence, 52.

35 *Ibid*, 52.

36 *Ibid*, 52.

37 Gilli and Gilli, Diffusion of Drone Warfare?, 57.

38 Horowitz, Artificial Intelligence, 52.

39 Gilli and Gilli, Diffusion of Drone Warfare?, 51–53.

40 Gilli and Gilli, Why China Has Not Caught Up Yet, 142.

41 Horowitz, Diffusion of Military Power, 32–35; Gilli and Gilli, Diffusion of Drone Warfare?, 59; Gilli and Gilli, Why China Has Not Caught Up Yet, 162; Avi Goldfarb and Jon R. Lindsay, “Prediction and Judgment: Why Artificial Intelligence Increases the Importance of Humans in War,” *International Security* 46, no. 3 (2022): 43–46.

42 Gilli and Gilli, Diffusion of Drone Warfare?, 60.

43 *Ibid*, 66.

44 Elsa B. Kania. “Artificial intelligence in China’s revolution in military affairs,” *Journal of Strategic Studies* 44, no. 4 (2021), 536–539.

		Determinant(s) of Military AI Adoption	
		Technology	Organisation and Infrastructure
Nature of Military AI	Dual-use	<i>Quadrant 1:</i> Investment screening may be effective, but must assess substitute venues.	<i>Quadrant 2:</i> Investment screening may be effective, but must assess targeted companies.
	Exclusive	<i>Quadrant 3:</i> Investment screening may be effective, but should primarily target defence-related companies.	<i>Quadrant 4:</i> The value of investment screening is reduced.

Table 1: Typology of the impact of investment screening on the diffusion of military AI.

Evaluating Investment Screening: A Typology

typology, and this section proceeds by discussing its implications.

Based on the discussion on the diffusion of military AI in the preceding section, this paper identifies two dimensions for evaluating the effectiveness of investment screening:

1. *The nature of military AI:* Does military AI strongly overlap with commercial AI, making it *dual-use*, or is military AI separate from commercial AI, and thus *exclusive*?
2. *The determinant(s) of military AI adoption:* Is access to *technology* a key requirement in advancing military AI adoption, or are *organisation and infrastructure* the decisive factors?

These dimensions make it possible to derive a typology that may guide future research on the impact of investment screening on the diffusion of military AI, or other complex, potentially dual-use technologies. Table 1 presents the

In the first quadrant, AI is dual-use and technology plays an imperative role in advancing military adoption of AI. Here, foreign investments may facilitate technology transfers, which in turn could provide military advantages to foreign states. Hence, the optimal policy may be to implement investment screening for a range of civilian AI companies.

A key question will, however, be to what extent AI technology possessed by a given company is unique or whether substitute technology may be accessed elsewhere. Investment screening seeks to prevent the spread of sensitive technology –patents, blueprints, and algorithms– as well as technological expertise and know-how to foreign entities. However, commercial AI could diffuse through several other venues. First, the technology may spread through the sale of products and services.⁴⁵ For example, Western AI companies may

⁴⁵ Horowitz, Artificial Intelligence, 50.

sell technological solutions (only software, or combined software and hardware, such as drones) to foreign companies or foreign military organisations. Second, AI development exhibits a strong open-source character, where algorithms are shared globally through platforms such as the machine learning end-to-end platform TensorFlow.⁴⁶ Third, flows of people (such as students or former employees) could potentially contribute to AI technology transfers.⁴⁷ Finally, states could seek to access technology through other means, such as espionage.⁴⁸ In sum, investment screening may have a limited impact if these other venues remain readily available to states.

In the second quadrant, AI is also dual-use in nature, but the decisive factors in military adoption of the technology are organisational and infrastructural. This would suggest that access to the technology alone does not suffice to enable military adoption by another state and that the differentiating advantage is *"the ability to design forces, training, and operational plans to take advantage of those dual-use applications"*.⁴⁹ In this situation, it might be more important that investment screening target companies that possess experience and expertise on the "ecosystem" surrounding AI adoption than the technological know-how.

Current investment screening regulations appear, however, to focus primarily on the technology components of military AI diffusion. For example, to determine if British investment screening legislation applies to transactions in a specific company, it must be assessed if the company conducts activities within a number of AI areas, such as *"audio and speech recognition"*, *"image classification"*, *"digital twinning"*, *"sensor data processing"* or *"threat detection and classification"*.⁵⁰ True, activities within these AI areas may give rise to unique business know-how and experience on organisation and infrastructure factors that are vital for military adoption. Yet, such considerations are absent in current screening regulations. This could result in technological cutting-edge start-ups being subject to screening, while companies that are not on the technological forefront but possess more experience on key organisational success factors are overlooked.

Moreover, as investment screening has intensified in Western countries, China has seemingly adjusted by obfuscating the source of investments, for example, through more intricate ownership structures.⁵¹ However, this raises the question of whether tacit and organisational knowledge is able to propagate through the ownership structure to the ultimate owner, which

46 *Ibid*, 51; TensorFlow, "Why TensorFlow," *TensorFlow*, 2023, <https://www.tensorflow.org/about>.

47 Aaron L. Friedberg and Charles W. Boustany, "Partial Disengagement: A New US Strategy for Economic Competition with China," *The Washington Quarterly* 43, no. 1 (2020): 29–32; Tenyotkin et al., *Economic Statecraft*, 27–32.

48 Horowitz, *Artificial Intelligence*, 52.

49 Horowitz, *Artificial Intelligence*, 51.

50 UK Government, *National Security and Investment Act*.

51 Tenyotkin et al., *Economic Statecraft*, 18.

would not be close to daily operations and innovation activities. Hence, if quadrant two is most representative for military AI adoption, foreign investments that do not yield regular access to operations might not be critical for screening.

In the third quadrant, military AI does not have a civilian counterpart, while technological components play a key role in enabling diffusion and adoption. In such a situation, states would benefit from foreign technology transfer, but commercial AI companies would be less important for advancing military use of AI. Espionage and possibly mimicry would be more likely means pursued by foreign states to access military AI technology,⁵² and the value of investment screening of commercial companies for slowing the diffusion of military AI would be reduced. However, investment screening could still be relevant to review transactions in any company that directly supports AI innovation and implementation in the armed forces, such as organisations within defence industries.

Finally, military AI is still exclusive in the fourth quadrant, but the differentiating factors for its adoption are organisational and/or infrastructural rather than technological. In this quadrant, states will find it challenging to implement military AI simply by getting access to other states'

technology unless they also possess or can acquire the necessary organisational and infrastructural support. If applications of military AI, which are crucial for military power, primarily fall within this quadrant, investment screening would have a limited impact on the rate of diffusion of military AI.

The typology in table 1 thus shows how investment screening could be a useful tool for slowing the diffusion of military AI. However, it also highlights that further research is needed to assess which quadrant(s) represent(s) military AI –and, consequently, how screening regulations should be designed. Based on existing knowledge, this paper derives the preliminary hypothesis that quadrant two, overall, best characterises military AI adoption. While some technological developments may be purely military in nature, scholars also highlight how there is a "*layer of uncertainty*"⁵³ arising from difficulties in assessing possible military applications of future civilian technological developments –suggesting that AI should be viewed as dual-use. Moreover, there appears to be strong empirical evidence that technology access, alone, is not sufficient to enable military AI adoption⁵⁴ –suggesting that organisation and infrastructure factors should be given more attention in investment screening. Yet, military AI will likely not belong to

⁵² Horowitz, Artificial Intelligence, 52.

⁵³ Ilaria Carrozza, Nicholas Marsh and Gregory M Reichberg, *Dual-Use AI Technology in China, the US and the EU*, PRIO Paper (Peace Research Institute Oslo, 2022), 31.

⁵⁴ Horowitz, Diffusion of Military Power; Gilli and Gilli, Diffusion of Drone Warfare; Gilli and Gilli, Why China Has Not Caught Up Yet.

just one quadrant due to the diverse range of possible applications. Investment screening regulations must be designed with these considerations in mind.

Conclusion

This paper raises the question of whether current investment screening regulations are effective tools in limiting foreign states' adoption of military AI. From existing literature, it derives a framework that suggests that the impact – and importance – of investment screening in preventing diffusion of military AI will depend on the extent to which 1) commercial AI in fact exhibit dual-use features, and 2) the technology itself is a determining factor in military AI adoption. Depending on the answer to these questions, the framework highlights how current investment screening regulations might not target the most sensitive companies, or might not be a useful tool in preventing the diffusion of military AI.

The framework could, however, be further improved. Most importantly, it does not assess the interplay between technological, organisational, and infrastructural factors. For example, technological access may spur organisational learning and infrastructural improvements, as experimentation with a technology could reveal challenges and gaps for adoption. Moreover, an existing presence of organisational and infrastructural support may increase the value of foreign technological transfers, which may, in turn, make investment screening more effective to prevent diffusion of military AI. In conclusion, more research is needed to establish the utility and optimal design of investment screening regulations. The framework proposed in this paper provides a starting point.

Game of Drones: Towards EU Unity on the Use of Armed Drones

by Thomas Klein Wolterink¹

Introduction

THE use of armed drones has become increasingly popular since the start of the war on terror in 2001.² The United States (US), which is a world leader in so-called “targeted killings”, has carried out at least 14,040 strikes, killing at least 910 civilians.³ Other countries like France, Israel, and the United Kingdom (UK) have also acquired and used drones outside their borders.⁴ Targeted killings are controversial as they lower the threshold for the use of force. However, advocates argue that they are highly effective and prevent civilian casualties.⁵ The question remains whether targeted killings are ethically and legally allowed under international law. The legal aspect seems to be a grey area, but with the increasing development and usage of drones in the European Union (EU), it is important to have a clear stance on their usage and legislation specifically designed for targeted killings. This article starts with exploring the existing legal framework for

the use of armed drones in three areas: *jus ad bellum*, international humanitarian law, and international human rights law. After the legal framework is determined, the stance of the European Union is developed, followed by a conclusion and discussion on how the European Union can establish a solid legal framework.

The existing legal framework

Armed drones, also known as Unmanned Combat Aerial Vehicles (UCAVs), are a relatively new technology in modern warfare. The US introduced the first UCAV, the MQ-1 Predator drone, in 1995. Initially used for observation and reconnaissance, it was later upgraded to include hellfire missiles.⁶ The MQ-1 was primarily operated by the US Air Force and the Central Intelligence Agency (CIA) and was used in several conflicts, including in Afghanistan, Yugoslavia, and Syria.⁷ Since then, more countries have acquired or developed armed drones. According to

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² Joshua A. Schwartz and Matthew Fuhrmann, “Do armed drones reduce terrorism? Here's the data,” *The Washington Post*, August 18, 2022, <https://www.washingtonpost.com/politics/2022/08/18/drone-alqaeda-terrorist-attack/>.

³ Abigail Fielding-Smith and Jessica Purkiss, “Drone Warfare,” *The Bureau of Investigative Journalism*, February 10, 2023, <https://www.thebureauinvestigates.com/projects/drone-war>.

⁴ Drone Wars UK, “Who Has Armed Drones?” *Drone Wars UK*, May 9, 2022, <https://dronewars.net/who-has-armed-drones/>.

⁵ Jennifer V. Carson, “Assessing the Effectiveness of High-Profile Targeted Killings in the ‘War on Terror’,” *Criminology & Public Policy* 16, no. 1 (2017): 191-202, 195; Jonathan Marcus, “Combat drones: We are in a new era of warfare - here's why,” *BBC*, February 4, 2022, <https://www.bbc.com/news/world-60047328>.

⁶ James Thompson, “Sunsetting the MQ-1 Predator: A History of Innovation,” *Air Force*, February 20, 2018, <https://www.af.mil/News/Article-Display/Article/1445531/sunsetting-the-mq-1-predator-a-history-of-innovation>.

⁷ Diederik W. Kolff, “Missile Strike Carried Out With Yemeni Cooperation—Using UCAVs to Kill Alleged Terrorists: A Professional Approach to the Normative Bases of Military Ethics,” *Journal of Military Ethics* 2, no. 3 (2003), 240-244.

the non-governmental organisation Drone wars UK, there are currently 22 countries with operational UCAVs, and 6 more are expected to have operational drones soon.⁸ However, governments are struggling to keep up with legislation for their intended use, including international humanitarian law and international human rights law. There is a lack of consensus on how to abide by international laws regulating the use of force, specifically concerning *jus ad bellum*, international humanitarian law, and international human rights law.⁹

Jus ad Bellum

The laws governing the use of force between states, known as *jus ad bellum*, must be reviewed before a state can go to war. For a state to plan an attack on the territory of another sovereign country, it must have the agreement of the country in question, at the risk of violating its sovereignty otherwise. This is outlined in Article 2(4) of the United Nations (UN) Charter.¹⁰ If consent is given, Article 2(4) is no longer relevant. If consent is not given, the UN Charter provides two options: lawful action under Article 51, based on self-defence, which requires certain conditions to be met, such as the scale and effect of the attack reaching a certain level of gravity, or a mandate from the UN Security Council (UNSC) under chapter

six.¹¹ However, even with consent, there are additional issues to consider, such as coercion and who is authorised to give consent. States should refrain from any form of military, political or economic coercion against the territorial integrity of any state when relying on Article 2(4).¹² Consent is given solely by the highest authorised state actors and is done publicly.¹³ The UN Charter only allows self-defence when "*an armed attack occurs*".¹⁴ However, customary international law states that military action can be taken as long as the threatened attack is imminent, there are no other means to deflect it, and the action is proportionate.¹⁵

International Humanitarian Law

International humanitarian law (IHL) applies only to armed conflicts. To determine if IHL is applicable, it is important to understand when an armed conflict is considered international or non-international. An international armed conflict is defined by Article 2(1) of the 1949 Geneva Conventions as "*all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties*"¹⁶ even if the state of war is not recognised by one of them. A conflict is considered non-international if it occurs across borders, but the parties involved are not considered state actors.

⁸ Drone Wars UK, Who has armed drones?.

⁹ Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, "The Right to Life and the International Law Framework Regulating the Use of Armed Drones," in *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*, ed. Dapo Akande et al. (Oxford: Oxford Academic, 2020), 153.

¹⁰ United Nations, "Charter of the United Nations," New York, 1945.

¹¹ Olivier Corten, *The law against war: The prohibition on the use of force in contemporary international law*, 2nd ed. (London: Bloomsbury Publishing, 2021), 195.

¹² United Nations General Assembly, "Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field," A/RES/43/51, New York, 1988.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Report of the High-Level Panel Established by the UN Secretary-General (December 2004) UN Doc A/59/565 (2004) at 188–92.

¹⁶ International Committee of the Red Cross (ICRC), "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," 75 UNTS 287, Geneva, 1949.

This is defined in Article 3 of the 1949 Geneva Conventions.¹⁷

According to the case of *prosecutor v Limaj and others*, an armed group must have a command structure, headquarters, and the ability to plan and carry out military operations to be considered relevant in the conflict.¹⁸ The question then arises as to who is a legitimate target. Civilians can never be targeted, except if they are directly participating in hostilities, this is known as the Principle of Distinction.¹⁹ All persons should be considered civilians unless it is clear that they are taking part in hostilities. Nevertheless, despite the increasing use of drones in recent years, they have not been extensively used in international armed conflicts between states. The only known examples are the Nagorno-Karabakh war between Armenia and Azerbaijan in 2020, and the ongoing war between Russia and Ukraine.²⁰

International Human Rights Law

The final element of the international framework for the use of armed drones to consider is international human rights law.²¹ International human rights law (IHRL) applies in all cases, whether there is an armed conflict or not. The most important

aspect of IHRL is the right to life.²² This right is described in several treaties and declarations, such as Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights.²³ The right to life can be seen as the default legal norm for the protection of people. Article 2 of the European Convention on Human Rights contains a set of exceptions for the use of lethal force, including quelling a riot and to effect a lawful arrest.²⁴ It is important to note that if a drone strike takes place in an armed conflict, both IHRL and IHL apply together.

Determining the legitimacy of targeting an individual under the IHRL can be complex. Principle 9 of the Use of Force and Firearms by Law Enforcement Officials states that force can only be used when it is strictly necessary to protect life and is the least harmful way of achieving the purpose.²⁵ Additionally, force can be used to prevent an imminent threat to the lives of others.²⁶

States are also required to investigate and provide an effective remedy if they have violated IHRL through a drone strike according to Articles 2 and 13 of the European Convention on Human Rights.²⁷ However, most drone strikes

¹⁷ *Ibid.*

¹⁸ International criminal Tribunal for the former Yugoslavia, *Prosecutor v Limaj and others*, Case No IT-03-66-A, November 30, 2005, paras 94–134. The Hague.

¹⁹ Nils Melzer, *Targeted Killing in International Law* (Oxford Academic, 2008), 382.

²⁰ Shaan Sheikh and Wes Rumbaugh, "The air and missile war in Nagorno-Karabakh: Lessons for the future of strike and defense," *the Center for Strategic and International Studies*, December 8, 2020. <https://www.csis.org/analysis/air-and-missile-war-nagorno-karabakh-lessons-future-strike-and-defense>; Robyn Dixon, "Azerbaijan's drones owned the battlefield in Nagorno-Karabakh — and showed future of warfare," *The Washington Post*, November 10, 2020, https://www.washingtonpost.com/world/europe/nagorno-karabakh-drones-azerbaijan-armenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b_story.html.

²¹ Heyns, The right to life and the International Law Framework.

²² Council of Europe, "European Convention on Human Rights, as amended by Protocols Nos. 11 and 14," Strasbourg, 1950, art 2(1).

²³ United Nations General Assembly, "Universal Declaration of Human Rights," 217 A (III), New York, 1948; United Nations General Assembly, "International Covenant on Civil and Political Rights," A/RES/2200(XXII), New York, 1966.

²⁴ European Convention on Human rights, art 2(2b).

²⁵ United Nations Human Rights office of the High Commissioner, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," Havana, 1990.

²⁶ Christophe Paulusen, Jessica Dorsey and Bérénice Boutin, "Towards a European position on the use of armed drones? A human rights approach." *International Center for Counter-Terrorism*, October 1, 2016, 8. <https://www.jstor.org/stable/resrep17498>.

²⁷ European Convention on Human Rights, art 2 and 13.

are carried out in secrecy, leading to a lack of transparency and complexity in determining IHRL compliance.²⁸

How the European Union Works Towards a Unified Position: From the EU Global Strategy to the Financing of Military Drones

In 2013, the European Defence Agency (EDA) recognised the potential of unmanned aircraft systems in future warfare and established a group with member states to evaluate the use of drones in targeted killings.²⁹ In 2014, The European Parliament (EP) urged the need for a unified stance on the use of armed drones, taking into account both IHL and IHRL, implemented in the Common Security and Defence Policy (CSDP).³⁰ The CSDP outlines the EU's approach to security, defence, and crisis management.³¹ The CSDP in its current form was established in 1999 during the Cologne European Council, primarily due to the French and United Kingdom's desire to create an intergovernmental EU security institution.³² The German and British governments proposed a supportive role, while France pushed for more autonomy. Over the years, the CSDP has undergone

significant changes and additions, such as the European Defense Fund (EDF) in 2017 and the European Peace Facility (EPF) in 2021.³³ In the case of a legal framework on armed drones, the CSDP is relevant since it outlines the views of the European Union. This includes policy areas that should be developed or the implementation of new technology, such as drones.

In 2016, the EU's former High Representative for Foreign Affairs and Security Policy, Federica Mogherini, presented the Global Strategy for the European Union's foreign and security policy, which included three major pillars.³⁴ The first pillar: new political goals and ambitions for Europeans to take more responsibility for their security and defence. Secondly, new financial tools to help Member States and the European defence industry to develop defence capabilities, known as the European Defense Action Plan. Finally, a set of concrete actions as a follow-up to the EU-NATO Joint Declaration, which identified areas of cooperation. The report itself is mostly explanatory and does not provide many concrete solutions. However, it is worth noting that, since the introduction of the EU technological funding

28 Philip Alston, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions," (E/CN.4/2006/53, March 8, 2006), 13, https://ap.ohchr.org/documents/dpage_e.aspx?si=E/cn.4/2006/53.

29 Foeke Postma, "Military Drones and the EU," *PAX for Peace*, December 5, 2019, 23. <https://paxforpeace.nl/what-we-do/publications/military-drones-and-the-eu>; European Defence Agency, "Remotely Piloted Aircraft Systems (RPAS)," <https://eda.europa.eu/what-we-do/all-activities/activities-search/remotely-piloted-aircraft-systems---rpas> [accessed February 12, 2023].

30 Directorate General for External Policies (European Commission), "Towards an EU common position on the use of armed drones," (QA-01-17-662-EN-N, June 5, 2017), 6, [https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2017\)578032](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2017)578032).

31 Anand Menon, "Power, Institutions and the CSDP: The Promise of Institutional Theory," *JCMS: Journal of Common Market Studies* 49, no. 1 (2010).

32 Fraser Cameron, *Foreign and Security Policy of the European Union: Past, Present and Future*, (London: Sheffield Academic Press, 1999), 15.

33 Raluca Csernaton, "The EU's Defense Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex," *Carnegie Europe*, December 6, 2021, 3, <https://carnegieeurope.eu/2021/12/06/eu-s-defense-ambitions-understanding-emergence-of-european-defense-technological-and-industrial-complex-pub-85884>; Council of the European Union, "European Peace Facility," Council Decision 2021/509, March 22, 2021, <https://eur.lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32021D0509>.

34 High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency, "Implementation Plan on Security and Defence" 14392/16, Brussels, November 14, 2016, 2, https://www.eeas.europa.eu/sites/default/files/eugs_implementation_plan_st14392.en16_0.pdf.

programme Horizon 2020, public funding for research and development of drones has significantly increased.³⁵ Under the admission rules of Horizon 2020, many projects were eligible for funding, including the manufacturing of drones.³⁶ Hundreds of millions of euros have been spent on drone projects, some of which include dual-use technology.³⁷

In 2017, the European Commission launched an initiative to support collaboration in the fields of defence research and development as well as to increase innovation in the field. The available budget for this initiative is around €13 billion for the period between 2021-2027.³⁸ The European Defense Fund (EDF) was the first document related to the Common Security and Defense Policy (CSDP) that publicly mentioned investment in drone technology for military use. This shows that the Commission is not against the development of UCAVs. One of the projects that are eligible for funding under the EDF is “Eurodrone”, a project by France, Germany, Italy, and Spain, which is developing a European Medium Altitude Long Endurance Unmanned Aerial Vehicle (MALE UAV).³⁹ With funding from the EU, this can be considered the first publicly-funded European drone development for military use.

Although it can be noted from above that the lines regarding military drones in the EU are moving, notably with funding, there does not seem to be a clear strategy at the European level. One of the reasons why the CSDP does not contain specific EU positions on the development and use of armed drones is that, unlike many other policies, drones fall almost entirely under the competence of the member states.⁴⁰

Conclusion

The use of armed drones is a relatively new phenomenon in modern warfare. However, the international laws regarding the use of drones are still unclear, which leads to a lack of consensus on how to abide by international law. The international framework for the use of force consists of three main areas: *jus ad bellum*, international humanitarian law, and international human rights law. The use of drones is quickly increasing, also in the European Union, and it is important to have a clear view of the stance of the different European actors.

With the implementation of the Horizon 2020 programme in 2014, the EU publicly took a stance regarding the use of armed drones. The programme helped fund several companies in designing and

35 Bruno O. Martins and Neven Ahmad, “The security politics of innovation: Dual-use technology in the EU’s security research programme,” in *Emerging Security Technologies and EU Governance: Actors, Practices and Processes*, ed. Antonia Calcara, (London: Routledge, 2022), 58.

36 Bruno O. Martins and Christian Küsters. “Hidden Security: EU Public Research Funds and the Development of European Drones,” *JCMS: Journal of Common Market Studies* 57, no. 2 (2018), 278-297.

37 European Commission, “EU helps SMEs innovate with dual-use technologies,” October 13, 2017, <https://ec.europa.eu/newsroom/growth/items/605620/en>.

38 European Commission, “EU budget: Stepping up the EU’s role as a security and defence provider,” Strasbourg, June 13, 2018, https://ec-europa-eu/commission/presscorner/detail/en/IP_18_4121.

39 *Ibid.*

40 Directorate General for External Policies, Towards an EU common position on the use of armed drones, 12.

producing drones that are also capable of carrying out tasks on the battlefield, indicating an open point of view towards the use of drones. Given the numerous legal and ethical dilemmas posed by the expanding utilisation of military drones, it is crucial that the European Union steps up and plays a more proactive role in this field. Existing laws are based on conventional warfare, but drones bring new dimensions to the conflict zone that must be considered. As a normative power with a demonstrated ability to shape global norms and regulations, it is vital for the EU to work towards establishing a clear legal framework at the international level, working together with its international partners. It is imperative to establish standards that prevent abuse and prioritise IHL and IHRL.

In order for the EU to have a substantial impact on international standards, it must speak with a unified voice. To achieve this, the European Council must formulate a clear strategy on drones, covering their production, use, and export to third countries. To address the lack of transparency, regulation, and oversight in drone usage, the EU could also establish a monitoring framework that would require Member States to increase the transparency of drone strikes. The emphasis could be on monitoring the selection of targets and ensuring that drone strikes are the most appropriate course of action in a given scenario.

The EU, often seen as a normative power, is able to influence global behaviour and thus has the possibility to set new standards for the use of drones.⁴¹ The question remains if it has the willingness to do so and whether the EU can set global standards when it lacks military strength and a common position.

41 Rok Zupančič and Nina Pejič, *Limits to the European Union's Normative Power in a Post-conflict Society*, (Berlin: Springer, 2018), 9.

Grudgingly and Then Hastily: The Future of European Strategic Autonomy within NATO

by Jakub Knopp¹

A Resurgence of Common Purpose and the Limits of Western Unity

THE 2022 NATO Strategic Concept underlined that independent Ukraine is vital for the stability of the Euro-Atlantic area. Throughout its over 70 years of unprecedented success and 8 strategic guidelines, the alliance has proven adroit at responding to rapid shifts in the international security landscape. By the end of an eventful and groundbreaking year, Secretary General Jens Stoltenberg opined that NATO members were more united than ever in their efforts to support Ukraine and punish Russia for its unlawful act of aggression.² A shared commitment to even the odds in a conflict that Michael Kofman dubbed as “*the climactic war of Soviet succession*”³ is meant to underpin liberal and democratic values that have defined NATO from its very inception. In essence, the war on the Eastern frontier of Europe puts at grave risk the Kantian idea of universal peace on which the project

of European integration was based.⁴ By committing his blunder, Vladimir Putin, who has long been the preeminent opponent of NATO enlargement, made the Russian strategic position the most precarious it has ever been. The discussed NATO accession of formerly non-aligned Finland and Sweden in a strictly geostrategic sense, and notwithstanding other tangible aspects, will add over 1400 km of additional frontage to cover for Russian troops.⁵ In short, President Putin is getting the exact opposite of what he has been advocating for for the last 15 years, since his infamous speech at the Munich Security Conference.⁶ There seems to be no doubt in the European capitals and across the pond that the result of the Russo-Ukrainian war will determine the security of the alliance for decades to come. Despite the enormous degree of humanitarian, financial, and military support, it is still up for debate if and how European unity will manage to hold. With prolonged inflation, looming recession,

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2 Jens Stoltenberg, “Stoltenberg: Putin is getting the opposite of what he wanted — more Nato, not less,” *Financial Times*, December 22, 2022, <https://www.ft.com/content/ccae3362-6e06-4a63-baf9-4922e03d9e43>.

3 Irregular Warfare Podcast, “Political Warfare and the Road to Invasion: Irregular Warfare in Ukraine since 2014,” *Irregular Warfare Podcast*, July 2022, <https://open.spotify.com/episode/6swir6sH5HKgnsd1rtaoyw?si=4bd2ee2ae52f41b8>.

4 Matthias Matthijs, “How Europe Got Its Mojo Back,” *Foreign Affairs*, January 17, 2023, <https://www.foreignaffairs.com/europe/how-europe-got-its-mojo-back>.

5 Jakub Knopp, “Granice neutralności. Finlandia i Szwecja na drodze do NATO,” *Młodzi o Polityce*, June 27, 2022, <https://młodziopolityce.pl/granice-neutralnosci-finlandia-i-szwecja-na-drozdze-do-nato/>.

6 RussianPerspective, “Putin’s famous Munich Speech 2007,” *RussianPerspective*, November 19, 2019, <https://www.youtube.com/watch?v=hQ58Yv6kP44>. During his speech Vladimir Putin voiced his concern about growing American involvement on the international stage. His worry stemmed from a number of colour revolutions in the post-soviet states interpreted as being instigated by Washington. The Russian President opined that the unipolar world order led by the United States is ill-suited for the international system.

and a structural energy crisis bound to persist, the West has not yet experienced the worst of this polycrisis.⁷

After considerable cuts in defence spending after the 2007-08 financial crisis, readiness levels of European NATO allies have dwindled. Though noticeable, the upward trend observed since 2014 did not fill the gaps that have emerged during the decades of the so-called “peace dividend”.⁸ Between 1999 and 2021, the combined spending on defence among EU Member States rose just 20%, compared to 66% by the US, 292% by Russia, and 592% by China.⁹ If it was not for the war in Ukraine, defence budgets would likely have been next in line to take the axe. Public debt across the Western world amassed during the pandemic had already started exerting pressure long before Vladimir Putin decided to invade Ukraine. Sustaining the momentum in defence expenditure observed throughout 2022 will be crucial if Europe is to fill the critical capability gaps and make NATO less dependent upon the United States. Turning those announcements into real budgetary commitments is how Europe can retain its forward thrust, with the German *Zeitenwende* being arguably the most prominent yardstick.

The Western unity, which was on full display throughout 2022, is a testament to Moscow’s wrong assumptions that led to the ill-fated decision to invade Ukraine. It was yet another example in the post-Cold War era of Europe rising to the occasion only when faced with an existential challenge.

This article will outline the current state of the European Union’s efforts at developing more autonomous capabilities and crafting a coherent Common Foreign and Security Policy (CFSP) as well as a Common Security and Defense Policy (CSDP). The focus will be put on determining the areas of neglect, which require concerted European actions. Crucially, the work will provide several proposals to ameliorate the state of the European defence landscape and plug key gaps to improve efficacy. In the later part, the article will lay out steps that the EU could take to shape a more balanced security architecture with a smaller burden put on the United States, to not make it an indispensable military ally. Some practical solutions include issuing more ambitious financial instruments, prioritising domains such as cyber and space, facilitating and promoting industrial cooperation and compartmentalising areas of certain defence and security policies in keeping with regional priorities.

Plugging the Gaps. Strategic Autonomy in Practice

The industrial powerhouses of Europe, with Germany and France at the forefront, should prioritise enhancing the production rates of military equipment and ammunition as well as encouraging cooperation on ambitious joint projects to deliver the highly-touted strategic autonomy. For decades the European military-industrial complex has favoured efficiency over scale. This resulted in the diminishment of stockpiles and slower production processes.

7 Adam Tooze, “Welcome to the world of the polycrisis,” *Financial Times*, October 28, 2022, <https://www.ft.com/content/498398e7-11b1-494b-9cd3-6d669dc3de33>.

8 John Paul Rathbone, “In a reversal of the post-cold war era, Putin’s attack on Ukraine prompts Nato members to spend more on defence,” *Financial Times*, June 7, 2022, <https://www.ft.com/content/689fcff0-ada2-47d2-a576-882cd1af33b4>.

9 Sylvia Pfeifer and Henry Foy, “Europe’s defence sector: will war in Ukraine transform its fortunes?,” *Financial Times*, July 18, 2022, <https://www.ft.com/content/0a917386-7a62-4e4a-9b89-123933f750a6>.

Expanding some of the existing initiatives outside NATO -such as the Permanent Structured Cooperation (PESCO)- and involving American and British companies to provide necessary know-how and resources should form the pillars of the new strategy. Initial breakthroughs have already been made. In November 2022, Joseph Borell confirmed that the UK would join the military mobility project, which involves 24 EU Member States as well as the US, Canada, and Norway.¹⁰

This initiative provides a glimpse at what proper transatlantic cooperation aimed at improving European capabilities could look like. Since 2017, more than 60 projects have been launched under the umbrella of PESCO.¹¹ Despite that impressive number, the majority of initiatives are plagued by cost overruns and delays. Only 26 projects are expected to deliver tangible results by 2025. PESCO reflects the EU's desire to procure enabling capabilities in the "*domains of the future*" such as cyber or space.¹² Even though it is afflicted by many inefficiencies, its focus on critical capability gaps such as armour mobility, air-to-air refuelling, ISR, streamlined C2 and unmanned aerial vehicles (UAVs) make it an important framework upon which to build. Some experts advocate for the European Defence Agency (EDA) to take a more proactive role which could concern managing joint projects, involving both national ministries and defence companies.¹³ It is also worth considering to what degree NATO's defence planning

process (NDPP) and the European Union's capability development process could be merged to facilitate the procurement of key enablers with American or British companies. However, it must be stressed that defence companies continue to greatly influence their countries' policies. Policymakers will face the steep challenge of unifying them under a shared goal, despite the obvious risk factor concerning their profits.

It is often said that the US is reluctant towards the idea of a more autonomous Europe because of its fear of the so-called 3Ds: decoupling, duplication, and discrimination.¹⁴ A recent American National Security Strategy (NSS) and its comprehensive whole-of-government strategy to contain China provides a window of opportunity for Joe Biden's administration to push American companies to shift their focus in trying to bolster the European military-industrial complex, to ensure high-production rates for the US military at home. Furthermore, the recent EU Strategic Compass recognised the US commitment as the pillar of European security, which should allay any concerns. Competition among various defence companies and differing strategic cultures are the main reasons behind fragmented defence procurement within Europe. The willingness to expand the cooperation has stagnated, if not worsened, since 2016. The EU Member States do not see tangible and lasting

10 Isabella Antinozzi, "UK-EU Defence Cooperation and PESCO's Military Mobility Project," *RUSI*, November 17, 2022, <https://www.rusi.org/explore-our-research/publications/commentary/uk-eu-defence-cooperation-and-pescos-military-mobility-project>.

11 Justyna Gotkowska, "A European Defence Union?," *Centre for Eastern Studies*, December 2, 2019, <https://www.osw.waw.pl/en/publikacje/osw-report/2019-12-02/a-european-defence-union>.

12 EEAS, "A Strategic Compass for Security and Defence," *The Diplomatic Service of the European Union*, https://www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-1_en [accessed February 15, 2023].

13 Max Bergmann, Colin Wall, Sean Monaghan and Pierre Morcos, "Transforming European Defence," *Center for Strategic and International Studies*, August 18, 2022, <https://www.csis.org/analysis/transforming-european-defence>.

14 Madeleine Albright, "The Right Balance Will Secure NATO's Future," *Financial Times*, December 7, 1998, https://www.jstor.org/stable/resrep06989.8?seq=1#metadata_info_tab_contents.

benefits from shared multinational projects. Only €140 million were spent in 2020 on joint Research and Development (R&D), and the trends are not encouraging. The main culprit behind these numbers might be a lack of a general direction and the unwillingness of NATO and the EU to create clear areas of responsibility among Member States. Allies need to see that their involvement in these shared enterprises directly contributes to meeting their national objectives. The case of the two 6th generation aircraft projects (FCAS and Tempest) running in parallel shows the degree of fragmentation. Arguably, the largest obstacle to broader cooperation, as evident in those initiatives, stems from hesitancy to distribute intellectual property rights.

A key concern pertains to the procurement of enabling capabilities. Germany and France, with their history of cooperation on joint projects and potent defence sectors, should take the lead in this regard. The politics also seem to provide an opening for more ambitious initiatives. Conviviality and a sense of common purpose has been on display on January 22 during the 60th anniversary of the signing of the Élysée Treaty that cemented relations between erstwhile enemies.¹⁵ Noteworthy examples include the plan to develop a joint MBT platform under the MGCS project.¹⁶ In his recent article in *Foreign Affairs*, seen by some as a political manifesto, Olaf Scholz drew attention to the importance of closer cooperation between Germany and France. In the Chancellor's view, both

Paris and Berlin share the same vision of a strong and sovereign EU, which, among many other areas, should enhance defence and security cooperation.¹⁷

Furthermore, France has the necessary expertise and experience to facilitate the continent-wide shift. From the economic standpoint, these efforts could help stave off layoffs and calm fears of deindustrialisation that arose after the prices of energy skyrocketed during the summer months of 2022. Many prominent German companies, such as BASF, are considering moving their production to more competitive markets, such as China.¹⁸ Some parts of the German industry that normally would go under in the current market could be refocused on the production of arms and military equipment.¹⁹ Naturally, it would require a buy-in from the three parties forming the coalition government, which might prove an arduous task. At the same time, if Germany is willing to spend up to €500 bn to shield its society from the economic fallout of war, one would hope that it will pitch in to strengthen its security and prevent any similar crisis from reemerging. During the Covid crisis, German fiscal hawks relented and agreed on a common EU debt instrument. If Berlin desires to lead the European project, Olaf Scholz's government should garner the political capital to provide funding for common European defence capabilities. Importantly, to ensure success, rationalising the expected spending increases, increasing efficiency,

15 The Economist, "France and Germany stifle their spats to celebrate a 60-year friendship," *The Economist*, January 19, 2023 <https://www.economist.com/europe/2023/01/19/france-and-germany-stifle-their-spat-to-celebrate-a-60-year-friendship>.

16 Armin Dirks, "Main Ground Combat System – The Combined Project Team," *European Security & Defence*, January 17, 2021, <https://euro-sd.com/2021/01/headline/20580/main-ground-combat-system-the-combined-project-team/>.

17 Olaf Scholz, "The Global Zeitenwende," *Foreign Affairs*, January/February 2023, <https://www.foreignaffairs.com/germany/olaf-scholz-global-zeitenwende-how-avoid-new-cold-war>.

18 BASF, "BASF in Greater China", BASF, 2021, <https://www.basf.com/cn/en/media/GC-report/GC-report-2021/basf-in-greater-china.html>.

19 Guy Chazan and Patricia Nilsson, "Germany confronts a broken business model," *Financial Times*, December 6, 2022, <https://www.ft.com/content/50a462b3-0e8b-49e1-873c-9505760d4a66>.

and eliminating redundancies will be necessary. Industrially, Germany ought to leverage its dominant position to create defence-industrial supply chains that act as integrators with suppliers in allied states. Technology transfer and local industrial developments would bolster Europe's resilience and limit the risk of duplication. Fiscal measures such as waiving the value-added tax on defence equipment are another possibility, and some French officials have argued for an EU-wide solution in this regard.²⁰ On another note, Environmental, Social, and Corporate Governance (ESG) rules which obstructed some institutions from financing defence projects in the past should be made away with.²¹

A plan of dividing NATO allies into different sets of tasks due to their capabilities, geography, and national security priorities does not mean that the European NATO alliance should not pursue joint procurement deals or development programs. It is hard to imagine reaching the level of the US military-industrial complex without combining the efforts, unique skill sets, and experiences of all NATO allies. Currently, it takes up to 3 years for a new Leopard tank to leave the factory line. French-made Caesar howitzers require 18 months to produce. Countries with well-established industrial complexes, such as France, Sweden, UK, or Germany, should lead in selected projects that tie other allies in a common goal of developing critical enabling capabilities at a required scale. Some leaders have already provided groundwork upon which to work. In June

of last year, Emmanuel Macron called on domestic defence contractors, including Dassault Aviation and Nexter Systems, to shift to a "*war economy*" footing.²² Such actions point to a renewed sense of urgency among Western policymakers and provide an opportunity to synergise European efforts.

Facilitating the Sea Change. The Pivotal Role of the European Union

As the Euro-centric NATO begins to take shape, the EU will inevitably start to have a larger say in security and defence matters. The Strategic Compass for Security and Defense, released in early 2022, signals a higher level of ambition for the bloc. However, without any significant legislative reforms and policy initiatives, the Compass will remain merely a political statement.²³ By leveraging its strengths, the EU should focus predominantly on the economic and legal aspects of the reform. It should also play a role in fostering integration, mobilising resources, and coordinating investments. By following the American playbook, the EU ought to invest in advanced manufacturing at home and provide subsidies. It could also encourage the creation of industrial alliances or more ambitious forms of integration to further rationalise production processes. If Brussels aims to become truly autonomous in the security sphere, it should move beyond small-scale initiatives and towards issuing common debt instruments to facilitate its ambitious plans.

20 Laurence Boone, "Europe must become a global political power," *Financial Times*, August 25, 2022, <https://www.ft.com/content/dfb90cca-cd02-4add-8378-86fddae2aefc>.

21 Peggy Hollinger, "Ukraine war prompts investor rethink of ESG and the defence sector," *Financial Times*, March 9, 2022, <https://www.ft.com/content/c4dafa6a-2c95-4352-ab88-c4e3cdb60bba>.

22 Leila Abboud, "Emmanuel Macron to boost French defence spending in response to Ukraine war," *Financial Times*, January 20, 2023, <https://www.ft.com/content/36985cf0-715e-46f7-92cb-cce87d7cc8a6>.

23 EEAS, A Strategic Compass for Security and Defence.

The Hamiltonian moment epitomised in the Next Generation EU recovery plan marked an important precedent in the history of European integration.²⁴ The European Commission should consider borrowing money on capital markets to either support collaborative investments or pursue joint procurements on behalf of the Member States. Already existing pool and share concepts such as European Air Transport Command (EATC) could be further expanded in order to fill the most pressing capability gaps. Agreeing on the qualified majority voting in the area of Common Foreign and Security Policy (CFSP) and Common Security and Defense Policy (CSDP) would mark a breakthrough and solidify the EU as an independent global actor. CSDP was launched back in the late 90s. Since then, the progress has been anaemic, mainly due to entrenched opposition from Member States that do not want to forgo their authority defence matters. The Danish decision from last year to join the CSDP was symbolic in essence but did not bring in any substantive changes to the overall picture.²⁵ German Chancellor Olaf Scholz, as one of the most ardent advocates of the reform, believes that, as the EU expands and starts becoming a geopolitical actor, quick decision-making will prove the key to success.²⁶ France's Minister of State for Europe, Laurence Boone, argues that the aim of the European Political Community (EPC) spearheaded last year by President Macron is to ensure stability in Europe through deep cooperation on issues

concerning foreign policy and security.²⁷ Providing a distinctly French outlook, Boone wrote that the EU has to become a proper geopolitical power to stay relevant. Such remarks fit into the broader goal of developing European strategic autonomy. It remains to be seen if the wide spectrum of countries that joined EPC manage to find common ground.

Conclusion

After the February invasion, a lot of comparisons have been made between NATO and Russia in regard to their overall potential, be it demographic, economic, or military. Even before the conflict, in 2021, European allies were spending \$200 billion on defence. What these numbers convey is that, notwithstanding the industrial capacity to produce large quantities of munitions, the West has an overwhelming advantage over Moscow. The NATO alliance, in concert with the EU, will have to embark on a difficult search for an optimum trade-off between readiness, investment, and force sizes. Given that peer adversaries such as Russia and China combined with other asymmetric yet potentially daunting and pressing issues, the strategy should be centred on dividing ample resources and stressing the specialisation of its members to counter a multitude of threats effectively. Ultimately, the members of the European community should strive to make the US an invaluable but not indispensable security ally.

24 Ben Hall, Sam Fleming and Guy Chazan, "Is the Franco-German plan Europe's 'Hamiltonian' moment?," *Financial Times*, May 21, 2020, <https://www.ft.com/content/2735a3f1-bc58-477c-9315-c98129d12852>.

25 The Danish Parliament, "The Danish opt-outs from EU cooperation", *thedanishparliament*, November 25, 2022, <https://www.thedanishparliament.dk/en/eu-information-centre/the-danish-opt-outs-from-eu-cooperation>.

26 Scholz, *The Global Zeitenwende*.

27 Boone, *Europe must become a global political power*.

State Sovereignty and Human Rights: A Balance the ECtHR Has Yet To Appreciate

by Anne Spillane¹

Introduction

In theory, the margin of appreciation (MOA) is a “*doctrine of judicial self-restraint*” developed by the European Court of Human Rights (ECtHR) as an essential safeguard to equipose the efficacy of the European Convention of Human Rights (ECHR) with State sovereignty.² In practice, the MOA is a veil used by the Court to avoid taking a stance on particularly difficult matters. While the subsidiary role of the ECtHR demands a mechanism that provides legal “elbow room” to the 47 signatory states, the MOA fails to achieve an equilibrium between majoritarian democracy and individual interests.³ Nowhere have its shortcomings evoked universal public condemnation than regarding Article 9, the Convention’s guarantee to freedom of religion.⁴

Freedom of Religion: An Unguaranteed Guarantee

Three cases exemplify the Court’s unfortunate tendency to hide behind the doctrine as a means of evading particularly contentious issues.

(i) *Leyla Sahin v Turkey: The Headscarf Ban*

The first case concerned a circular that was issued prohibiting students from wearing Islamic headscarves to courses and tutorials at Istanbul University. Notwithstanding the ban, Ms Sahin, who was in her fifth year of Medicine, continued to attend lectures wearing her headscarf until she was ultimately suspended.⁵ The ECtHR ruled that the limitation on the applicant’s freedom of religion was prescribed by law and pursued the legitimate aim of protecting public morals, order, and safety.⁶ A wide margin of appreciation was afforded as the Court found that, where questions concerning the relationship between the State and religions were at stake, on which opinion could reasonably differ, the role of the national decision-making body had to be given special importance. The ECtHR justified such a wide ambit of discretion on the diversity of approaches taken by national authorities to religious symbols. In a powerful dissent, Judge Tulkens critically questioned the Court’s proof that wearing a headscarf in universities would jeopardise

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² Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Cambridge: Intersentia, 2004), 229.

³ Andreas Follesdal, “Appreciating the Margin of Appreciation,” in *Human Rights: Moral or Political*, ed. Adam Etinson (Oxford: Oxford University Press, 2017), 2.

⁴ ECtHR, *Case of Greece v United Kingdom*, Application Number 176/56, June 2, 1956. Strasbourg.

⁵ ECtHR, *Case of Sahin v Turkey*, Application Number 31961/96, September 25, 2001. Strasbourg.

⁶ *Ibid.*

public safety. Therefore, the wide margin of appreciation was inconsistent with the Convention's objective of protecting human rights. In this case, the Court hides behind the doctrine to support national authorities.⁷

(ii) *S.A.S. v France: The Burqa Ban*

In a similar judgement to *Sahin*, the ECtHR upheld the compatibility of the French law, which prohibited the wearing of burqas in public places.⁸ The Court deemed the ban necessary in a democratic society characterised by pluralism, tolerance, and broadmindedness and endorsed its argued aim to further the goal of "*living together*" in French society.⁹ However, it is striking to note that while the Court declared the ban as being proportionate to its pursued goal, it simultaneously sided with the applicant by acknowledging the upset caused by the law on the Muslim community and the detrimental effect of its implementation on Islamophobia.¹⁰ From this, a condemning inference can be drawn. While the Court generally seeks to grant a wide MOA to strike a balance between competing interests, in *S.A.S.*, it is clear that the Court hides behind the wide ambit of discretion it affords to avoid the conclusion voiced in the dissenting opinions of Judges Nussberger

and Jaderblom, that the abstract idea of "*living together*" is not proportionate to the burqa ban.¹¹

(iii) *Lautsi v Italy: Religious Symbols in School Classrooms*

The final case concerns a complaint of infringement of the applicant's Article 9 rights following a state school's refusal to remove the large crucifixes that were displayed in each classroom of the institution.¹² The ECtHR once again allowed a wide MOA to national authorities in deciding matters concerning the freedom of religion. It classified the crucifix as a "*passive symbol*" rather than a form of indoctrination that would fall outside the scope of the margin. Such reasoning is blatantly inconsistent with the Court's approach to wearing an Islamic headscarf. Through this judgement, the ECtHR gives particular preference to Christianity and undermines the very ideology they previously pledged to protect, pluralism.¹³ The dissenting opinions of Judges Malinverni and Kalaydjieva warn that "*while the doctrine of the MOA may be useful, it's a tool that needs to be handled with care*".¹⁴ *Lautsi* forces us to question whether the margin is no more than a mere formality employed as a means of justifying a totally arbitrary treatment of certain religious symbols.¹⁵

7 Lutfi Chakim, "The Margin of Appreciation and Freedom of Religion: Assessing Standards of the European Court of Human Rights," *The International Journal of Human Rights* 24, No. 6 (2020): 851.

8 ECtHR, *Case of S.A.S. v France*, Application Number 43835/11, July 1, 2014. Strasbourg.

9 *Ibid*, par. 153.

10 *Ibid*, par. 155.

11 *Ibid*, dissenting opinion of Judges Nussberger and Jaderblom, par. 3-4.

12 ECtHR, *Case of Lautsi and Others v Italy*, Application Number 30814/06, March 18, 2011. Strasbourg.

13 Chakim, *The Margin of Appreciation and Freedom of Religion: Assessing Standards of the European Court of Human Rights*, 857.

14 ECtHR, *Case of Lautsi and Others v Italy*, dissenting opinion of Judges Malinverni and Kalaydjieva, par. 1.

15 Daniel Capodiferro Cubero, "The Position of Children's Freedom of Thought and Religion in the Rulings of the European Court of Human Rights on the Case *Lautsi V. Italy*," *The Age of Human Rights Journal*, no. 75 (2013).

The ECtHR and the Margin of Appreciation

(i) The Vague Degree of European Supervision

From examining the above jurisprudence, it must be argued that the MOA is an ill-defined interpretative mechanism utilised by the Court when affording a measure of deference to the decisions of contracting States.¹⁶ As the doctrine is not expressly rooted in the text of the Convention, the measure of deference allowed tends to be subjective, which consequentially infuses the practice of the ECtHR with relativist and malleable standards.¹⁷ At the heart of the doctrine's application exists a great legal uncertainty as to the width of margin the Court will consider appropriate in any given case.¹⁸ It has been well established in the case law that the MOA is an instrument subjected to European supervision; signatory States are not granted an unlimited power of discretion. As emphasised in *Handyside v United Kingdom*, "such discretion concerns both the aim of the measure challenged and its necessity".¹⁹ In the cases of *Sahin, S.A.S.*, and *Lautsi*, it was held that the use of the MOA "goes hand in hand with European supervision embracing both the law and the decision applying it".²⁰ Such a sentiment denotes the theoretical importance of European supervision in deciphering the limitations of the doctrine. However, the

practical realities of the MOA demonstrate that there is no clear standard between its width and the degree of European supervision. According to Kratochvil, in order for European supervision to be applied as a substantial, transparent factor, the Court must provide certain criteria that determine the width of the margin.²¹ Until then, the ECtHR's reference to European supervision as a limiting agent does little to define the contours of the doctrine and simply serves to compliment the Court's subjective arguments. The vague degree of European supervision is particularly proven in the *Lautsi* case, where the ECtHR acknowledges that the MOA is confined by the boundaries of this limitation yet provides no indication of the extent of its confinement, "according to the case law, the margin of appreciation is subject to European supervision. The Court's task then consists in ensuring that the limit on the margin of appreciation has not been overstepped".²²

Thus, the objection emerges that the degree of European Supervision that limits the intensity of the ECtHR's review of national measures is intolerably vague. Such a finding upholds the view that the use of the MOA in case law is clearly ill-defined. It is submitted that perhaps the Court maintains this vague outline of the MOA throughout its case law so that it may effectively hide its controversial decisions behind it.

16 Gary Born, Danielle Morris and Stephanie Forrest, "A Margin of Appreciation" Appreciating its Irrelevance in International Law," *Harvard International Law Journal* 61, no. 1 (2020): 65-134, 66.

17 Petr Agha, *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts* (London: Bloomsbury, 2017), 3.

18 Michael R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights," *The International and Comparative Law Quarterly* 48, no. 3 (1999): 638-650, 641.

19 ECtHR, *Case of Handyside v United Kingdom*, Application Number 5493/72, December 7, 1976. Strasbourg.

20 ECtHR, *Case of Sahin v Turkey*.

21 Jan Kratochil, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 29, no. 3 (2011): 345.

22 ECtHR, *Case of Lautsi and Others v Italy*, dissenting opinion of Judges Malinverni and Kalaydjieva, par. 48.

(ii) The Concerning Malleability of the Doctrine to European Consensus

Another issue that arises when examining the application of the MOA in case law is the concerning malleability of the doctrine to the European consensus test. The so-called “European consensus” undoubtedly plays a prominent role as an intensity-determining factor in the MOA jurisprudence.²³ In the judgments of *Sahin, S.A.S.*, and *Lautsi*, one of the reasons offered by the ECtHR in granting a wide margin of appreciation to the national authorities was due to the absence of European consensus regarding Religion-State relations. The Court established in the *Lautsi* case that the State was afforded a wide ambit of discretion because of the lack of European consensus on the presence of religious symbols in State schools.²⁴ Similarly, in *Sahin* and *S.A.S.*, the Strasbourg body found that the respondent States were permitted a wide margin of appreciation due to the absence of European consensus on wearing religious dress.²⁵ The importance of the consensus test is cast starkly into focus by contrasting the “wider” MOA awarded by the Court in cases involving freedom of religion with the “narrower” MOA in cases involving the protection of sexuality.²⁶ For example, in *Dudgeon v UK*, the ECtHR granted a strict MOA to Northern Ireland’s legislation upon identifying that there was a shifting European consensus towards homosexuality amongst contracting

States, and thus the criminalisation of such acts constituted a breach of Article 8 (right to respect for private and family life, home and correspondence).²⁷

Ultimately, it may be surmised that where there is European consensus, the Court will be more inclined to limit the margin of appreciation. Conversely, where there is little or no consensus, the Court will be more inclined to defer greater authority to national jurisprudence. While the European consensus test allows necessary room for the ECtHR to provide guidance to States on matters of Religion-State relations without conforming to a universal approach, there are several problems associated with the use of this condition as a means of regulating the MOA.²⁸ Firstly, the consensus practice is vague. As attested to in *Cossey v UK*,²⁹ the concept is incredibly ambiguous, which leads to many contested applications where judges disagree amongst themselves on whether there is a development among States towards a common approach.³⁰ Furthermore, it remains gravely unclear to what exact degree the lack of a universal European procedure can be cited as a cause for applying a wide margin.³¹

As well as being a difficult yardstick to find and weigh, the Court has evoked much criticism for using the consensus test as a standard to reduce the protection of fundamental rights in signatory States. Integral human rights, such as Ms Sahin’s

23 Agha, Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts, 24.

24 ECtHR, *Case of Lautsi and Others v Italy*.

25 ECtHR, *Case of Sahin v Turkey*.

26 Born, Morris and Forrest, “A Margin of Appreciation” Appreciating its Irrelevance in International Law, 89.

27 ECtHR, *Case of Dudgeon v UK*, Application Number 752/76, February 24, 1983. Strasbourg.

28 Chakim, The Margin of Appreciation and Freedom of Religion: Assessing Standards of the European Court of Human Rights, 859.

29 ECtHR, *Case of Cossey v UK*, Application Number 1043/84, September 27, 1990. Strasbourg.

30 Andreas Follesdal, (n 2), 15.

31 Marise Iglesias Vila, “A Margin of Appreciation Doctrine for the European Convention on Human Rights,” *International Journal of Constitutional Law*, Volume 15, No. 2 (2017): 393-413, 408.

ability to freely manifest her religion through wearing a headscarf, should not depend on what has been decided or legislated by the majority. As stated by Eva Brems, *"the Court leaves itself vulnerable to the charge that it manipulates the consensus inquiry to achieve an interpretation of the Convention that it finds ideologically pleasing"*.³² In relying on the consensus test, the Court fails in its primary mission as guardian of the Convention's most fundamental objective: the protection of human rights. Thus, the malleability of the MOA to the imprecise European consensus test is deeply concerning. This intensity-determining factor immensely contributes to the legal uncertainty surrounding what the MOA doctrine entails. Once again, it is argued that the Court can be seen hiding behind this lack of clarity to obscure its reluctance or failure to decide particularly difficult issues in contested areas. Ultimately, the MOA must be better defined.

(iii) The Inconsistent Application of the Doctrine

Undoubtedly, variation in the intensity of review by a Court of a pluralist and diverse legal order is a necessary reality. As repeatedly asserted by the ECtHR, the Convention is a *"living instrument"* that must be interpreted considering the evolving European legal tradition.³³ However, it is submitted that the MOA is not an adequate response to such a necessity. With its content and rationale varying significantly from case to case,

the jurisprudence of the Strasbourg Court leaves little question that the doctrine has been erratically applied.³⁴ In the absence of clear defining standards, the interpretative instrument does not articulate deference to national authorities but rather produces unpredictable results that undermine the very purpose of the ECHR.³⁵ As one observer concluded, *"[o]n occasion the Court sums up the various considerations that would have to be addressed in deciding whether a given restriction is needed in the particular circumstances and then moves on to announcing that in view of the existence of these various considerations, the decision of the national authorities was within the margin of appreciation allowed to the State according to whatever cocktail of width factors the Court had decided was appropriate"*.³⁶

Such a sentiment is proven to be true in the realm of Article 9 case law. As discussed, in the decisions of *Sahin, S.A.S.*, and *Lautsi*, the Court granted a wide ambit of discretion to contracting States in their interpretation of the freedom of religion. Yet in the subsequent case of *Eweida and Others v United Kingdom*, the MOA was applied in a manner that is inconsistent with the previous judgements.³⁷ *Eweida and Others v United Kingdom* incorporates the complaints of four applicants whose various employers prohibited them from practising their religious beliefs in the workplace.³⁸ In relation to the proceedings against British Airways, the ECtHR surprisingly applied a narrow MOA to the airline's ban on

32 Eva Brems, "The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights" *Heidelberg Journal of International Law*, No. 56 (1996): 56.

33 Born, Morris and Forrest, "A Margin of Appreciation" *Appreciating its Irrelevance in International Law*, 88.

34 *Ibid*, 79.

35 *Ibid*, 108.

36 Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 641.

37 ECtHR, *Case of Eweida and Others v United Kingdom*, Application Number 48420/10, January 15, 2013. Strasbourg.

38 *Ibid*.

religious clothing and accessories from staff uniforms. Rather than siding with the State, as it has done in the Islamic headscarf case law, the Strasbourg Court arbitrarily found that Eweida's cross was "*discreet and cannot have detracted from her professional appearance*".³⁹ While the Court distinguished Eweida's case from the other three complaints in an attempt to reassert the wide MOA afforded to States in freedom of religion claims, as reasoned in dissenting opinions of Judges Bratza and Bjorgvinsson, the fact that British Airways was "*able ultimately to amend the uniform code to allow for the visible wearing of religious symbols demonstrates that the earlier prohibition was not of crucial importance*".⁴⁰

Thus, this decision exemplifies the inconsistent and opaque application of a doctrine whose legitimacy and usefulness are to be questioned. While the variability of the ECtHR's decisions can be understood considering the interpretation of the Convention as a living document, the failure of the ECtHR's jurisprudence to identify an analytically consistent approach to the MOA is inexcusable. The dark cloud of legal uncertainty that swarms over the application of the doctrine as a result of the shifting limitations that it constructs in any given case without adequate explanation ultimately gives rise to the argument that the MOA rests on the Court's subjective discretion.⁴¹ In the words of one sympathetic commentator, "*in spite of the mountain of jurisprudence, the concept's most striking characteristic*

remains its casuistic, uneven, and largely unpredictable nature".⁴² It is argued that the erratic application of the doctrine makes the outcome of human rights claims uncertain and unpredictable in ECtHR proceedings.

(iv) Failure to Promote Human Rights

The final criticism that flows from the analysis of the MOA in case law is that the doctrine does not achieve the balance between domestic interests and individuals' rights. It is submitted that the interpretative mechanism is overly deferential to the procedures of national authorities and, consequently, ineffectively protective of international human rights, particularly those of minorities.⁴³ As observed by one commentator, "*to grant margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities*".⁴⁴

The decisions of *Sahin*, *S.A.S.*, and *Lautsi* are testimony to the ECtHR's ultimate failure to secure the objective of the Convention. Particularly in the case of *Sahin*, the MOA granted to the concerned State was far too generous for a myriad of reasons. Perhaps the Court under-analysed the Turkish judiciary's interpretation of secularism, as stated by Judge Tulkens. Perhaps the Court took an excessively narrow approach to the right to freedom of religion. Perhaps the Court over-emphasised the lack of

39 *Ibid.*

40 *Ibid.*, par. 5.

41 Born, Morris and Forrest, "A Margin of Appreciation" Appreciating its Irrelevance in International Law, 108.

42 Steven Greer, "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights" *Human Rights Files*, no. 17 (2000): 5.

43 Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," *New York Journal of International Law and Politics* 31 (1999): 850.

44 *Ibid.*

European consensus in relation to the headscarf ban. Ultimately, the application of vague variables to justify an excessively wide MOA is directly related to the ECtHR's need to make a hard choice when grappling with the complexities of a case.⁴⁵

The MAO is a tool that serves as an unacceptable apology on behalf of the Court for yielding fundamental human rights to the wishes of the governments in controversial issues. Such a subjective, uncertain, and arbitrary discretion afforded to States by the legal concept entails a failure of the ECHR to protect human rights. Thus, through the guise of the MAO doctrine, the Court *"stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities"*.⁴⁶

Conclusion

The MOA is a doctrine that is engulfed by legal uncertainty. The interpretative mechanism developed by the ECtHR's jurisprudence does not adequately reconcile the need to promote State sovereignty with the need to protect human rights. The excessive deference frequently awarded by the margin to contracting States leads this article to share the view of dissenting judges and commentators alike who urge the Court to discard the margin of appreciation in

favour of an objective analysis of state responsibility under particular provisions of the ECHR.⁴⁷ As asserted by Gay Born, the concept of the MOA is the legal equivalent of a hammer.⁴⁸ The vague doctrine effectively converts *"all issues into nails, subject to the same treatment and standards, rather than considering their specific context, including the text, objects, and purposes of applicable treaty provisions and principles of international law"*.⁴⁹ Ultimately, this hammer is not justified but rather contrary to the very existence of the European Convention on Human Rights.

⁴⁵ Agha, Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts, 6.

⁴⁶ Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 853.

⁴⁷ Born, Morris and Forrest, "A Margin of Appreciation" Appreciating its Irrelevance in International Law, 91

⁴⁸ *Ibid*, 133.

⁴⁹ *Ibid*.

The Right of Access to a Lawyer In Pre-Trial Proceedings: A Janus-faced System of Protection In Europe?

by Owen Forde¹

Overview

THE right of access to a lawyer in pre-trial proceedings ("Right") is a "fundamental feature of a fair trial",² deriving its scope and content from "a [notably] complex web of EU and Council of Europe instruments",³ namely the Charter of Fundamental Rights of the European Union ("Charter"), the European Convention on Human Rights ("Convention") and the Directive 2013/48/EU⁴ ("Directive").

To guarantee a Right that is both "practical and effective",⁵ the suspect must be safeguarded from self-incrimination and, correspondingly, must be able to exercise their right to silence. Falling short of this, the right becomes "decorative, like a vase on the table"⁶ -equality of arms is impaired, exacerbating the already-bifurcated structure of proceedings and, in certain cases, fomenting in, *inter alia*, miscarriages of justice and systematic violations of the defence's rights.⁷

The strife towards the "concretisation of criminal defence rights"⁸ in Europe has repeatedly evidenced dialogue -whether it be in the form of deference (interdependence) or lip service (agnosticism)- between the ECtHR and the EU legislature. This exchange has proven conducive to the evolution (or destruction) of the Right in manifold ways, and it is against this background that this essay addresses the following inquiry:

To what degree is Directive 2013/48/EU concurrent with the Strasbourg standard of protection vis-à-vis the right of access to a lawyer, and what are the legal implications of such?

Foundations: The ECtHR's Interpretation of Article 6 ECHR

(i) **Salduz: The Sparkplug for EU Legislative Reform**

In its seminal ruling in *Salduz*,⁹ the ECtHR held that Article 6(3) of the Convention

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² ECtHR, *Beuze v Belgium*, Application No. 71409/10, November 9, 2018. Strasbourg, par 123.

³ Tawhida Ahmed, "The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?," in *Adjudicating International Human Rights*, ed. James A. Green and Christopher P.M. Waters (BRILL, 2015), 100.

⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, November 6, 2013, 1-12 (henceforth 'Directive').

⁵ ECtHR, *Airey v Ireland*, Application No. 6289/73, October 9, 1979. Strasbourg, par 24.

⁶ Ed Cape and Jacqueline Hodgson, "The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice," *New Journal of European Criminal Law* 5, no 4 (2014): 450-479, 476.

⁷ Anneli Soo, "Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? *Ibrahim and the others v. the UK*," *European Journal of Crime, Criminal Law and Criminal Justice* 25, no 4 (2017): 327-346, 341.

⁸ Alex Tinsley, "Protecting Criminal Defence Rights Through EU Law: Opportunities and Challenges," *New Journal of European Criminal Law* 4, no 4 (2017): 461-480, 461.

⁹ ECtHR, *Salduz v Turkey*, Application No. 36391/02, November 27, 2008. Strasbourg.

encompasses a right of access to legal assistance “from the first interrogation”.¹⁰ The corollary stemming from this *dictum*, namely that “[t]he rights of the defence will (...) be irretrievably prejudiced when incriminating statements made (...) without access to a lawyer are used for a conviction”,¹¹ is more ponderous still. This protection comprised an “almost absolute right”¹² married with an “automatic exclusionary test”¹³ for unlawfully obtained evidence.

(ii) One Step Forward, Two Steps Back

Salduz subsequently “served as the detonator”¹⁴ for wide-reaching and comprehensive law reform. Notwithstanding the resultant epidemic-like fortification of defence rights, the introduction of Directive 2013/49/EU has had a significant ripple effect on Strasbourg, provoking a one-step forward, two-steps back narrative.

The ECtHR in *Ibrahim*¹⁵ uprooted the quasi-exclusionary rule and unearthed a new “proceedings as a whole” test. In a “two-stage test”¹⁶ of analysis, the Strasbourg court now considers firstly whether there are “compelling reasons for a restriction”,¹⁷ and secondly, whether or not this restriction adversely impacts the “overall fairness of

the proceedings”.¹⁸ The second stage of analysis calls for the consideration of a non-exhaustive list of criteria.¹⁹ This approach, according to the presiding judges, did not conflict with or countermand the principles designated in *Salduz*, but rather departed from these principles “under the guise of interpreting it”.²⁰ Whether this was a direct, or at least ancillary effect, of the Directive is up for debate, given the ECtHR, interestingly, afforded deference to the same in *Ibrahim*,²¹ and similarly, liberally cited from the Directive again in *Beuze*.²² Are *Ibrahim* and *Beuze*, albeit they judgments of the Strasbourg Court, by-products of the Directive?

Directive 2013/48/EU: Duplicating or Deviating from the ECHR Standard?

Directive 2013/48/EU concentrated on strengthening, not diminishing, the *Salduz* principles by “clarifying them to ensure their practical effectiveness (...) applying not a restrictive but an expansionist interpretation of the Court’s case-law”.²³ This is elucidated in the Directive itself, which stipulates from the outset that neither the Convention nor the International Covenant on Civil and Political Rights (ICCPR) “provide a sufficient degree of trust”.²⁴ The Directive –a “sparse and loosely constructed skeleton”²⁵ drafted pre-*Ibrahim*- has afforded equal, in parts

10 *Ibid.*, par 5.

11 *Ibid.*

12 Soo, Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? *Ibrahim and the others v. the UK*, 333.

13 *Ibid.*, 335.

14 Dimitrios Giannouloupoulos, “Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries,” *Human Rights Law Review* 16, no 1 (2016): 103-129, 113.

15 ECtHR, *Ibrahim and Others v United Kingdom*, Application Nos. 50541/08, 50571/08, 50573/08 and 40351/09, September 13, 2016. Strasbourg.

16 Ergul Celiksoy, “Overruling ‘the *Salduz* Doctrine’ in *Beuze v Belgium*: The ECtHR’s further retreat from the *Salduz* principles on the right to access to lawyer,” *New Journal of European Criminal Law* 10, no 4 (2019): 342-362.

17 *Ibid.*, 343.

18 *Ibid.*

19 ECtHR, *Ibrahim and Others v United Kingdom*, par 274.

20 *Ibid.*, Joint Partly Dissenting, Partly Concurring Opinion of Judges Sajó and Laffranque, par 3.

21 ECtHR, *Ibrahim and Others v United Kingdom*, par 261.

22 ECtHR, *Beuze v Belgium*, par 79-86.

23 Nasiya Daminova, “The European Court of Human Rights on the ‘Access to a Lawyer’ Directive 2013/48/EU: the Quest for a Coherent Application of the Right to a Legal Assistance in Europe?,” *European Criminal Law Review* 11, no 2 (2021): 211-241, 233.

24 Directive 2013/48/EU, Recital 5.

25 See *Customs and Excise Commissioners v Apse Samex* [1983] 1 All ER 1042, Bingham J.

higher (e.g. formulation of the Right in EAW proceedings),²⁶ but also lower levels of protection compared with the Convention norm. These points of divergence and convergence produce vacillating legal ramifications, and consequently, have led to the existence of a *de facto* Janus-faced system of protection in Europe. To demonstrate this, the discussion in the forthcoming chapter is confined to providing a comparative analysis between the Directive and ECtHR case law.

(i) Timing and Scope

The Right under Article 6 ECHR initiates “*from the moment he [was] taken into police custody or pre-trial detention*”.²⁷ This principle is echoed in Article 3(1), read in conjunction with Article 2(1) of the Directive, which stipulates that “*Suspects or accused persons shall have access [...] without undue delay*”²⁸ when deprived of their liberty. While Anagnostopoulos contends the Directive duplicates the standard set by the ECtHR,²⁹ others argue Article 3 is “*too vague and leaves room for abuse*”³⁰ and, thus, deviates from the ECHR norm.

Concerns emerge as to whether the Directive falls afoul of the ECHR standard and, thus, violates Article 52(3) of the Charter (*contra legem*). It manipulates -not reiterates- the initial *Salduz* principles. Despite this, the EU legislature’s deference

towards Strasbourg, exemplified best in the Recitals of the Directive, may constitute a get-out-of-jail-free card as such, the EU legislature leaving the door to conform interpretation with Strasbourg case law ajar.³¹ Is the EU legislature employing the Convention as a scapegoat, rather than an interpretive tool, in setting its own inadequate standards of protection?

(ii) Derogations

Directive 2013/48/EU mitigates the positive obligation borne by Member States through derogations, circumscribed by Articles 3(5) and (6) and qualified by Article 8, which demarcates the related conditions. Member States can, “*in exceptional circumstances*”,³² derogate from the Right if one of the “*compelling reasons*” in the ensuing subparagraphs are satisfied, namely (a) “*to avert serious adverse consequences for the life, liberty or physical integrity of a person*”,³³ or (b) in circumstances where “*immediate action by the investigating authorities is imperative to prevent substantial jeopardy*”.³⁴ The text, instead of portraying the defence lawyer as someone who “*contribute[s] his part to getting the truth on the table in accordance with the law*”,³⁵ adopts the (often misguided) perspective of the lawyer as a roadblock to a successful criminal investigation.

Equally inauspicious is Article 8(3) of the Directive which allows the decision as to

26 Directive 2013/48/EU, Article 10.

27 ECtHR, *Dayanan v Turkey*, Application No. 7377/03, October 13, 2009. Strasbourg, par 31.

28 Directive 2013/48/EU, Article 3(1).

29 Ilias Anagnostopoulos, “The Right of Access to a Lawyer in Europe: A Long Road Ahead?,” *European Criminal Law Review* 4, no 1 (2014): 3-18, 10.

30 Elisavet Symeonidou-Kastanidou, “The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation,” *European Criminal Law Review* 5, no 1 (2013): 68-85, 73.

31 Directive 2013/48/EU, Recital 54.

32 *Ibid*, Articles 3(5) and (6).

33 *Ibid*, Article 3(6a).

34 *Ibid*, Article 3(6b).

35 Anagnostopoulos, “The Right of Access to a Lawyer in Europe: A Long Road Ahead?,” 10.

temporary derogations to be taken “by another competent authority on condition that the decision can be submitted to judicial review”.³⁶ Unlike its Strasbourg counterpart, which permits only the judicial authority to assess whether or not the derogation from the Right is justified,³⁷ the Directive empowers executive authorities, such as police officers, to debar early access to legal aid. This provision is inherently vague, courtesy of its blatant lack of both definition and further explanation, and consequently, enforcement authorities are implicitly encouraged to capitalise on detentional periods, using rights-avoidance strategies where the lawyer is not present, to secure a conviction.³⁸

(iii) Remedies

When the Right has been unjustifiably violated, the accused person is prone to coercion and, thus, predisposed to self-incriminate through the production of (falsified) confessions. To strike a balance, therefore, the person whose rights have been wrongfully contravened must be provided a remedy *restitutio ad integrum*, i.e. the evidence obtained as a consequence of the violation must be excluded, and the suspect must be returned to the pre-violation position: “a

right is only as strong as the remedy to its violation”.³⁹ The Strasbourg case law is built on this bedrock.⁴⁰

Although the draft Directive included a similar exclusionary rule⁴¹ to that espoused in *Salduz*, Article 12 merely goes as far as guaranteeing “an effective remedy under national law” to ensure that “the fairness of the proceedings are respected”.⁴² Although Recital 50 and the explanatory memorandum of the Directive explicitly reference the exclusionary rule in *Salduz*,⁴³ the operation of Article 12 –an undeniable hermeneutic floor– is subject (once more) to Member State discretion –an inalienable but unavoidable Achilles heel in the legislation given the choice of legal instrument. The *ab initio* interpretation of “effective remedy” leads to aberration –transposition by Member States presents a “real risk of keeping [...] different rules”.⁴⁴ Ličková *et al.* corroborate this.⁴⁵ By the same token, Article 12 only accounts for a remedy in circumstances where incriminating statements are made in contravention of Article 3. For non-incriminating evidence, *per contra*, the Directive is silent. This completely leaves in limbo the scope of applicability of the rule.⁴⁶

36 Directive 2013/48/EU, Article 8(3).

37 ECtHR, *Beuze v Belgium*, par 23.

38 Anagnostopoulos, *The Right of Access to a Lawyer in Europe: A Long Road Ahead?*, 13.

39 Soo, *Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK*, 339.

40 ECtHR, *Panovits v Cyprus*, Application No. 4268/04, March 11, 2009. Strasbourg. Joint Concurring Opinion of Judges Spielman and Jebens, see par 3-19.

41 Draft Article 13(2).

42 Directive 2013/48/EU, Article 12.

43 Soo, *Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK*, 337.

44 Symeonidou-Kastanidou, *The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation*, 85.

45 Magdalena Ličková and Joan S. Mullor, “Limitations to access to justice and Article 47 of the Charter: the right to be advised, defended and represented,” in *The Practice of Judicial Interaction in the Field of Fundamental Rights*, eds. Federica Casarosa and Madalina Moraru (Edward Elgar Publishing, 2022), 146- 164, 161.

46 *Ibid.*

Cognisant of the aforementioned shortcomings, a strong case can be made to support the existence of “a clearer legal framework”⁴⁷ under the Convention. The EU legislature, arguably, has abdicated its mission to “upgrade (or at least retain)”⁴⁸ the defence’s Right in this respect. The rationale for this, however, may be entrenched in the anatomy of the Directive itself – a “compromise text”⁴⁹ accosting *sui generis* political and procedural idiosyncrasies.

Legal Overtones: The Good, the Bad, the Ugly

One was reminded by *Beuze* that “a garden that is often replanted will not bear fruit”.⁵⁰ Is the introduction of the Directive reflective in this instance? Perhaps the EU has earned acclaim by giving legislative expression to Articles 47 and 48(2) of the Charter: a “human rights gap”⁵¹ has been filled. Moreover, the promulgation of the Directive has established a multi-layered accountability mechanism: the Commission embraces its role as guardian of EU law, ensuring Member States adhere to the standards set and judgments executed. This is particularly benign against the absence of any executive powers for the ECtHR under the Convention regime.⁵² As Ahmed postulates: “EU law [...] offers better opportunities for the protection of

ECHR rights [...] than the ECtHR does itself for its own instrument”.⁵³ Nonetheless, top-down monitoring by the Commission “should not [...] be seen as a panacea”.⁵⁴

The introduction of the Directive has deteriorated, arguably demolished, the ECHR level of protection in place post-*Salduz*. In this light, the Directive cannot be seen as upgrading or upholding the ECHR standard, but rather undermining it. In corroboration, the Directive has contributed to confusion and country-specific differentiation. *Doyle*⁵⁵ is a *prima facie* illustration, where despite being denied the presence of his solicitor during questioning, during which Mr. Doyle confessed to murder “following clear pressure and intimidation by police officers”,⁵⁶ the ECtHR found no violation of Article 6 ECHR, justifying their finding under the two-stage test of analysis developed earlier in *Ibrahim* – a legal test adopted pursuant to the entry into force of the Directive. Likewise, this paradigmatic shift in Strasbourg is acutely oppressive on non-EU Convention signatories, which are “being encouraged to follow the standard [...] stemming from the EU legal order – which these states preferred not to join”⁵⁷ but also for “EU Member States that already adopted [...] laws transposing the (*Salduz*-inspired) Directive”.⁵⁸ This backdrop

47 Symeonidou-Kastanidou, The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation, 84.

48 Daminova, The European Court of Human Rights on the ‘Access to a Lawyer’ Directive 2013/48/EU: the Quest for a Coherent Application of the Right to a Legal Assistance in Europe?, 228.

49 *Ibid.*, 70.

50 ECtHR, *Beuze v Belgium*, Joint Concurring Opinion of Judges Yudkivska, Vucinic, Turkovic and Huseynov, par 28.

51 Zlata Đurđević, “The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order,” in *European Criminal Procedure Law in Service of the Protection of European Union Financial Interests: State of Play and Challenges*, eds. Zlata Đurđević and Elizabeta Ivičević Karas (Zagreb: Croatian Association of European Criminal Law, 2016): 9-23, 9.

52 Council of Europe, European Convention on Human Rights, Article 46.

53 Ahmed, The EU’s Protection of ECHR Standards: More Protective than the Bosphorus Legacy?, 118.

54 Tinsley, Protecting Criminal Defence Rights Through EU Law: Opportunities and Challenges, 469.

55 Irish Supreme Court, *DPP v Doyle* [2017] IESC 1, January 18, 2017; ECtHR, *Doyle v Ireland*, Application No. 51979/17, May 23, 2019, Strasbourg.

56 Scottish Legal News, “ECtHR: Irish man refused access to a solicitor during questioning did not experience rights violation,” *Scottish Legal News*, May 23, 2019, <https://www.scottishlegal.com/articles/ecthr-man-refused-access-to-solicitor-during-questioning-suffered-no-violation-of-his-right-to-a-fair-trial>.

57 Daminova, The European Court of Human Rights on the ‘Access to a Lawyer’ Directive 2013/48/EU: the Quest for a Coherent Application of the Right to a Legal Assistance in Europe?, 241.

58 *Ibid.*

of legal uncertainty sends the principle of European consensus spinning out of kilter.

Conclusion

How the standards of protection under the Directive and the Convention coincide, to this day, remains a contentious issue. The “*cross-fertilisation*” between the two regimes “*has proven to work in both directions*”.⁵⁹ Although *Salduz* functioned as a catalyst for the Directive, the standard of protection purported within was not entirely what was expected; achieving a high degree of harmonisation came at the expense of falling short in upgrading (or at least maintaining)⁶⁰ the original *Salduz* guarantees. In the aftermath, the introduction of the Directive proved to have major consequences for Strasbourg and its High Contracting Parties; the ECtHR, over time, destroyed the foundational principles applicable to Article 6 ECHR, and replaced them with new (weaker) guarantees, and lesser obligations, birthed through interpretation, closely aligned to the Directive. The quest toward a coherent (instead of a Janus-faced) protection regime in Europe is by no means complete.

59 Ličková and Mullor, Limitations to access to justice and Article 47 of the Charter: the right to be advised, defended and represented, 162.

60 Daminova, The European Court of Human Rights on the ‘Access to a Lawyer’ Directive 2013/48/EU: the Quest for a Coherent Application of the Right to a Legal Assistance in Europe?, 228.

Governing Europe from a Distance: The French National Coordination System of EU Policy

by Charles Martinet¹

Introduction

"French positions in all the institutions of the European Union must be expressed with clarity and the greatest possible coherence. [...] The unity of French positions is a necessary condition of the efficiency of our action".²

Na few words, Édouard Balladur, French Prime Minister from 1993 to 1995, expressed France's attachment to defending its interests at the European level with a single voice. Indeed, bargaining success depends on the formation of clear and coherent preferences, with *"well-reasoned arguments"*,³ red lines, and room for compromise. It is a necessary aspect of defending one's priorities within the various formations of the Council of the EU, an institution representing the member states, where diplomats and national Ministers negotiate EU policy decisions. A

country must know the priorities it wants to defend.

Given the dominant role of member states in the European legislative system and the need for them to defend what they perceive to be their national interest, coordination is at the centre of European public policy-making. As European legislative work is ultimately a work of compromise, member states are forced to form coalitions; their capacity to carry out this task *"is dependent upon [...] the efficiency of their coordination processes, and in particular the reception of timely and clear positions from the capital"*,⁴ which can then be acted upon by the Permanent Representation.

Today, coordination⁵ is all the more necessary as *"resources are scarce, issues are becoming increasingly cross-cutting, and policies more inter-dependent"*.⁶ Coupled with an increasing decentralisation of national governance, the complexity of

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2 Original: *"Les positions françaises dans toutes les instances de l'Union européenne doivent donc être exprimées avec clarté et dans la plus grande cohérence. [...] L'unité des positions françaises est une condition de l'efficacité de notre action."* Premier Ministre, "Circulaire du 21 mars 1994 relative aux relations entre les administrations françaises et les institutions de l'Union européenne", Paris, March 21, 1994, 1, https://sgae.gouv.fr/files/live/sites/SGAE/files/Contributed/SGAE/01_SGAE/documents/19940321_Circulaire_PM_relations_FR_UE.pdf.

3 Diana Panke, "Developing Good Instructions in No Time – An Impossibility? Comparing Domestic Coordination Practices for EU Policies of 19 Small States," *West European Politics* 33, no 4 (2010): 770-790.

4 Clément Perarnaud, "Power to the connected? Determinants of member states' bargaining success in the making of the EU Digital Single Market," *Journal of Cyber Policy* 7, no 1 (2022): 55-71.

5 In organisation theory, coordination refers to *"the modalities of division of labor and the alignment of organizational goals with a functional requirement of convergence or efficiency"*. Original: *"les modalités de division du travail et de mise en cohérence des buts de l'organisation avec une exigence fonctionnelle de convergence ou d'efficacité"*. Jean Nizet and François Pichot, *La coordination du travail dans les organisations* (Paris: Dunod, 2012). Cited in Michel Mangenot, "Ce que coordonner veut dire," *Revue Française d'Administration Publique* 2, no 158 (2016): 331-340.

6 Angelos Sepos, "The National Coordination of EU Policy: Organisational Efficiency and European Outcomes," *European Integration* 27, no 2 (2005): 169-190.

European administrative structures, and the sometimes divergent interests and preferences of ministerial departments, these reasons make coordination an increasingly sophisticated and important matter. The creation of a national stance amounts to "*negotiating the quagmire*".⁷ One of the countries that most consistently succeed in carrying out this activity is France.

The country's system of coordination is seen by practitioners and scholars⁸ alike as one of the most well-performing and effective among EU member states. In 1998, a reform of the German government's administrative structure was indeed justified by the need to reach the level of coordination of France, which was considered superior.⁹ Another proof of its attractiveness lies in the slow but certain evolution of national coordination systems towards the centralised French model, characterised by a "*highly centralized and formalized co-ordination process*".¹⁰

The aim of this article is to understand the characteristics that make this system effective. Specifically, how does centralising coordination under one body enable France to quickly and effectively formulate a clear and consistent position on European legislative files? It will also be assessed to what extent France's centralised system allows the country to "upload" its policy preferences at the

European level, though staying away from analysis of the Permanent Representation's role, a topic worthy of a separate study.

The stakes of effective coordination are significant, especially for EU laws with strong distributive consequences. Consistency of European policies with national regulations brings considerable benefits.¹¹ The reverse is also true: "*the adoption of EU regulations that are out-of-step with long-standing domestic orientations can impose heavy adjustment costs on companies and be politically costly for governments*".¹² More generally, and in many areas, the decisions taken in Brussels have a sizable impact on national governments.¹³ Finally, coordination is important for the European Union as a whole: Without a nation-like European polity, effective national coordination is the only way for member states to translate their preferences into European policies.

Before analysing the determinants of successful national coordination, we must keep in mind that a country's ability to imprint its mark on European laws in order to achieve its national goals also depends on other factors, including the proximity of its position to that of other Member States, the size of the country's population (which gives it a higher voting power), the involvement of civil society and interest groups, the talent of its negotiators, etc.¹⁴

7 Josselin Dravigny, Jacques de Maillard and Andy Smith, "Sécurité intérieure européenne et définition de l'intérêt national : le modèle français revisité," *Revue Française d'Administration Publique* 2, no 158 (2016): 405-417.

8 Alexandre Marin, "Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes ? Perspectives d'évolution de la coordination interministérielle française," *Revue Française d'Administration Publique* 2, no 158 (2016): 373-388.

9 Scott James, "Adapting to Brussels: Europeanization of the core executive and the 'strategic-projection' model," *Journal of European Public Policy* 17, no 6 (2010): 818-835.

10 *Ibid.*

11 Hussein Kassim, "Meeting the Demands of EU Membership: The Europeanization of National Administrative Systems," in *The Politics of Europeanization*, ed. Kevin Featherstone and Claudio M. Radaelli (Oxford: Oxford University Press, 2003), 83-111.

12 *Ibid.*; James, Adapting to Brussels: Europeanization of the core executive and the 'strategic-projection' model.

13 Sepos, The National Coordination of EU Policy: Organisational Efficiency and European Outcomes.

14 "Success depends to a very large extent on the substance of national preference with respect to any particular issue and how close they are to those of the other member states and of the Commission, on the prevailing policy climate, on the input of the European Parliament, and on the mobilization of interest groups". Hussein Kassim, "The United Kingdom," in *The National Co-ordination of EU Policy: The Domestic Level*, ed. Hussein Kassim et al. (Oxford: Oxford University Press, 2000), 235-264. The congruence of

However, as long as the coordination system is well-adapted to the political regime it is a part of,¹⁵ its characteristics will serve as a multiplier of these structural factors.

The French Model: From the Bottom to the Top

Responsibilities

In France, the body tasked with coordinating with the ministries of a policy area with EU-level implications is the *Secrétariat Général aux Affaires Européennes* (SGAE), or General Secretariat for European Affairs. According to its website, the SGAE's role is to foster a unique and coherent position of the French government on EU policy matters in all European institutions and at all negotiation stages of the policy-making process.¹⁶ To fulfil this mission, it convenes meetings¹⁷ between ministries and disseminates information received from the Permanent Representation or European institutions to relevant ministries and administrative units.¹⁸ The ultimate goal of this coordination process

is to send information to and guide the work of French negotiators. Thus, after the formation of a national position, the SGAE, through the relevant sector heads or a Deputy Secretary-General, sends official instructions to the French Permanent Representation. The SGAE also advises the government on European affairs¹⁹ and facilitates the implementation of European laws.²⁰

The nature of France's coordination system derives from the structure of its political regime. The SGAE's predecessor, the SGCI, was created in 1948 following an inter-ministerial dispute on how best to distribute the funds of the Marshall Plan. But it was after the creation of the 5th Republic that the French coordination system affirmed a centralised bent. Successive transfers of national competencies to the European level, especially in the 1990s, further enhanced the role of the SGAE, with increased personnel and stronger authority over the ministries.²¹

the country's laws with the European policy proposal is also a very important factor: "As one German official noted, "if you look closely at the final draft of the directive, you will find that many sections were literally copied from the German law of broadcasting and advertising". In that respect, the congruence of German law with the European vision of the Commission enhanced the German case". Sepos, *The National Coordination of EU Policy: Organisational Efficiency and European Outcomes*.

- 15 What an effective coordination system looks like will depend on a country's political culture, administrative structure, view of what the goal of coordination is, etc. Hussein Kassim, "Conclusion: The National Co-ordination of EU Policy: Confronting the Challenge," in *The National Co-ordination of EU Policy: The Domestic Level*, ed. Hussein Kassim et al. (Oxford: Oxford University Press, 2000), 235-264. For example, a study commissioned by the Ministry of Foreign Affairs of the Netherlands concluded that while France's coordination system "is very efficient, [it is] not transferable to the Netherlands, with their fragmented party politics and coalition government polity". Thomas Traguth, Wolfgang Wessels, Mads Dagnis Jensen, and Jean-Michel Eymeri-Douzans, "Shaping National Voices in the EU: EU policy coordination in Germany, Denmark and France and lessons for the Netherlands," *Policy and Operations Evaluation Department of the Ministry of Foreign Affairs of the Netherlands*, July 2021, 53. <https://english.ioe-evaluatie.nl/publications/sub-studies/2021/06/29/shaping-national-voices-in-the-eu---eu-policy-coordination-in-germany-denmark-and-france-and-lessons-for-the-netherlands>.
- 16 Secrétariat général des affaires européennes, "Accueil," *Secrétariat général des affaires européennes*, <https://sgae.gouv.fr/sites/SGAE/accueil.html> [Accessed February 2, 2023].
- 17 1500 per year according to Marin, *Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes ? Perspectives d'évolution de la coordination interministérielle française*.
- 18 In practice, as one French public servant stated, "we create massive mailing lists and send information to everyone to ensure that everyone has the information". Dravigny et al., *Sécurité intérieure européenne et définition de l'intérêt national : le modèle français revisité*.
- 19 For instance, the SGAE serves as an internal source of expertise during the preparation of the European Council.
- 20 Marin, *Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes ? Perspectives d'évolution de la coordination interministérielle française*.
- 21 *Ibid.*

The Coordination Cycle

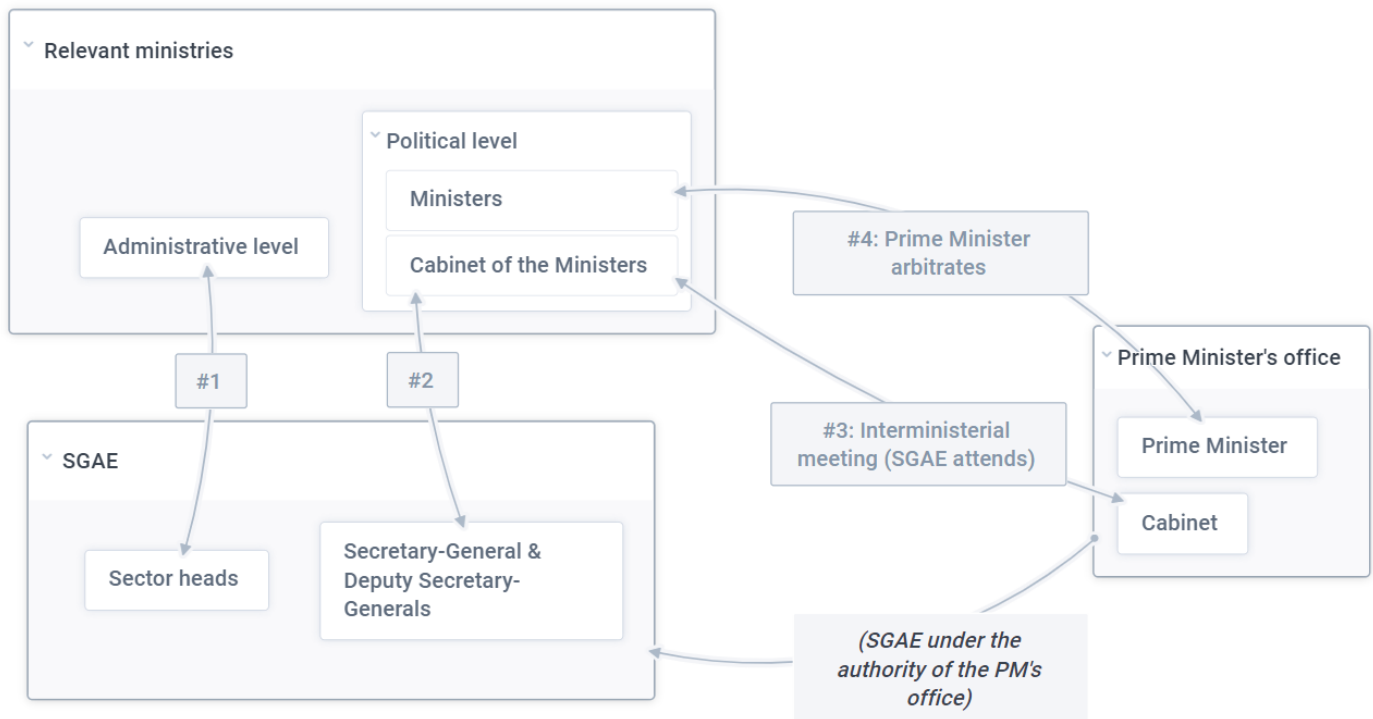


Figure 1: France's coordination system for EU policy.²² The process is successfully handled by actors at stages #1, #2, #3, and #4 until a compromise is found.

Within the SGAE, the work begins at the level of one of the 13²³ sector heads (*chefs de secteur*), each responsible for a policy area. Within 15 days of receiving a draft bill from the Commission, they organise meetings with the public servants of relevant ministries. This is the start of a "gradual pruning"²⁴ process to define a national stance and a negotiation strategy. In the vast majority of cases (>90%),²⁵ this results in an agreement on the French position.

If this is not enough, and as coordination turns into conflict resolution, the three Deputy Secretaries-Generals (SGA) and the Secretary-General of the SGAE take over by coordinating with the Cabinet of the relevant ministries. The SGAs have a filtering role; the objective is generally to keep the coordination work within SGAE and to avoid having to involve the political level.²⁶ Especially when a quick decision is needed to advance a negotiation, the SGAE is the final arbiter, and the file does not go up to the level of the PM's office.

22 Figure made by the author, using information from Marin, *Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes? Perspectives d'évolution de la coordination interministérielle française*.

23 Secrétariat général des affaires européennes, "Organisation," *Secrétariat général des affaires européennes*, <https://sgae.gouv.fr/sites/SGAE/accueil/a-propos-du-sgae/organisation.html> [Accessed February 2, 2023].

24 Marin, *Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes? Perspectives d'évolution de la coordination interministérielle française*.

25 Michel Mangenot, "Se partager les affaires européennes : aux origines du système français de coordination," *Revue Française d'Administration Publique* 2, no 158 (2016): 341-359.

26 "The role of a Deputy Secretary General is to absorb enough shocks to prevent matters from escalating [to the political level]". Marin, *Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes? Perspectives d'évolution de la coordination interministérielle française*.

If problems persist, however, one or more inter-ministerial meetings occur, bringing together members of the Cabinet of the relevant ministries chaired by a member of the Prime Minister's Cabinet.²⁷ Only in exceptional cases will the Prime Minister arbitrate a case (directly between the Ministers).

The Effectiveness of Centralised Coordination Systems: A Case of French-bashing?

The objective of a national coordination system is projection, *"the attempt to*

maximize the uploading of national policy preferences into the EU policy-making area".²⁸ While having a formal and centralised coordination process is generally recognised to be highly correlated with the formulation of clear and coherent national positions,²⁹ several scholars are sceptical that the latter translates into effectiveness in projecting national preferences at the EU level.³⁰ Can we deduce from the French case and its ability to formulate a clear and coherent national position that centralised coordination systems enhance the chances of achieving successful EU policy outcomes? In short: how much does it help to have a single national position?

<u>Coordination Ambition:</u>	Comprehensive:	OR	Selective:
	Goal: constructing <i>"an agreed position on virtually every issue across the full range of EU activities and competences"</i>		<i>"focused on ensuring that national interests are effectively represented in sensitive policy areas"</i>
<u>Level of centralisation:</u>	Centralised:	OR	Decentralised:
	<i>"EU business is monitored by [...] structures [...] charged with overall responsibility for coordination and with the power to settle disputes that may arise between different departments."</i>		<i>"no single authoritative actor [...] [with] the authority to impose solutions or to force a reconciliation of views"</i>

Table: Typology of national coordination systems for EU policy. According to this typology, France has a comprehensive and centralised system.³¹

27 In addition to the need to create a compromise between the ministries after the exhaustion of solutions at lower levels, Dravigny et al., *Sécurité intérieure européenne et définition de l'intérêt national: le modèle français revisité*, cite two cases where the political level wants to intervene: on politically sensitive issues, and in response to crises. This intervention sometimes damages the coherence of French positions, as negotiators may be contradicted by a public intervention by a minister, the Prime Minister, or the President.

28 James, *Adapting to Brussels: Europeanization of the core executive and the 'strategic-projection' model*.

29 *"Highly formalized coordination mechanisms are associated with developing timely, clear and consistent negotiation positions"*. Mads C.D. Jensen, "Exploring central governments' coordination of European Union affairs," *Public Administration* 95, no 1 (2017): 249-268. See also Panke, *Developing Good Instructions in No Time – An Impossibility? Comparing Domestic Coordination Practices for EU Policies of 19 Small States*.

30 In other words, Kassim et al., *The National Co-ordination of EU Policy: The Domestic Level*, do not dispute that centralised systems yield coherent and unique positions; they argue that such positions are not ideal when considering the nature of EU policy-making processes.

31 Table made by the author. Quotes from Kassim, *Meeting the Demands of EU Membership: The Europeanization of National Administrative Systems*.

Arguments that centralised systems are inherently unsuited to the European policy game speak against the effectiveness of France's system. In his seminal review of national coordination systems, Kassim lays out their potential drawbacks.³²

First, "*the centre may be 'divided', 'paralysed', or 'inept'*".³³ This has happened in France before, notably during periods of "cohabitation", when the Prime Minister and the President do not belong to the same political party. However, the last occurrence of cohabitation was in 2002, and because of Constitutional reforms made in 2000, it now has slight chances of happening again.³⁴ Outside of such a case, the Prime Minister is subordinated to the President, with the SGAE under the authority of the former. It is challenging to see French political leadership become so politically paralysed as to be unable to give political direction to the SGAE or be at the mercy of its ministries. Kassim also mentions that a centralised system does not necessarily lead to effective coordination, especially when "*adequate personnel, expertise, and linguistic skills*" are lacking. This also seems not to be the case with France, the SGAE being composed of experienced³⁵ officials. France is thus

on the high end of 2 criteria for effective centralised national coordination systems: political leadership and human capital.

Another argument is that centralised systems lead to potentially rigid positions³⁶ unadapted to the nature of EU policy-making, characterised by "*fast-moving negotiations*", a "*recurrent, multi-issue bargaining process*",³⁷ and "*the informal norm of reciprocity*", all elements that may necessitate changing one's initial national position. In short, the lack of coordination itself may be beneficial to the state in question, as it can lead to an "*avoidance of isolation and the last-minute achievement of trade-offs*". This is presumably not the case for states, such as France, "*with a clear and well-coordinated set of priorities that may entail less flexibility*".³⁸ This is a conceptually valid point, also supported by at least one empirical analysis.³⁹ The increased use of Qualified Majority Voting since the 1990s requires frequent, rapid, and efficient adaptation of national negotiation strategies to "*facilitate effective bargaining*".⁴⁰ To respond to the growing complexity and increasingly cross-sectorial nature of European policies, France has taken steps to delegate coordination procedures⁴¹ (at least those of a non-strategic or routine nature).

32 Kassim, Conclusion: The National Co-ordination of EU Policy: Confronting the Challenge.

33 *Ibid.*

34 Antonin-Xavier Fournier, *Analyse Critique de la Cohabitation Sous la Ve République: Bilan et Perspectives* (Montréal: Université du Québec à Montréal, 2007), 10.

35 Kassim, Conclusion: The National Co-ordination of EU Policy: Confronting the Challenge, 254.

36 Because ministries have been through a bargaining process arbitrated by a central body, which gives EU negotiators little room to make compromises with other member states.

37 "*A sophisticated poker player should allow the beginner to win occasionally; otherwise he'll lose a partner*", B. Guy Peters, "Bureaucratic Politics in Institutions of the European Community," in *Euro-Politics: Institutions and Policy-Making in the 'New' European Community*, ed. Alberta Sbragia (Washington: Brookings Institution, 1992). Cited in Kassim, Conclusion: The National Co-ordination of EU Policy: Confronting the Challenge.

38 Simon Bulmer, Charlie Jeffery and William E. Paterson, *Germany's European Diplomacy: Shaping the Regional Milieu* (Manchester: Manchester University Press, 2000). Cited in Sepos, The National Coordination of EU Policy: Organisational Efficiency and European Outcomes.

39 Panke, Developing Good Instructions in No Time – An Impossibility? Comparing Domestic Coordination Practices for EU Policies of 19 Small States.

40 James, Adapting to Brussels: Europeanization of the core executive and the 'strategic-projection' model.

41 For example sector heads now have the ability to send instructions directly to Brussels, instead of having to go through their superiors, the SGA. Marin, Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes ? Perspectives d'évolution de la coordination interministérielle française.

Nevertheless, even if we admit that centralised systems produce rigid positions, centralisation may also contribute to a country's ability to defend its interests in Brussels if it entails having a single point of contact.⁴² The SGAE is the only body formally authorised to exchange information with the French Permanent Representation for and from the negotiations.⁴³ This unique communication channel (and concentration of EU policy-making expertise in the SGAE) may facilitate quick adjustments to France's national position.⁴⁴ The SGAE's and the Prime Minister's office's power to arbitrate between ministries may also help move the needle when compromise is needed to succeed at the EU level. France also makes it a point to *"never be in a position of inferiority in the Council"*,⁴⁵ showing it can be flexible when faced with a lack of support. Finally, a lack of flexibility may also strengthen the credibility of France's bargaining position and, thus, its ability to "upload" its policy preferences, as it can legitimately say it has to abide by domestic interests.⁴⁶

A last advantage of centralising coordination authority is that Ministries are incentivised to argue their position in order to increase the chances of it being

favoured by the SGAE. This filter leads to better-informed and clearer negotiation instructions.⁴⁷ This is of prime importance. Since no Member State is large enough to rely solely on its voting power, its negotiators will have to form coalitions with other Member States on issues over which they share a common interest. Without a clear, timely communicated position, the members of a Permanent Representation will not be able to seek out and gather potential allies.

Real Problems, Remaining Efforts

Arguments that clear and coherent national positions do not help countries with centralised systems more effectively defend their interests seem to rest on shaky foundations.⁴⁸ Still, France faces other real hurdles in its quest to promote its national preferences in Brussels. The current focus of France's coordination system on inter-ministerial coordination does not sufficiently recognise (i) how the lack of focus on EU policy matters within ministries restricts the ability to think strategically and long-term and (ii) that the inherently multi-level, multi-stakeholder, and multi-stage nature of EU policy-making creates a need for an influence strategy in addition to a negotiation strategy.

42 Which is the case for France.

43 No ministry has the ability to send the French national position to the Permanent Representation, even when it is the only one working on the file. This helps prevent any confusion among negotiators about the position they should defend.

44 In comparison, once negotiation dynamics incentivise a change of position to get closer to a beneficial compromise, decentralised systems do not have a single point of contact to regroup with. Either it takes longer to foster a new domestic position (with negative consequences for sometimes quick-paced negotiations), or the stance of a group of stakeholders is omitted (with negative consequences on the political backing of the national position).

45 Traguth et al., *Shaping National Voices in the EU: EU policy coordination in Germany, Denmark and France and lessons for the Netherlands*.

46 Robert Jervis, *The Logic of Images in International Relations* (Princeton: Princeton University Press, 1970), 74-76.

47 A Belgian official says: *"most of the silly ideas (...) we get rid of them, because it is tested during our internal coordination"*. Panke, *Developing Good Instructions in No Time – An Impossibility? Comparing Domestic Coordination Practices for EU Policies of 19 Small States*. The Belgian system is much less centralised than the French one, but the Belgian ministries also have to go through in-depth internal dialogue.

48 Sepos, *The National Coordination of EU Policy: Organisational Efficiency and European Outcomes*, whose article nonetheless seeks to highlight the disadvantages of centralised coordination, finds that the Belgian and German coordination systems can lead domestic stakeholders to *"lobby EU institutions and other member states with opposing positions, speaking with two voices and generally making the government's voice sound weak and incoherent"*, which helps neither with credibility nor general success in 'projecting' policy preferences.

It is difficult to convince an administration focused on the day-to-day affairs of the nation to dedicate itself to European negotiations,⁴⁹ whose benefits often materialise only years down the line. The presence of a powerful central body like the SGAE helps mobilise relevant Ministries to formulate a clear and coherent position. However, there has been no move to further prioritise European policies within individual Ministries.

The lack of prioritisation of long-term work based on a strategic vision of France's interests is due in part to the mandate of the SGAE, that is, coordinating among different Ministries to formulate a single and coherent national position. This is rightfully the main focus of France's coordination system. European negotiations require a quick response from the Capital, with very short deadlines between receiving a text and the need for a positioning of the French government. The majority of the SGAE's resources are therefore dedicated to this responsibility. Nevertheless, in the past, this has led France to adopt a reactive rather than proactive position.⁵⁰ Many public officials shove their proverbial heads into the sand instead of taking a bird's eye view.

Addressing this problem could involve systematising and formalising procedures related to EU policy work outside of the necessary but intermittent coordination process. Setting up interministerial

working groups on high-priority political EU topics, or writing and disseminating white papers, would allow for a more forward-looking vision and a constant reflection on European issues. It could also be worthwhile to systematically identify, at the early stages of European legislative work (before the Commission officially proposes a text), the important actors involved, the significant issues of the text, and potential friction points.⁵¹ These activities would allow France to adopt a more strategic vision in the ways it conducts its coordination action.

A second hurdle comes from the fact that EU policy-making is a multi-level (spanning several scales of political systems, including at least regions, nations, and the supranational EU level), multi-stakeholder (it relies on expertise, resources, or influence outside of public sector bodies, with think-tanks, NGOs, and private sector companies all having an important role), and multi-stage process (the policy-making process (i) consist of different steps with different actors involved and (ii) its outcome depends on the outcome of previous negotiations and/or the history between the negotiators, both elements which create the need for trust and honesty between actors). These three elements create the need for an influence strategy,⁵² able to link the several *levels, stakeholders, and stages* of EU policy-making. In particular, and with special relevance for our purposes, domestic coordination can

49 Some scholars indeed deplore that the SGAE "has not become a mechanism that inculcates the concerned actors with a holistic and non-sectoral approach to formulating the European positions of the French state". Original: "Le SGAE n'est pas devenu un mécanisme qui inculque aux acteurs concernés une approche holiste et non-sectorielle de la formulation des positions européennes de l'État français", Jacques de Maillard and Andy Smith, "Les administrations répressives françaises et l'Union européenne: adaptations, concurrences et ancrages nationaux," *Politique européenne* 3, no 23 (2007): 17-35. Cited in Dravigny et al., *Sécurité intérieure européenne et définition de l'intérêt national: le modèle français revisité*.

50 Mangelot, *Se partager les affaires européennes : aux origines du système français de coordination*.

51 For now, such long-term and foresight focused activities seem to be limited to the writing and publication, every six months, of a report on the important issues and deadlines of the next European Council presidency, with an outline of France's positions on the files to be dealt with, Marin, *Un rapprochement du Secrétariat général du gouvernement et du Secrétariat général des affaires européennes? Perspectives d'évolution de la coordination interministérielle française*.

52 Dravigny et al., *Sécurité intérieure européenne et définition de l'intérêt national : le modèle français revisité*.

help lay the foundations of an influence strategy, which is then operationalised by the Permanent Representation.

Seeking to influence the debate upstream of the European bill proposal is a desirable strategy, and creating and maintaining networks of nationals and non-nationals within and outside EU institutions is one of its necessary conditions. The use of human and informational resources is indeed increasingly a prerequisite of impact in Brussels. Advocacy skills are as or more important than negotiation skills.⁵³ Relatedly, the French system does not rely enough on the influence and expertise of non-governmental actors, particularly NGOs and interest groups. The establishment and maintenance of networks with these actors would contribute to the formation of a potential SGAE monitoring and foresight strategy. The Czech Republic is a model in that regard, with a coordination mechanism that incorporates systematic outreach to think tanks.⁵⁴

Conclusion

Ultimately, there are reasons to doubt conceptual arguments that criticise the ability of centralised systems to foster a clear and coherent national position or the usefulness of such positions in EU policy-making. France has the resources and political leadership necessary

for its central coordinating body, the SGAE, to effectively find compromises between different ministries. The French system may produce rigid positions seemingly unadapted to the EU policy game; but this may be a net positive, as rigidity may strengthen France's negotiating position. And centralisation of information exchange with the Permanent Representation within the SGAE may further enable quick coordination and adjustment of the negotiating stance. Still, as we have seen, the French system of coordination has room for improvement, notably in dealing with EU policy matters with a strategic and long-term approach and to better influence policy debates in Brussels outside of the Council of the EU.

Fulfilling the essential responsibilities of EU negotiations depends on the ability to coordinate domestically to define a clear national position. The French coordination system stands out because it is led by a relatively small administrative unit responsible for almost all of the formation of France's position on EU policies. And since effective coordination is a factor that can be relatively easily influenced, through capacity-building or administrative reforms, compared with structural factors such as proximity of the national position with other member states or population size, the study of the effectiveness of the SGAE shines an interesting light on EU policy making.

⁵³ Mangenot, Ce que coordonner veut dire.

⁵⁴ Viera Knutelská, "The Czech Coordination System of European Affairs and Its Inclusiveness," *Études du CEFRES* 1, no 16 (2013). <https://cefres.cz/fr/300>.

Populist Foreign Policy in Action? The Case of the Five Star Movement's China Policy

by Alain Tao¹

Introduction

THE left-leaning populist Five Star Movement (M5S) emerged from the Italian general elections of March 4, 2018, with a third of all votes, becoming the largest political force in Italy at the time.² Failing to secure a majority, however, M5S had to enter into painstaking coalition talks with right-wing populist The League, which acquired nearly a fifth of all votes.³ After 88 days of negotiations, on June 1, 2018, the coalition between the M5S and The League made history by forming the first-ever populist government in Western Europe under the leadership of political independent Giuseppe Conte.⁴ This arrangement was not to last, however. Little over a year in office, the First Conte Government (Conte I) was replaced by the Second Conte Government (Conte II) in September 2019, following a political crisis that saw The League replaced by the Democratic Party and the Free and Equal Party. M5S remained the senior coalition partner during both governments.

During the early months of Conte I, both parties were eager to pursue their populist agendas. For The League, this was the expulsion of migrants and sealing off Italian ports to new arrivals.⁵ For M5S, the priority was to introduce pension reform and an ambitious basic income scheme by increasing the annual budget.⁶ However, the proposed budget would have increased the public deficit to 2.4% of GDP, which was in violation of European fiscal regulations.⁷ This move was wildly seen as challenging the authority of the European Commission, which is responsible for the review of draft budgets.⁸ In response, the Commission labelled the draft budget as a *“particularly serious non-compliance with the budgetary policy obligations laid down by the EU”* in a letter to the Italian finance minister.⁹ What ensued was a confrontation with the Commission that threatened an infringement procedure over the budget.¹⁰

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² Daniela Giannetti, Luca Pinto and Carolina Plescia, “The first Conte government: government of change or business as usual?,” *Contemporary Italian Politics* 12, no. 2 (2020): 182-199.

³ *Ibid.*

⁴ *Ibid.*

⁵ Encyclopedia Britannica, “Italy | Facts, Geography, History, Flag, Maps, & Population,” *Encyclopedia Britannica*, January 18, 2023, <https://www.britannica.com/place/Italy/The-migrant-crisis-and-the-growth-of-populist-movements>.

⁶ Ferdinando Nelli Feroci, “The “Yellow-Green” Government's Foreign Policy,” *Istituto Affari Internazionali*, 19 (2019).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Silvia Amaro, “Italy's Budget Crisis Threatens the Entire EU Project, Strategist Says,” *CNBC*, October 19, 2018, <https://www.cnbc.com/2018/10/19/italy-budget-threatens-the-entire-eu-project-strategist-says.html>.

¹⁰ Feroci. The “Yellow-Green” Government's Foreign Policy.

It is in this context that M5S is seen to pursue an active rapprochement with China. The Ministry of Economic Development (MED), controlled by M5S, created a China Task Force.¹¹ This task force was charged with encouraging greater cooperation between economic actors, especially public ones, and Beijing.¹² Plans were also announced for Rome's participation in China's flagship infrastructure investment project, the Belt and Road Initiative (BRI), as well as in the "Made in China 2025" industrial development program.¹³ It appeared that M5S was courting Beijing as an alternative partner to the EU. More broadly speaking, could M5S's engagement with China be considered a manifestation of its populist ideology in its foreign policy? In light of the party's history of Euroscepticism,¹⁴ and advocacy for the re-alignment of Italy's traditional foreign policy orientation,¹⁵ populist ideology should be considered as a driver for closer relations with Beijing.

The following paper is divided into three parts. Firstly, the influence of populist ideology on foreign policy is explained. Secondly, this dynamic between populism and foreign policy is then extrapolated onto M5S's China policy to test its validity in the face of empirical evidence. Lastly, a conclusion is drawn from evaluating the evidence to ascertain the extent to which populist ideology was a motivator for M5S's engagement with China.

Populism and Foreign Policy

In order to draw a link between populism and foreign policy, what constitutes a populist government must be defined first. The generally accepted definition is a government that promotes "*an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, "the pure people" versus "the corrupt elite", and which argues that politics should be an expression of the volonté générale (general will) of the people*".¹⁶ Two salient characteristics can be drawn out from this definition:¹⁷ 1) anti-elitism, through which populists make a clear divide between "*ordinary citizens*" and an exploitative, predatory "*elite*", and 2) anti-pluralism, through which populist leaders claim that only they incarnate the will of the people.

These two characteristics can manifest as a sovereigntist foreign policy doctrine on the international scene. "*Sovereignism*" demands political independence or more thereof for a territorial entity such as a region or state.¹⁸ In the European context, populists regularly claim that their country's national sovereignty needs to be "*reclaimed*" from a supranational, technocratic elite, i.e. the EU, that ignores the will of their electorate.¹⁹ This claim is then used to justify foreign policy revisionism, as a rupture is needed with the previous "*unjust*" order to create a

11 Ludovica Poggetti, "Italy Charts Risky Course with China-Friendly Policy," *MERCIS*, October 11, 2018, <https://merics.org/en/analysis/italy-charts-risky-course-china-friendly-policy>.

12 *Ibid.*

13 *Ibid.*

14 Paolo Franzosi, Francesco Marone and Eugenio Salvati, "Populism and Euroscepticism in the Italian Five Star Movement," *The International Spectator* 50, no. 2 (2015): 109-124.

15 Varriale Amedeo, "Institutionalized Populism: The "Strange Case" of the Italian Five Star Movement," European Center for Populism Studies, *ECPS Party profile series* (2021).

16 Cas Mudde, "The Populist Zeitgeist," *Government and Opposition* 39, no. 4 (2004): 541-63; 538

17 Sandra Destradi, David Cadier and Johannes Plagemann, "Populism and Foreign Policy: A Research Agenda (Introduction)," *Comparative European Politics* 19, no. 6 (September 14, 2021): 663-82,

18 Erin K Jenne, "Populism, Nationalism and Revisionist Foreign Policy," *International Affairs* 97, no. 2 (March 2021): 323-43.; Fabrizio Coticchia and Valerio Vignoli, "Populist Parties and Foreign Policy: The Case of Italy's Five Star Movement," *The British Journal of Politics and International Relations* 22, no. 3 (May 25, 2020): 523-41.

19 Jenne, Populism, Nationalism and Revisionist Foreign Policy.

new one that better represents popular sovereignty.²⁰ This revisionism can be expressed as a rejection of the authority of multilateral and supranational institutions, distrust of conventional allies perceived as obstructors of sovereignty, or the diversification of international partnerships to counterbalance traditional dependencies.²¹

In the case of M5S, its political ideology was considered archetypically populist.²² The party displayed overt hostility toward the "*casta*", i.e. the political elite, while promoting its own image as a collection of political novices whose inexperience is compensated by their honesty as common citizens.²³ The European Union was equally considered to be an "*enemy of citizens*" for its collusion with the "*casta*" to subvert popular will.²⁴ This deep mistrust was expressed by harsh criticisms against the EU and staunch opposition to European policies, such as the European Stability Mechanism and sanctions on Russia for its annexation of Crimea.²⁵ The party has also made rhetorical support for a recalibration of Italy's conventional foreign policy configurations in the name of national interest.²⁶

In light of its ideological leanings, it would appear that the standoff with the Commission on the proposed budget was just another expression of M5S's virulent Euroscepticism. In parallel, its engagement with China could be seen as an attempt at off-setting its dependencies on the EU. However, a deeper look at M5S's China policy tells a distinctively different story.

No Welcome with Open Arms: Engagement with Beijing under Conte I (2018-2019)

Indeed, the Beijing-friendly policy of Conte I appeared to signal a break with the West's *status quo* on China. When Italy formally acceded to the BRI by signing a Memorandum of Understanding (MoU) during Chinese President Xi Jinping's visit to Rome, it became the first G7 country to officially sign up for the project.²⁷ This was in spite of criticisms voiced by Italy's allies, most notably the United States, who viewed the BRI as a geopolitical tool to expand Beijing's global reach by ensnaring participants in debt traps.²⁸ On a visit to Shanghai, the Minister of Economic Development and leader of M5S, Luigi di Maio, openly refused to condemn Beijing's

20 *Ibid*; Coticchia and Vignoli, Populist Parties and Foreign Policy: The Case of Italy's Five Star Movement.

21 Giulio Pugliese, Francesca Ghiretti and Aurelio Insisa, "Italy's Embrace of the Belt and Road Initiative: Populist Foreign Policy and Political Marketing," *International Affairs* 98, no. 3 (May 2022): 1033–51; Destradi, Cadier and Plagemann, Populism and Foreign Policy: A Research Agenda (Introduction); Linda Basile and Oscar Mazzoleni, "Sovereignist Wine in Populist Bottles? An Introduction," *European Politics and Society* 21, no. 2 (October 11, 2019): 151–62; David Cadier, "Populist Politics of Representation and Foreign Policy: Evidence from Poland," *Comparative European Politics* 19, no. 6 (September 14, 2021): 703–21; Fabrizio Coticchia, "A Sovereignist Revolution? Italy's Foreign Policy under the 'Yellow-Green' Government," *Comparative European Politics* 19, no. 6 (October 21, 2021): 739–59.

22 Pippa Norris, "Measuring Populism Worldwide," *Party Politics* 26, no. 6 (July 2, 2020): 697–717; Andreas Johansson Heinö, "Timbro authoritarian populism index," *Timbro*, February. <https://populismindex.com/wp-content/uploads/2019/02/TAP2019C.pdf> (2019).

23 Elena Dal Zotto, "Populism in Italy: The Case of the Five Star Movement," *CIDOB*, April 2017, https://www.cidob.org/en/articulos/cidob_report/n1_1/populism_in_italy_the_case_of_the_five_star_movement.

24 Eugenio Salvati, "Eurosceptic, Eurocritical or Euroconfused? An Analysis of the Five Star Movement's Voting Behaviour in the European Parliament," *European Politics and Society* 20, no. 3 (August 2018): 296–314.

25 Dal Zotto, Populism in Italy: The Case of the Five Star Movement.

26 Amedeo, Institutionalized Populism: The "Strange Case" of the Italian Five Star Movement.

27 Philip Giurlando, "Populist Foreign Policy: The Case of Italy," *Canadian Foreign Policy Journal* 27, no. 2 (November 4, 2020): 251–67.

28 CNBC, "Critics of China's Belt and Road Initiative Are 'Prejudiced', the Country's Top Diplomat Says," *CNBC*, March 30, 2019, <https://www.cnbc.com/2019/03/30/critics-of-chinas-belt-and-road-initiative-are-prejudiced-diplomat.html>.

repressive Hong Kong policies, which, at the time, had provoked massive pro-democracy protests in the autonomous city.²⁹ Di Maio insisted that “*we [the Italian government] do not want to interfere in the issues of others and therefore, as far as we are concerned, we have an approach of non-interference in the issues of other countries*”.³⁰ This position stood in direct contrast with that of the EU and fellow Member States, which had called on Beijing to exercise restraint and de-escalate tensions.³¹

Nonetheless, this drive for closer ties with Beijing seemed to have been largely the work of one man, Michele Geraci. A self-professed Sinophile, Geraci taught economics in China for ten years and learned fluent Mandarin in the process.³² He was tapped by The League for the position as one of the Undersecretaries of the Ministry of Economic Development, where he formed the China Task Force that he led personally.³³ He believed that closer ties, especially business ties, with China would help generate the revenue needed to implement the government’s plans for a flat tax and a universal income.³⁴ Expressing hopes for Italy to become “*the leader in Europe in the*

relationship with China”,³⁵ Geraci actively promoted and protected Chinese interests in his role as Undersecretary of Economic Development. He objected to an EU-wide investment screening mechanism that was widely considered to be targeting Chinese investments,³⁶ expressed a preference for Chinese investors over Lufthansa’s plans to acquire Italy’s flagship airline Alitalia,³⁷ advocated for Huawei’s involvement in the development of Italian 5G,³⁸ and encouraged a Chinese takeover of the port of Trieste.³⁹ Given Luigi Di Maio’s political inexperience, it was highly likely that Geraci had some sway over his superior at the MED.⁴⁰ Di Maio was extremely preoccupied with increasing Italian trade and inbound FDI, something Geraci believed China could deliver on.⁴¹

Beyond the BRI MoU and the number of favourable gestures made by Geraci, there were signs that Beijing will not be welcomed with open arms. Just three days after the MoU signing ceremony, the Italian parliament approved the extension of the executive’s “*golden power*” to veto corporate acquisitions that threaten national security in the domains of finance, insurance, energy,

29 Redazione Ansa, “Di Maio: non interferiamo su Hong Kong,” *Agenzia ANSA*, November 5, 2019, https://www.ansa.it/sito/notizie/topnews/2019/11/05/di-maio-non-interferiamo-su-hong-kong_4019d8ee-ebf1-4d3b-96dc-c19a16e7155f.html.

30 *Ibid.*

31 Rodion Ebbighausen, “US, EU Reluctant to Criticize China,” *Deutsche Welle*, August 14, 2019, <https://www.dw.com/en/west-reluctant-to-criticize-china-over-hong-kong-stance/a-50028222>.

32 Michele Geraci, “La Cina e il governo del cambiamento,” *Il Blog Di Beppe Grillo*, June 11, 2018, <https://beppegrillo.it/la-cina-e-il-governo-del-cambiamento/>.

33 Philippe Le Corre, “Italy’s Risky China Gamble,” *Carnegie Endowment for International Peace*, March 14, 2019, <https://carnegieendowment.org/2019/03/14/italy-s-risky-china-gamble-pub-78602>.

34 Geraci, La Cina e il governo del cambiamento.

35 Caixin Global, “Italy Wants to Be China’s Gateway to Europe, Partner in Africa,” *Caixin Global*, September 14, 2018, <https://www.caixinglobal.com/2018-09-14/italy-wants-to-be-chinas-gateway-to-europe-partner-in-africa-101326349.html?rkey=4jojc+U9Dvsngy8ZDEibRfFL/E7ci4pKud7PUK4r1phWPzv/CEmu0g==>.

36 Poggetti, Italy Charts Risky Course with China-Friendly Policy.

37 *Ibid.*

38 Le Corre, Italy’s Risky China Gamble.

39 Zeno Saracino, “Il Porto di Trieste e la Cina, Geraci: ‘Dobbiamo essere veloci a decidere,’” *TRIESTE.news*, February 1, 2019, <https://www.triesteallnews.it/2019/02/il-porto-di-trieste-e-la-cina-geraci-dobbiamo-essere-veloci-a-decidere/>.

40 Francesca Ghiretti, interview by author, online, January 16, 2023.

41 Geraci, La Cina e il governo del cambiamento.

water, health, food safety, and most importantly, cybersecurity and 5G.⁴² A month later, Prime Minister Conte insisted that *"we [the Italian government] will be very careful that there are no predatory initiatives on the Chinese side, especially in the telecommunications sector, a very sensitive sector such as 5G where we ask that maximum safety standards be respected"*.⁴³ It is obvious that despite favourable rhetoric and high visibility agreements, the M5S-led government in Rome was acutely aware of the risks of doing business with Beijing.

Giving the Cold Shoulder: Engagement with Beijing under Conte II (2019-2021)

Rome's wariness of Beijing's influence only heightened after the departure of The League from the ruling coalition. Michele Geraci was not reconfirmed as Undersecretary due to his affiliations with The League.⁴⁴ On the very same day, Rome exercised its *"golden power"* in 5G for the first time on deals between Italian and Chinese telecom providers.⁴⁵ Rome imposed undisclosed requirements on deals between Wind Tre, Vodafone Italia, and Huawei, as well as blocking Fastweb's

agreement with Huawei to develop its 5G core network.⁴⁶ In a further slight to the Chinese, the port of Trieste, once promoted as a future node on Beijing's Maritime Silk Road and proudly touted in the BRI MoU, was acquired by German firm HHLA.⁴⁷ When asked why the Chinese were ousted from the bid, the new Minister of Economic Development Stefano Patuanelli (M5S) explained that *"[t]he investments and port infrastructures made by China could bring some concerns and also worried our American allies [...] we have always said it, we look to China not as an ally but as a partner"*.⁴⁸ Later that month, the Italian parliament approved the first of four decrees introducing the *"Digital Perimeter"*, a security threshold that tech suppliers and operators need to meet in order to deal with entities in the public, defence, energy, telecoms, financial, economic, and IT sectors.⁴⁹ This measure was wildly seen as targeting Chinese telecom firms, as they usually have lower standards for security and data protection.⁵⁰ After departing the MED and freeing himself of Geraci's influence, Luigi di Maio became a critical voice of China in his new role as Foreign Minister,⁵¹ as shown by his call for Beijing to preserve Hong Kong's autonomy.⁵²

42 Andrew Novo, "Italy Slips China's Embrace," *CEPA*, October 21, 2022, <https://cepa.org/article/italy-slips-chinas-embrace/>.

43 Giovanni Pelosi, "Via Della Seta, Conte: «Più Investimenti Cinesi, Ma Non Predatori»," *Il Sole 24 Ore*, April 26, 2019, https://www.ilsole24ore.com/art/via-seta-conte-piu-investimenti-cinesi-ma-non-predatori-ABi1F8rB?refresh_ce=1.

44 Francesca Ghiretti, interview by author, online, January 16, 2023.

45 Reuters Staff, "Italy Approves Use of Special Powers over 5G Supply Deals," *Reuters*, September 5, 2019, <https://www.reuters.com/article/us-huawei-tech-5g-italy-idUSKCN1VQ1YG>.

46 Luca Zorloni, "5G: Conte bis, atto primo. Scatta il golden power - Wired," *Wired Italia*, September 5, 2019, <https://www.wired.it/internet/tlc/2019/09/05/5g-golden-power-conte-bis/>.

47 Michele Arnese and Francis Walsingham, "Hhla, tutto sulla società pubblica tedesca che controllerà il porto di Trieste," *Startmag*, October 2, 2020, https://www.startmag.it/smartcity/hhla-tutto-sulla-societa-pubblica-tedesca-che-controllera-il-porto-di-trieste/?_ga=2.261536772.883480154.1656955715-1647704799.1656955715.

48 *Ibid.*

49 Otto Lanzavecchia, "Italy's digital defence rises, reassuring the US," *Formiche.net*, October 27, 2020, <https://formiche.net/2020/10/digital-perimeter-italian-cyberspace-huawei/>.

50 Otto Lanzavecchia, "Italy's digital defence rises, reassuring the US,"

51 *Il Post*, "Draghi ha cambiato le cose con la Cina," *Il Post*, July 3, 2021, <https://www.ilpost.it/2021/07/03/italia-cina-draghi-conte/>.

52 Redazione Ansa, "Preserve Hong Kong Independence, Di Maio Tells Wang," *ANSA.it*, August 25, 2020, https://www.ansa.it/english/news/2020/08/25/preserve-hong-kong-independence-di-maio-tells-wang_c1510363-b8c7-42ed-adec-dbffc95bb8e1.html.

The Doubtful Sincerity of M5S's Courting of the Middle Kingdom

Although many M5S officials did frame their government's engagement with Beijing as a way to challenge the EU,⁵³ this alone does not prove that Rome was actually practising soft-balancing in an act of "*realignment*". Both Conte governments primarily engaged with China on economic issues, while still airing on the side of caution by exercising its regulatory powers to protect strategic sectors. This contradiction between economic engagement and protectionism existed within the China policy of the previous left-leaning Democratic Party (PD) administrations. They signed a number of business deals and cooperation agreements with China,⁵⁴ as well as having allowed several high-profile takeovers by Chinese firms.⁵⁵ In the political realm, PD-led Italy was a founding member of Beijing's Asian Infrastructure Investment Bank, an international financial institution designed to support BRI projects and compete with the American and Japanese-led Asian Development Bank.⁵⁶ In addition, M5S's much-touted participation in the BRI was actually the fruit of a long process of negotiations that were initiated by Conte's predecessor, Paolo Gentiloni (PD).⁵⁷ Yet,

paradoxically, PD also supported the EU's Investment Screening Mechanism and opposed China's bid for Market Economy Status within the World Trade Organization.⁵⁸

Far from being an ideologically motivated move to strategically distance itself from traditional allies in favour of alignment with an emerging power, M5S's courting of Beijing needs to be viewed through a rhetorical understanding of populism. In contrast to the ideational approach, this minimalist conception regards populism as "*a dramatic performance, not to be understood literally by leaders or followers*".⁵⁹ This entails a less significant impact on foreign policy since populism is instrumentalised as political argumentation rather than actual motivation for foreign policy revisionism. Viewed through this lens, M5S's China policy, especially under Conte I, was a rebranding of the policies of previous administrations to advance the sovereigntist message that Italy was pursuing a foreign policy independent of the EU. Given the tensions with the Commission over the draft budget, pressure from international investors, and the European Central Bank, Rome decided to engage with third parties like the United States, Russia, and China.⁶⁰ This was done

53 Giurlando, Populist Foreign Policy: The Case of Italy; Coticchia, A Sovereignist Revolution? Italy's Foreign Policy under the 'Yellow-Green' Government.

54 Simone Dossi, "Italy-China relations and the Belt and Road Initiative. The need for a long-term vision," *Italian Political Science* 15, no. 1 (2020).

55 Paola Danilo and Masoni Arosio, "ChemChina to Buy into Italian Tire Maker Pirelli in \$7.7 Billion Deal," *Reuters*, March 23, 2015, <https://www.reuters.com/article/us-pirelli-chemchina-idUSKBN0MI0PQ20150323>.

56 Dossi, Italy-China relations and the Belt and Road Initiative. The need for a long-term vision.

57 Nicola Casarini, Lorenzo Mariani and Fabio Angiolillo, "Political values in Italy's China policy: A "constructive approach"," *Rühlig, N., van der Putten, J FP, Seaman, J., Otero-Iglesias, M., Ekman, A., Political values in Europe-China relations, ETNC Report* (2018): 51-55.

58 Francesca Ghiretti, interview by author, online, January 16, 2023.

59 Norris, *Measuring Populism Worldwide*.

60 Pugliese, Ghiretti and Insisa, Italy's Embrace of the Belt and Road Initiative: Populist Foreign Policy and Political Marketing.

in part to shore up confidence in Italian sovereign bonds.⁶¹ More importantly, it was designed to signal to Brussels and Italian voters that Rome was able to engage bilaterally with major powers outside of the European framework, thereby reclaiming its “*sovereignty*” on the world stage.⁶² It was no coincidence that the elaborate and highly publicised signing ceremony of the BRI MoU preceded the May 2019 European Parliament elections, seen as a bellwether for support of the populists.⁶³

In short, Rome’s brief “*romance*” with Beijing under Conte I was merely an electoral/ negotiating ploy aimed at promoting a sovereigntist image, all the while being devoid of any real break with the *status quo ante populi*. This rhetorical approach to populism is about communicating intent, not content, therefore, it does not equate to soft-balancing and a real “*populist*” foreign policy.⁶⁴

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 Francesca Ghiretti, interview by author, online, January 16, 2023.

A Critical Juncture for a more 'Autonomous' EU? Tips for the 2024-2029 HR/VP

by Irene Rusconi¹

Where We Started From

EU Strategic Autonomy (EU-SA) is perhaps the most debated concept within the EU. Since the 2016 EU Global Strategy, "*an appropriate level of ambition and strategic autonomy*" has been deemed necessary to "*promote peace and security within and beyond its borders*".² Lately, it has found new life under the aegis of von der Leyen's "Geopolitical Commission",³ which considers it essential to increase strategic considerations in its policy initiatives, and High Representative (HR/VP) Borrell's mandate, under which the EU must "*learn to use the language of power*"⁴ to strengthen its ability to defend its interests.

However, although it is an almost 10-year-old concept, little has been done to progress towards that goal, primarily because it was never fully embraced by all Member States (MSs). The Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) complexities hinder EU progress towards strategic autonomy because they are intergovernmental and consensus-based, and thus tend to be slow, indecisive, and susceptible to blockades and vetoes of single MSs.⁵ Thus, it seems impractical to

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² EEAS, "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy," *European External Action Service*, June 2016, eeas.europa.eu/sites/default/files/eeas_review_web_0.pdf.

³ EURACTIV, "Von der Leyen unveils 'geopolitical Commission'," *EURACTIV*, September 20, 2019, euractiv.com/section/politics/video/von-der-leyen-unveils-geopolitical-commission/.

⁴ Pauline Bock, "EU must develop 'appetite for power' says foreign policy chief Josep Borrell," *Euronews*, February 17, 2020, euronews.com/2020/02/16/eu-must-develop-appetite-for-power-says-foreign-policy-chief-josep-borrell.

⁵ Barbara Lippert, Nicolai von Oндarza and Volker Perthes, eds, *European Strategic Autonomy. Actors, Issues, Conflicts of Interests (Stiftung Wissenschaft und Politik*, March 2019), swp-berlin.org/publications/products/research_papers/2019RP04_lpt_orz_prt_web.pdf.

succeed in implementing this goal if MSs diverge amongst themselves on a unanimous definition and, consequently, on the concrete implications this level of autonomy entails. Indeed, the enthusiasm of the concept's strongest promoter, France, was not shared equally.⁶ The two principal problems encountered were the relationship with NATO and differential perceptions of risk. On one side, countries with a more transatlantic tradition⁷ were afraid that an increase in EU autonomy would necessarily mean a distancing from the Atlantic Alliance rather than a supportive and complementary position. On the other, not all EU Member States see problems through the same lenses,⁸ and consequently do not have the same strategic perceptions; although generally agreeing that they face the same risks, perceptions of those risks are necessarily differentiated.

The inevitably intergovernmental approach, compounded by disagreement among individual MSs on what and how to implement, has led to the launch of unstructured programs and initiatives, slowing down the process of equipping the EU with organised military capabilities. These deficiencies have long hampered the EU's capacity for action and undermined the aspiration to strengthen EU-SA. But external conditions in the international chessboard require the EU's contribution to regional security and defence, making EU-SA a more salient concept than ever.

Where We Are Now

The current Ukrainian invasion has made clear how the EU's global weight is thinning.

The EU's inability to be displayed as a strong actor within the neighbourhood and to be considered a security provider and region stabiliser was evident even before the invasion. Indeed, it would have been unlikely for Russia to have invaded the country if a broadly-considered strong actor like the US bordered Ukraine. Militarily, the EU has been incapable of standing up for its values and demonstrating an active presence in areas where our interests are at stake.⁹ Russia's war thus brings into focus, once again, the EU's "Achilles' heel" regarding EU-SA, namely the continued weakness in defence policy.

However, MSs and the EU have immediately shown a clear and unified vision of purpose in making concrete, practical actions to increase their capacity to act. Unlike other crises, where the EU required months of negotiations to agree on common actions, its response to Russia's invasion was exceptional: it was quick, robust, and harmonious. The EU not only launched several sets of sanctions against Russia but also agreed to place €2.5 billion in arms for Ukraine under the European Peace Fund.¹⁰ A key moment in the EU's joint action was the Versailles Declaration. Although the concept was never mentioned literally, it

6 Mario Damen, "EU strategic autonomy 2013-2023. From concept to capacity," *European Parliament*, July 2022, [europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI\(2022\)733589_EN.pdf](https://europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI(2022)733589_EN.pdf).

7 *Ibid.*

8 Josep Borrell, "Why European strategic autonomy matters," *European Union External Action Service*, December 3, 2020, eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en.

9 *Ibid.*

10 Council of the European Union, "European Peace Facility: EU support to Ukraine increased to €2.5 billion," *Council of the European Union*, July 22, 2022, consilium.europa.eu/en/press/press-releases/2022/07/22/european-peace-facility-eu-support-to-ukraine-increased-to-2-5-billion/.

is an extraordinarily solid expression of the political will to achieve greater EU-SA. On defence, increased investment in capabilities should be made “*collaboratively within the EU [...] in joint projects and [...] procurement*”.¹¹ The European Council showed renewed unity in endorsing the Strategic Compass, which assesses threat perceptions for the EU from various regions of the world –an additional tool to increase EU-SA in defence matters. The most groundbreaking aspect, however, is what Borrell emphasised in his preface: it is an MSs-owned document, in which they “*have been in the driving seat*”.¹² Thus, this “*new sense of seriousness and strategic purpose that has taken hold in Europe*”¹³ shows the need for a “*quantum leap forward on security and defence, similar to other big jumps we have made in European history*”.¹⁴

Russian aggression against Ukraine will permanently change the political narrative of the EU-SA. Because of the direct military threat on its own borders, it is an impetus to make the EU more capable of acting to help protect its MSs and citizens and assert its interests in a highly-competitive global political environment. Although this crisis has exposed the shortcomings of the EU’s foreign and security policy, it has also enabled the development of what could be the basis of an innovative approach to CFSP and CSDP.

What To Do

It is arduous to claim to be a “geopolitical Commission” capable of acting as a global player without being autonomous. However, a more imposing role in the international chessboard is necessary if the EU aims to avoid becoming increasingly irrelevant: as Metsola confessed, there is an urgency to “*make defence union a reality*”.¹⁵ Therefore, MSs need to better invest and cooperate much more on defence, thus demonstrating their strategic responsibility when security interests at their borders and beyond are at stake. Consequently, strategic autonomy is a process of political survival.¹⁶

However, the current war in Ukraine has been crucial in creating political momentum for the development of the EU-SA since it has shown itself as harmonising MSs’ risk conceptions: Russia’s aggressiveness has become a major security threat for the European continent and the identitarian enemy of the values and principles that are the cornerstone of what the EU stands for. Even when the unanimous response against Russia has begun to fade,¹⁷ however, there has remained an MS communion of purpose that more needs to be done for a common European defence.

11 European Council, “Informal meeting of the Heads of State or Government. Versailles Declaration,” *European Council*, March 11, 2022, consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf.

12 Josep Borrell, “A Strategic Compass to make Europe a Security Provider,” *European External Action Service*, March 11, 2022, eeas.europa.eu/sites/default/files/en_updated_foreword_-_a_strategic_compass_to_make_europe_a_security_provider_v12_final.pdf.

13 *Ibid.*

14 *Ibid.*

15 Roberta Metsola, “We need to reassess Europe’s role in a new world: Metsola to EU leaders,” *European Parliament*, 10 March 2022, europarl.europa.eu/news/it/press-room/20220310IPR25211/we-need-to-reassess-europe-s-role-in-a-new-world-metsola-to-eu-leaders.

16 Borrell, Why European strategic autonomy matters.

17 Paolo Magri, “Facing War: Rethinking Europe’s Security and Defence,” *ISPI*, November 2022, ispionline.it/sites/default/files/pubblicazioni/facingwar.rethinking-europes-security-and-defence.reportispi2022.pdf.

The crisis should also have strengthened the EU and NATO's relationship, clarifying how their actions remain firmly intertwined as both have immediately demonstrated operational unity. Therefore, EU-SA will not be a sign of departure from the Transatlantic Alliance but coordinated with it as closely as possible. It is a political obligation to have some degree of autonomous capability with the development of its own integrated equipment, which would also greatly improve coordination with NATO in defence planning and provide the apparatus to support its defence effort. If MSs commit to developing high-level capabilities, these will also be available to NATO. In fact, EU-SA, in military terms, is the solution to the long-standing demand for equitable burden-sharing within NATO.¹⁸ It is not at its detriment but rather in its interest.

The definition and implementation of the EU-SA are, therefore, more urgent than ever, but this historical phase of convergence of visions makes the timing favourable. Because, if it is true that strategic autonomy is not achieved with a magic wand but through a process¹⁹ –“Europe will not be done all at once”, Schuman declared–,²⁰ the current crisis can be the seed to breathe new life into the project. However, if, as they say, only crises have the power to trigger

further change and integration within the Union, could this war really be the required critical juncture to produce deep structural changes²¹ and start the process of making the EU “autonomously” mature?

This process could start with a commonly-accepted EU-SA definition. Referring to Macron's definition –the need to ensure Europe's autonomous operational defence capabilities and to develop a shared strategic culture–²² it is time to launch the process by being capable of deploying military capabilities. While the timing is convenient, as we are experiencing a convergence of views on identifying a more homogeneous assessment of the threats facing Europe and a “*shared strategic culture*”, the crisis has also shown how the EU continues to stand in cooperation with NATO. Strategic autonomy in the military defence apparatus has been framed as the EU's potential to broaden the spectrum of missions and greater operational readiness in dealing with all types of emerging threats.²³ In 2013, the Council already linked the concept of EU-SA with the need for greater EU activism in the field of defence investment. Lately, most MSs have thus pledged to significantly increase defence spending in the coming years, either at the national level²⁴ or jointly with other MSs,²⁵ after having lost more than a third of their capacity in the past two

18 Corentin Brustlein, “European Strategic Autonomy: Balancing Ambition and Responsibility,” *IFRI*, November 16, 2018, ifri.org/sites/default/files/atoms/files/brustlein_european_strategic_autonomy_2018.pdf.

19 Borrell, Why European strategic autonomy matters.

20 Robert Schuman, “Schuman Declaration,” *European Union*, May 1950, european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en#:~:text=we%20had%20war%2C%20will%20not%20be%20made%20all%20at%20once%2C%20or%20according,opposition%20of%20France%20and%20Germany.

21 Serena Giusti, “EU Security and Defence Policy in a Volatile Context,” *ISPI*, November 2022, ispionline.it/sites/default/files/publicazioni/facingwar.rethinking-europes-security-and-defence.reportispi2022.pdf.

22 Damen, EU strategic autonomy 2013-2023. From concept to capacity.

23 Raluca Csernaton, “The EU's Defense Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex,” *Carnegie Europe*, December 6, 2021, carnegieeurope.eu/2021/12/06/eu-s-defense-ambitions-understanding-emergence-of-european-defense-technological-and-industrial-complex-pub-85884.

24 Chancellor Scholz pursued a massive €100 billion defence package to restore the German military, although he has lately recalibrated his shot at €300 million. Julia Dahm, “Scholz accused of not living up to defence spending promise,” *EURACTIV*, November 24, 2022, euractiv.com/section/politics/news/scholz-accused-of-not-living-up-to-defence-spending-promise/.

25 Macron, Scholz, and Sánchez have called the heads of their respective defense industries to unblock work on the Future Combat Air System (FCAS), which should aim to build a joint common aircraft by 2040. Vivienne Machi, “Europe's new warplane program could finally, maybe, take off,” *DefenseNews*, November 22, 2022, defensenews.com/global/europe/2022/11/22/europes-new-warplane-program-could-finally-maybe-take-off/.

decades.²⁶ The implementation of a truly autonomous military apparatus, then, is the necessary steppingstone to initiating a broader and longer-term process through which the EU can become autonomous: although present-day investments would yield results over a considerable period, this still should not be seen as a reason not to jump-start efforts. Just as the EU was born out of coal and steel pooling and has become the current political construct exercising some of the MSs' national sovereignty in numerous fields, the implementation of common military capabilities could be the springboard for something certainly broader. Europe, Schuman continued, is made by concrete actions, creating first and foremost a "*solidarité de fait*".²⁷

Greater efforts to create a military apparatus allow the EU to be a more reliable and responsible US partner as well. In effect, this would strengthen the EU's partnerships and role in the world, contributing significantly to European and transatlantic security. The EU could become a geopolitical power, developing hard power tools while relying on its existing soft power ones, enabling it to address the full spectrum of threats²⁸ – thus strengthening EU-SA. Progressive implementation of joined-up military instruments could also trigger more important political consequences, to the point where MSs will be much closer to

becoming a proper Union²⁹ –with the belief that collaborative EU-wide security and defence industrial projects will become an important variable in the EU security and defence supranationalisation.

Who Can Do It

Since a strong political will is crucial for concrete steps towards EU-SA –due to the intergovernmental CFSP and CSDP approach– the European Council will take a leading role in implementing it, balancing the MSs' autonomy with the EU common goals.³⁰ However, the metaphorical alignment of the planets due to the conflict in Ukraine has created a favourable environment, making concrete the consensus on defence in the European Council –which must be exploited if a more assertive process of creating EU autonomy is to begin. Geopolitical pressures on Europe have made MSs more aware of the importance of defence development policies.

The renewed common purpose vision should therefore be exploited by the Commission in its role as long-term goals and strategies prompter.³¹ These instances provide a window of opportunity to assume a more prominent role in security and defence policies. The Commission had already carved out a role for itself in this field, leading its funding agenda and demonstrating sustained

26 According to EDA, 2018 aggregate underinvestment, compared to 2008 spending levels, stands at a worrying €160 billion. EDA, "EDA finds record European defence spending in 2020 with slump in collaborative expenditure." *European Defence Agency*, December 6, 2021, eda.europa.eu/news-and-events/news/2021/12/06/eda-finds-record-european-defence-spending-in-2020-with-slump-in-collaborative-expenditure.

27 Schuman, Schuman Declaration.

28 European Parliamentary Research Service, "Future Shocks 2022: Strengthening European defence union," *European Parliamentary Research Service*, May 21, 2022, epthinktank.eu/2022/05/21/future-shocks-2022-strengthening-european-defence-union/.

29 Vincenzo Camporini, Keith Hartley, Jean Pierre Maulny and Dick Zandee, "European Preference, Strategic Autonomy and European Defence Fund," *Ares*, November 2017, clingendael.org/sites/default/files/2017-11/Ares-22-Report-Nov-2017.pdf.

30 Damen, EU strategic autonomy 2013-2023. From concept to capacity.

31 *Ibid.*

political entrepreneurship in shaping EU defence research and industrial issues,³² also through the DG DEFIS actions. For instance, the Commission has important room for manoeuvre in reallocating the European Defence Fund (EDF) budget to research and development activities. It can be appreciated, therefore, that the EDF really does represent a fundamental change in the EU defence communitarisation process.³³ It marks an unprecedented turn in the Commission's institutional role as a nontraditional defence actor towards supranational governance transformation,³⁴ through increased activism and strong intervention in an area conventionally of MSS' exclusive domain through the intergovernmental method. Pursuing the action of this supranational body par excellence would provide a great incentive for increasing communitarisation and Europeanisation of security and defence policies.

In this context, the HR/VP role is strategic. Being the Commission Vice-President, the Foreign Affairs Council President, and participating in the European Council works, s/he represents the ideal crossroads between an imperative intergovernmental approach and desirable supranational action. S/he could indeed use his/her special relationship with the European Council to seize and press the renewed MSS cohesion towards a more joined-up approach on defence military capabilities pooling to place these efforts within the Commission-implemented tools. It can thus be that necessary stronger political steering to escape the trap of MSS'

cluelessness and faltering to join forces on a suitable scale.³⁵ The HR's agenda in the 2024-2029 change of administration could be thus interpreted as a turning point, kick-starting the implementation of policies to make the EU more strategically autonomous. Hence, there is a need for the new HR/VP to be able to exploit his/her conjuncture offering a unique window of opportunity to seize a renewed momentum for the defence sector process, thereby simultaneously widening its office compared to what it has enjoyed so far.

How To Do It

The Commission-proposed EDF is certainly the most suitable instrument to enhance the EU's Defence Technological and Industrial Base (EDTIB) while strengthening the Community Method to promote joint defence, as it gives the possibility of using nearly €8 billion for the 2021-2027 period from the EU budget: €2.7 billion for collaborative defence research and €5.3 billion for collaborative capability development projects to supplement national contributions.³⁶ A higher funding rate is also offered to projects developed under the Permanent Structured Cooperation (PESCO).³⁷ A defence funding increase within this framework might therefore be more cost-effective. Cooperating within PESCO surely is a more achievable goal, as participating States have proven a more homogeneous EU defence view and thus are more willing to cooperate in the project. It must be remembered that it continues to be

32 The Preparatory Action for Security Research (PASR) (2004-2006); the 2003 European Security Strategy (ESS); the European Security Research Program (ESRP) (2007-2013); the Security Research section under the Horizon 2020 program (2014-2020); the emergence of a European defence industrial research agenda taking shape after the 2013 European Council conclusions; and the 2016 EU Global Strategy. Csernaton, "The EU's Defense Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex".

33 *Ibid.*

34 *Ibid.*

35 Giovanni Grevi, "Conclusions. European Defence: Quantum Leap or Limbo?" *ISPI*, November 2022, ispionline.it/sites/default/files/publicazioni/facingwar.rethinking-europes-security-and-defence.reportispi2022.pdf.

36 European Commission, "European Defence Fund," *European Commission*, defence-industry-space.ec.europa.eu/eu-defence-industry/european-defence-fund-edf_en.

37 *Ibid.*

primarily intergovernmental, retaining powers in the MSs' hands. Eventually, the newest tools in the Strategic Compass framework may also be worthwhile.³⁸ Another role the HR/VP holds – chairman of the European Defense Agency (EDA – still proves to be strategic since the Agency is entrusted with the coordinating role in all these initiatives.³⁹ Through the EDA's Defence Investment Gaps Analyses,⁴⁰ s/he can prioritise the most deficient joint defence fields.

What to do in concrete terms? Efforts could be put into action to finally meet the so-long-ago collectively-agreed benchmarks by defence ministers in the 2007 EDA Steering Board: meeting the 35% target of total equipment spending on EU-collaborative equipment procurement and the 20% target on EU-collaborative defence R&T.⁴¹ Currently, MSs are still far from reaching the 35% target –since in 2020 it reached its lowest level at 11% and R&D was only 6%:⁴² they should thus increase funding by at least €5 billion.

PESCO and the EDF seek to stimulate cooperative processes that equip MSs with the required capabilities and structures to exercise greater EU-SA. Being able to fully exploit these existing tools at this favourable time to give new impetus to the process toward EU-SA is surely the crucial task the new HR/VP is expected to implement. Developing projects under the EDF, moreover, means expanding the Commission's influence in EU defence, beginning to wrest a small part of the –traditionally intergovernmental– CSDP decision-making process from the MSs' hands toward a more supranational approach: this may also provide for greater efficiency in terms of more agile governance structures at the EU level. A significant increase in the military capabilities' Europeanisation is the beginning of a progressive path, potentially achievable in the new five-year mandate – if the green wave created by the current crisis can be seized and exploited for the purposes of a strategically autonomous EU.

38 A Defence Joint Procurement Task Force to support MSs' immediate procurement, an EU Framework for Defence Joint Procurement based on a Commission-led European Defence Investment Programme (EDIP) regulation; and a European Defence Capability Consortium (EDCC). European Commission, "Stronger European Defence," *European Commission*, commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/stronger-european-defence_en.

39 Andrea Locatelli, "EU Defence: Joint Capability Development," *ISPI*, November 2022, ispionline.it/sites/default/files/pubblicazioni/facingwar.rethinking-europes-security-and-defence.reportispi2022.pdf.

40 *Ibid.*

41 EDA, "Defence Data," *European Defence Agency*, 2021, eda.europa.eu/publications-and-data/defence-data.

42 EDA, "Defence Data 2019-2020. Key findings and analysis," *European Defence Agency*, 2021, eda.europa.eu/docs/default-source/brochures/eda---defence-data-report-2019-2020.pdf.

Could Germany's Past Ostpolitik Undermine Its Future Position As A Regional Leader?

by Eugenia Hanniffy¹

Introduction

COMING into the one-year anniversary since the beginning of the Russian invasion of Ukraine in February 2022, Berlin has been facing heat from its allies to provide more support to Ukraine, not just an expression of solidarity but also in the form of heavy tanks. As the biggest economy in the European Union (EU),² and the main producer and licensing authority of Europe's tanks and military equipment, it would have been expected that Germany would be one of the first nations in Europe to support Ukraine not only by showing solidarity, but also providing the most military support after the US and the UK.³ In reverse, we observe that Germany has presented a lack of initiative and willingness to be the main supporting state for Ukraine on behalf of the EU outside of speeches of solidarity. The fault may, partially, lie in Germany's *Ostpolitik* –the notion that “*there can be no security in Europe without Russia*”.⁴

The German government has hoped that, through a close-knit partnership during and post-Cold War era, it could encourage Russia to follow the path of liberal democracy and cooperate with the West to maintain peace in the

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² Eurostat, “GDP and Main Components (Output, Expenditure and Income),” *ec.europa.eu*, 2023, <https://ec.europa.eu/eurostat/databrowser/bookmark/77682094-d1c6-41f6-a100-293a2752314a?lang=en>.

³ Pawel Zerka, “The Case for Defence: How Russia's War on Ukraine Has Proved France Right,” *ECFR*, November 21, 2022, <https://ecfr.eu/article/the-case-for-defence-how-russias-war-on-ukraine-has-proved-france-right/>.

⁴ Kristi Raik, “Germany's Zeitenwende Fails to Address Europe's New Geopolitical Reality,” *Internationale Politik Quarterly*, January 4, 2023, <https://ip-quarterly.com/en/germanys-zeitenwende-fails-address-europes-new-geopolitical-reality>.

region.⁵ However, such candour has led the country and parts of Europe into a path of energy dependency. It has made Berlin reluctant to aggravate the Kremlin, even as parts of Eastern Europe have pointed to Russia's continuous concerning domestic and foreign policy. Furthermore, such dependency has put regional security at risk as Germany's economic interests were prioritised over strengthening national and European defence. Given Russia's war in Ukraine, the EU, and especially its eastern borders, have been left rather vulnerable. Germany's past inattentiveness to the bloc's security, and current pressures from other states such as Poland to send more military support to Ukraine, leads European nations, foreign policy analysts, and observers of current affairs to pose several questions: why is Germany, nearly one year later, still lagging in sending tanks and weapons? Is Germany the right choice of a leader in a time of crisis? And is there a potential candidate that could "step in" in Germany's place as a regional leader and address the pressing question of regional defence and security if escalation occurs?

This article will discuss Germany's *Ostpolitik*, its origin, and how it has been sustained since the end of the Cold War into the 21st century, as well as the consequences it has now on Germany's role as a leading regional power. Increasing attention in media and analytical think tanks is given to *Ostpolitik* and its role during the Cold War and how it has impacted German foreign policy towards Russia and Eastern

Europe since the 1990s. However, less application is dedicated to addressing the potential consequences of *Ostpolitik* on Germany's future and whether it may lose its influence in the EU. The author argues that Germany's *Ostpolitik* has led to its practising appeasement towards Russia leading up to the war, which makes it at risk of losing its credibility and influence in the EU. Furthermore, France, also a regional power with an advanced military capacity, influence at a global scale, and diplomatic mediation qualities since the beginning of the war in Ukraine, proves to be a potential candidate to overtake Germany as a new regional leader.

Germany's *Ostpolitik*

Ostpolitik was a West German foreign policy during the Cold War, introduced under the social-liberal coalition, aiming to appease relations with the Communist bloc, particularly the USSR and the German Democratic Republic.⁶ In the speech, *Wandel durch Annäherung* (Change through Rapprochement), Egon Bahr put forward principles that would define West German foreign policy until the end of the Cold War. Inspired by John F. Kennedy's "Strategy for Peace", Bahr considered the future reunification of Germany, which could not have been possible without the cooperation of Moscow.⁷ Bahr's speech led to the development of *Ostpolitik* in the 1970s under Willy Schmidt's administration, which created a new *detente* for Russia.⁸ Under SPD, defence

⁵ Zerka, The Case for Defence: How Russia's War on Ukraine Has Proved France Right.

⁶ Klaus Schubert and Martina Klein. *Das Politiklexikon. 7., aktual. u. erw. Aufl. Bonn.* Dietz 2020. Lizenzausgabe Bonn: Bundeszentrale für politische Bildung, <https://www.bpb.de/kurz-knapp/lexika/politiklexikon/17973/ostpolitik/>.

⁷ Egon Bahr, "Wandel Durch Annäherung," Rede in Der Evangelischen Akademie Tutzing [Tutzingener Rede], https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0091_bah&object=translation&st=&l=de [Accessed January 29, 2023].

⁸ Michael Roth, "Op-Ed: A New Ostpolitik for the Watershed Moment," *Internationale Politik Quarterly*, July 15, 2022, <https://ip-quarterly.com/en/op-ed-new-ostpolitik-watershed-moment>.

spending and military strength increased. Stability beyond coexistence became a priority for Germany, even more so than the appeal of freedom and civil action, which became a priority for Poland and other parts of the Communist bloc throughout the 1980s.⁹

Germany cohered to *Ostpolitik* and the promotion of stability in Europe since the fall of the Berlin wall. Through close economic relations, or *Wandel durch Handel* (Change through Trade), Germany was continuing its dialogue with Russia, even after Russian President Vladimir Putin came into office and gradually began to constitute an authoritarian system.¹⁰ The main culprit of the bilateral economic interdependence was the energy sector. Under Gerhard Schröder and Angela Merkel, Germany has become enveloped in commercial ties through the Nord Stream 1 project. Nord Stream 1 was a pipeline which would deliver natural gas from Russia to Germany through the Baltic Sea.¹¹ Not only did this project bypass Ukraine and decrease its importance as a transit state, but it has tied Germany to the Russian sphere of influence, rather than *vice versa*, as Germany originally intended through the *Ostpolitik*.

Apart from unfortunate commercial and energy policies, in hindsight, there has been further evidence against Russia as a destabiliser, precisely through its military

interventions in its “Near Abroad” and domestic regions: the two Chechen wars in the 1990s,¹² the war in Georgia in 2008, the annexation of Crimea in 2014, and the continuous military presence in the Transnistrian region of Moldova.¹³ Despite the ongoing violations of international law and human rights, Berlin has never put forward measures that condemned the actions of the Russian government, which sent Moscow a clear signal – good business can allow anything.¹⁴ It is only with the invasion of Ukraine in late February of 2022 that, in the end, Berlin was provoked to rethink its position and reassess its partner’s true agenda. Furthermore, the crisis created a demand for Berlin to decide on a new course for its own foreign policy.

Germany’s v France’s Response to Ukraine

At the beginning of Russia’s invasion of Ukraine, Germany and France had a unitary response to the crisis. Both states expressed, in words, commitment to support Ukraine, as well as improve and strengthen defence, energy and economic policies in the EU. In action, the two regional leaders have diverting strategies in how they support Ukraine or address matters of regional security.¹⁵ Germany produces most of Europe’s heavy tanks, namely the Leopard 2s, and is the only one that can give the go-ahead

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Andreas Umland, “The Ruins of Ostpolitik,” *New Eastern Europe*, February 23, 2022, <https://www.eurozine.com/german-ostpolitik-in-the-shadow-of-russias-imperial-revenge/>.

¹² Elina Driscoll, “Insurgency in the North Caucasus: Lessons of the First Chechen War,” *Small Wars Journal*, July 26, 2020, <https://smallwarsjournal.com/jrnl/art/insurgency-north-caucasus-lessons-first-chechen-war>.

¹³ Umland, The Ruins of Ostpolitik.

¹⁴ *Ibid.*

¹⁵ Sylvie Corbet and Emily Schultheis, “France, Germany Renew Alliance Strained amid War in Ukraine,” *AP NEWS*, January 22, 2023, <https://apnews.com/article/russia-ukraine-politics-france-government-european-union-germany-a9c9475ec75e58773cac38d2ccb7b4bf>.

to export them to non-NATO territories, much to Poland's dismay, which has been formally requesting for tanks to be sent to Ukraine.¹⁶ The issue has led to a heated debate among German Members of Parliament, creating disunity within Olaf Scholz's coalition government.¹⁷ Scholz continues to stress the aid that Germany *has* already sent in the past to avoid further pressure.¹⁸ The disagreement within Germany and external criticism are limiting the bloc leader's ability to make rational decisions regarding its own national interests or those of the EU. Furthermore, it could send signals to Kyiv, which sees Germany as a strategic partner and a key to entering the EU to escape Russia's sphere of influence,¹⁹ that Berlin is not a reliable partner, nor is it ready to let go of its ties to the Kremlin.

Berlin is making decisions out of pressure from other states rather than its own initiative, whether it is cancelling the operation of the Nord Stream-2 pipeline or sending the appropriate amount of weaponry. Defence has not been a priority for Berlin in the past as it has been rather timid in participating in talks on security matters since 1945 and still feels the fault

over its aggression in the two World Wars, as well as over the millions of Russian lives lost at that time.²⁰ The responsibility for the past translates into concern over further violent escalation right now, which could prolong the war and leave Ukraine without additional and potentially beneficial support. Furthermore, it could also have a negative impact on Germany's relations with its fellow eastern EU Member States.

In comparison, France has shown to be an equally reliable nation when dealing with matters of security and defence. It has the most powerful military in the EU and is only second to the UK in Europe,²¹ and it is more independent from Russian energy due to its developed nuclear energy programme,²² which further grants it a seat in the United Nations Security Council. In the recent *National Strategic Review*, France recalls its position on the modernisation of Europe's military capacity, which has been in place since 2017.²³ Since the beginning of the war in Ukraine, Paris has provided Kyiv with anti-tank missiles and has made promises to send its own tanks, while also boosting its presence in Lithuania, Romania and Estonia in order to defend the EU's eastern borders.²⁴ At

16 Deutsche Welle, "Ukraine Updates: Poland Asks German Permission to Send Tanks," *DW*, January 24, 2023, <https://www.dw.com/en/ukraine-updates-poland-asks-germany-for-permission-to-send-tanks/a-64495260>; Ellen Mitchell, "Poland Asks Germany for Permission to Send Leopard Tanks to Ukraine," *The Hill*, January 24, 2023, <https://thehill.com/policy/defense/3828105-poland-asks-germany-for-permission-to-send-leopard-tanks-to-ukraine/>; Monika Scisłowska, "Poland Pushes for More Tanks for Kyiv, Will Seek German OK," *ABC News*, January 23, 2023, <https://abcnews.go.com/International/wireStory/poland-germany-ahead-send-tanks-ukraine-96603884>.

17 Judy Dempsey, "Germany Must Move Past the Crossroads," *Carnegie Europe*, January 10, 2023, <https://carnegieeurope.eu/strategieurope/88765>.

18 Katya Adler, "Why Germany Delayed Sending Leopard 2 Tanks to Ukraine," *BBC News*, January 25, 2023, <https://www.bbc.co.uk/news/world-europe-64402928>.

19 Iliya Kusa, "Can Ukraine and Germany Overcome Their Disagreements over Russia?," *Carnegie Endowment for International Peace*, January 10, 2023, <https://carnegieendowment.org/politika/88764>.

20 Adler, "Why Germany Delayed Sending Leopard 2 Tanks to Ukraine."

21 Global Fire Power, "European Military Strength (2023)," *globalfirepower.com*, 2023, <https://www.globalfirepower.com/countries-listing-europe.php>.

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the same time, aware of Russia's potential threats of further escalation, Macron has made efforts to communicate with Putin and push for talks between the two nations.²⁵ These factors make France a vital actor both at a regional and global level, and are more important in times of war, particularly if it is occurring at Europe's front door. Macron takes a step further and calls for the strengthening of the internal market and a "new energy model" which prioritises diversification and boosting of the green industry, as a strategy for economic independence.²⁶ Although such plans are not of utmost urgency in times of conflict, it presents a streak of leadership on France's part as the country looks forward and sets long-term goals for itself and its region.

Conclusion

The war in Ukraine has highlighted the flaws of Germany's past foreign policies towards Russia, particularly in areas of national security and energy policy. Although *Ostpolitik* may have contributed to Germany and its national interests at the time when Brandt was putting it forward, Germany has become more powerful and influential than it was in the 1970s. It no longer has to solely answer to its national interests but is partially responsible for

the interests of the EU as a whole. The war in Ukraine gives Germany a chance to show leadership in the regional bloc and revise its foreign policy to include the position of Central and Eastern European countries.²⁷ By failing to do so, even with economic power, Berlin could risk losing its reputation in the EU, and its influence could transfer to a state that is firmer and more forward-thinking in the spheres of security and peacekeeping, such as France.

It is worth noting that at the time this article is written, the war in Ukraine continues, and strategies of leaders in and outside of Europe change on a daily basis, therefore, so could Germany's position. European security is at stake and the leaders of the EU must make important decisions that are not based on the past but they have to prioritise the future of the EU, as well as their own national interests.

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INTERVIEW

Interview of Jakob Gomolka with Jacob Werksman, Principal Advisor at DG CLIMA, lead negotiator at COP

Jacob Werksman is Principal Adviser for international aspects of EU climate policy to the European Commission's DG CLIMA and EU chief negotiator at the international climate conference COP 27. Having previously worked for environmental NGOs, Werksman is now one of the Commission's key figures responsible for EU climate foreign policy.

Our author Jakob Gomolka met Werksman when he attended COP 27 in Sharm-al-Sheikh, Egypt, as an observer for youth NGO Young European Leadership (YEL). Werksman had briefed the YEL delegation about EU positions in anticipation of COP. After the conference, Werksman agreed to an interview offering his inside perspective on how the negotiations had proceeded.

One of the things that struck me most about going to COP was that, on a personal level, it is this giant puzzle of things: It's so many people coming together, it's diplomats working until late into the night trying to figure out a deal. How does it feel to attend as a negotiator?

For people attending the COP, it's a once-a-year event that you can prepare for mentally and physically. It is stressful, but it's not an unusual form of stress. Is the stress combined with a certain degree of hope because it's also one of the events where potential solutions are made, right? Yeah. I am always optimistic that we'll find a consensus at the end of the day.

The challenge is making sure that you keep your eye on the longer game because there is a kind of a false sense of finality and solution that you get from working on a process that meets and produces some form of outcome year-on-year.

And you always have to keep a longer view on whether all of this is adding up to something that is solving the problem or at least contributing to a solution to the problem. There's always hope, but there are two levels of hope: one is, are you going to close the deal with this particular COP? The other is, do all these COPs actually add up to something that is going to have an effect on the climate challenge?

Many people are quite critical of what COP has turned into. This was the biggest COP so far, with many civil society and youth advocates but also with a large group of business and fossil fuel representatives. Do you think it's worth trying to be inclusive, or has COP outgrown its purpose?

It's very hard to have, as an individual, a full experience of an event that size. For me, as a negotiator, the presence of tens of thousands of others there doesn't affect my day-to-day work, but it does attract

leaders and helps with the overall *zeitgeist* of the meeting too.

I have heard a lot of concerns that a significant presence of business, in particular fossil fuel-related businesses, affects the outcomes. I don't feel that in terms of my own day-to-day experience. I've never had them even approach me, or, more importantly, the politicians that come to the COP. On the other hand, we get approached by civil society and increasingly by youth groups for meetings all the time –and we grant them and hear directly from the youth constituencies about their hopes and disappointments. On balance, I think the inclusiveness of the process works more towards providing an opportunity for access to civil society at large than to businesses in particular.

That is encouraging to hear. Before you started working for the EU, you went to law school in the US. I understand that after graduation, your first job in climate policy was actually being involved in climate negotiations on the other side of the table, for Vanuatu?

Yes, that's right. My first job after law school was an internship with an NGO in London called FIELD, the Foundation for International Environmental Law and Development. We had a series of grants from U.S. foundations to provide free legal assistance to small island developing states that didn't have at that stage [the early 1990s] a lot of capacity to negotiate. After the internship, I went back to the U.S. to work for a law firm and brought FIELD on as my pro-bono client. Not long after that, I returned to FIELD full-time for nearly ten years, working with the Alliance of Small Islands States (AOSIS) through the negotiations of the UNFCCC, the Kyoto Protocol, and the Marrakech Accords.

This is also the time when people first started engaging with loss and damage. Did loss and damage play a role when you were doing pro bono work for Vanuatu?

In the early years, the theme of "loss and damage" was played in in different ways than today. At first, we were designing a framework convention, and we were trying to ensure as much as possible that that convention addressed the needs of small islands. We began by scanning existing international agreements to see whether there were any functions that we thought could help. One idea was for some kind of insurance arrangement in which those that were contributing to an environmental risk would set aside resources in circumstances where that risk led to harm to the environment. One of the models we looked at was from the IMO, where there is an international fund for marine pollution [the International Oil Pollution Compensation Fund] that collects money from receivers of crude oil from shipping companies and sets it aside in a fund. In circumstances where there was an oil spill from a ship, the fund pays out to fix the spill and, in theory, to compensate victims.

On the basis of that, we came up with this proposal for a funding facility that would perform a similar function, that would take resources from rich countries emitting greenhouse gases and make them available for small island states that were experiencing the impacts of sea level rise. I believe this was the first time a proposal from a group of governments referred to "loss and damage" as a concept related to climate change. But the concept then took on a life of its own in the years that followed. This is the reason why the word "insurance" is in the framework

convention because that idea got boiled down into one word and ended up in the convention text.

Some of the small island negotiators say that they have been demanding a fund for loss and damage for the past 30 years and haven't been given it. I think that that's not 100% accurate because in the intervening years since the proposal was first made, addressing loss and damage was not an AOSIS priority. What they were rightly concerned about in the early years of the negotiations was a focus on cutting emissions. That's really what we wanted the regime to do. That's why at the very first meeting of the Conference of the Parties in 1995, it was AOSIS that tabled the proposal for a protocol to the Convention introducing legally binding specific targets for developed countries to cut their emissions. This proposal provided the basis for the 1997 Kyoto Protocol.

So even though loss and damage were not the main focus back then, it has accompanied you throughout. Was the fund something you were waiting for? Is it also a personal success that some sort of agreement now came through?

I don't really see it in personal terms, but any satisfaction about a new funding arrangement is counter-balanced by my disappointment that we haven't been able to cut emissions fast enough. I can't see it in any other terms than that we find ourselves in a situation where emissions and temperatures have continued to rise, and the only thing in the science that has surprised us is that the impacts seem to be happening even under 1.1 and 1.2 degrees at a level that's going to be difficult to manage.

I am glad to see the amount of empathy that the establishment of the funding arrangements reflects and the potential to feed that empathy back into the countries

that are causing the problem in a way that leads to the mobilization of much, much more funding than we've seen in the past. My hope now is that this isn't just a political compromise reached in order to ensure that a COP doesn't fail but that it reflects a message of solidarity and empathy. However, I don't think that whatever additional empathy the new funding arrangements might generate will close the gap between needs and resources.

I don't think that this is going to lead to a regime of liability and compensation in which any harm that's experienced by a developing country will generate money to make that country whole again –to literally compensate a developing country for the impacts of climate change. To me, that vision isn't one that will or could be realised. I just don't think that the politics – however much they might generate more empathy and sympathy and solidarity–will ever allow for that kind of literal compensation to take place. The issue of climate change is far more complicated than a mechanical logic of harm caused, therefore, victims compensated.

My impression was that the runup that led to the adaption of the L&D agreement was not smooth at all. Germany spearheaded the Global Shield initiative, an insurance scheme many observers perceived to be an appeasement attempt to offer anything but an L&D fund. Towards the end of week 2, the EU delegation threatened to walk out over the lack of progress on mitigation. Yet, in the end, there was a compromise even without progress on mitigation. Can you give us more insight into your negotiating strategy?

The EU, including Germany, had all begun to see the problem of loss and damage as really quite a complex one. It wasn't a simplistic dynamic of us pushing back on the fund as being the solution. But it really

did emerge from us listening to the way in which different developing countries were expressing their needs.

For example, even within AOSIS, heavily indebted, middle-income Caribbean countries were concerned about the impacts of extreme weather and their need to access funding to rebuild their economies on affordable terms. They were looking for a form of debt relief, more access to grant resources, and more lenient borrowing terms from the World Bank and the IMF. On the other end of the spectrum, least developed countries like small island states in the South Pacific were more concerned about the loss of territory and the loss of cultural heritage, what we refer to now as non-economic losses resulting from slow onset events like sea level rise. With economies already significantly dependent upon and fully eligible for ODA, they were looking for more grant resources tailored to their specific needs. Two completely different sets of needs and for which different kinds of instruments would need to be designed to address them! And then you had all the countries in between that were looking for better access to early warning systems, more support for drought and desertification, etc.

The German G-7 Presidency proposal for a Global Shield came out of that thinking –that there are institutions out there that are doing work to address this variety of needs– on early warning systems that are already providing insurance for those that can't afford it, insurance for the uninsured as form of development assistance that is targeted on certain kinds of vulnerability. Additionally, organisations like the World Food Programme provide absolutely essential help. The Global Shield became the leading example of a much more promising way of raising significant additional resources than simply creating a fund, calling it a “Loss and Damage

Fund”, and then expecting it to just be able to raise money and deliver it effectively.

The problem, going into COP27, was that the fund, as the G77 described it, was the kind of fund that would be least likely to raise any significant resources. It was a fund that was described as mobilising trillions of dollars exclusively from “developed countries” for which any “developing country” would be eligible, with the definition of what a developed or developing country would be drawn from the 1992 Framework Convention on Climate Change. And then the G77 went on to describe it as a fund that would be able to pay out massive amounts of money to any developing country, experiencing an impact of climate change within a 24 to 48-hour period, without any conditions attached to how the money would be spent. On that basis, I couldn't think of a single donor that would have any interest in putting money into that fund. I just don't live in a world in which that could be a political reality. But it was a solid G77 position that this fund be established at COP27, presenting a very high risk that without a compromise that included a fund, the COP would fail.

And so that's why the EU made the move towards the end of the second week of COP27 to say that “we realise that the political moment is now”. But if we have to, in principle, create a fund, and we could only do so under certain conditions, that fund would have to be part of an effort to strengthen the broader “mosaic” of funding arrangements –of the kind represented by the Global Shield. It had to focus on assisting the particularly vulnerable developing countries. It had to have at least the potential to raise money and resources from beyond the traditional donor group. And that would have to be part of a package that emerged from Sharm el-Sheikh that kept Glasgow's focus on the need to cut emissions intact

and developed, a decent mitigation work program to continue to focus on pre-2030 ambition. And I think that's where we landed roughly at the end of Sharm. It's not ideal from our point of view, but at least we think that those basic elements were met.

Thank you for that insight. My impression was that within the G77, it was an easy step without great cost to demand an L&D fund –even for actors who are not really committed to climate action. What does that mean for the EU? Do you think we could think of what happened as, at some level, a strategic defeat? Have you effectively lost leverage over countries which are hard to move on mitigation?

I don't see the relationship between loss and damage and mitigation in quite those terms. I don't think agreeing to a new funding arrangement for loss and damage either increases or decreases our ability to demand more emissions cuts from, for example, emerging economies like China and India. The issue around the politics of mitigation and loss and damage had more to do with our relationship with the progressive and the vulnerable developing countries, like the small island states, where an impression was created that they weren't willing to fight hard alongside us on ambitious outcomes on mitigation, until and unless we agree to the establishment of a loss and damage fund.

I am not sure that that's accurate. They were ploughing their political efforts into loss and damage in a very, very focused way, but I didn't get the impression that they were willing to walk away from their own obvious self-interest in cutting emissions. I do think that there was a political deal made within the G77 that countries like China and Saudi Arabia and the other like-minded developing

countries, which tend to be the kind of hard-liners in these negotiations, would support the small islands in asking for the fund as long as the fund was on terms that were acceptable to the like minded. I think it was a hard deal for the small islands to do because I don't think that the G77 proposal on the fund design (which did not focus on the particularly vulnerable and would have limited the fund's donor base) was ideal for their interests. But I understand why they did it because it was the united G77 that forced an outcome at COP27.

Your EVP Timmermans has been vocal about wanting to integrate nations like China into the emissions reduction effort. Is there a level at which the L&D facility agreement does change EU approaches to the G77 by encouraging the most affected nations to demand that developing countries also need to step up?

I do think that the decision taken in Sharm is a step forward towards a more contemporary and accurate framing of who should be doing what now in terms of cutting emissions, but also in terms of contributing to climate finance, including climate finance for the loss and damage, because we did fight a good fight on this issue.

The loss and damage decision does not refer to developed countries at all in the context of funding or otherwise. It talks about particularly vulnerable developing countries being eligible for assistance, but it doesn't talk about developed countries being the sole source of finance. That's different from every other fund that we've established previously. That doesn't mean that we're going to easily broaden the donor base, and negotiations on the design of the new funding arrangements, including the fund, will still be a big challenge. I think that the most likely

way forward is a much more informal broadening of the donor base rather than a specific decision that says, for example, China will now be treated as a developed country for the purposes of climate financing. This is an opportunity to recognise that China and other countries with similar profiles are already significant contributors to the “broader mosaic” of funding arrangements for loss and damage. China, for example, helps fund the World Food Programme and, through its bilateral assistance, provides a lot of post-disaster support.

What I worry about is that, in the transitional committee, politics will end up focusing on the kind of two ends of a spectrum of those politics. On the one side, developing countries are going to continue to be obsessed about the fund, getting the fund designed and up-and-running within a year, and will not be as concerned about how the fund will actually add value to the mosaic that’s already out there. On the other end of the spectrum, some of the developed country members of the committee will focus exclusively on broadening the donor base. In the meantime, the real challenge is strengthening the mosaic of existing institutions. I fear that as global temperatures rise, that will be neglected.

I think the risk is less about over-complication and more about over-simplification. The better approach is to spend some time thinking about where the gaps are that a fund could fill. One of the things that could emerge would be a new fund that could be established to help address that particular problem, like working on non-economic loss –because we have already acknowledged that this is a gap and that there isn’t any institution out there currently that’s really addressing it.

Do you think one of the functions of COP 27 was the message that historical polluters, like the United States, have to start paying up in accordance to the damage done –because we’re starting to have mechanisms that tie them to the damage done?

I honestly don’t think so. I don’t think that the United States, or China for that matter, see the decision in Sharm as creating a political acceptance of a concept of liability, that they are now liable in political or legal terms for their emissions. The decision in Sharm does not create that expectation or strengthen the arguments around liability. It doesn’t say that the funding arrangements will be based on “compensation”, it says “assistance”. And in our understanding, that’s assistance –like humanitarian assistance and development assistance– based on the concept of solidarity and a sense of political responsibility of those that are better resourced and those that have emitted more, to help those that are not responsible for causing the problem and are experiencing the impacts.

This discussion around liability will continue in the context of the efforts to request an advisory opinion from both the International Court of Justice as well as the International Tribunal for the Law of the Sea to try to get more legal precision around what are the states’ responsibilities in the context of climate change. I wish those efforts well. But I don’t think the decisions in Sharm change this.

Can you connect the outcomes of COP 27 with developments in Brussels, like the agreement on CBAM and the move towards more investment in response to the US IRA, for us? Domestic support for the green transition might have

negative effects on outside developing nations, which will struggle to compete in the subsidies race and will be faced with additional trade barriers. Might this lead to difficulty for climate diplomacy going forward?

For me, the relationship between COP 27 and CBAM is about how behind the curve the international politics are, or how ahead of the curve the European politics are. What the EU is going through now is a very open, transparent, and not always pretty experiment of what it means when a major economy takes a net zero commitment seriously. All the politics, all the trade-offs, all the sausage-making that is necessary to maintain that political commitment is just fully on display.

More globally, there are industrial policies that are beginning to emerge now, a combination of trade and investment, including government subsidies in innovation and production and consumption, that policymakers are judging as necessary. It's true that those economies that are in a position to be able to print more money while still keeping their balance of payments and inflation and other aspects of their economy under control have an advantage. They've got a tool that other jurisdictions don't. That's a tool that can be used responsibly or it can be used irresponsibly. And one of the differences between those two approaches, I think, is the extent to which economies that are subsidising their transition keep their markets open in such a way that allows others to benefit. We have not put in place domestic content requirements that say these benefits can only extend within our borders. While EU climate policies will have impacts on developing states, I think the key is that our markets remain fundamentally open.

Thank you very much for the insight! Finally, what are you looking forward to and what do you expect the future of climate diplomacy to be after the term of the current Commission?

What I'm really looking forward to, and maybe I'm being overly optimistic, is that the conversation of climate diplomacy becomes more and more about how you get to net zero. I think there's a potential within the mitigation work program to do that. The agreement in Sharm invites much more sector-specific policy conversation around the how. And so that's a much better place to be than one in which there is perfect peace and comfort because no one is doing anything.

In terms of the next Commission, I hope that it will be one in which the European Green Deal and its next stages continue to be the core mandate in the way that they have for the first five years. The European Green Deal implies such a profound vision over a long period of time. A legally binding net zero by 2050, if it remains intact, which I hope and believe it will, will be one of the biggest lasting legacies of this Commission, because everything that will happen moving forward will be determined and bound by that. It absolutely has to be maintained in the next Commission, or we won't get there.

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