

Università degli Studi di Torino

De Europa | Special Issue - College of Europe 2022

Six selected Master's theses by College of Europe students

Guest Editor

Georges Mink, Titulaire de la Chaire de Civilisation européenne
Collège d'Europe à Natolin
Directeur de Recherche émérite au C.N.R.S. (ISP)



Brugge

College of Europe
Collège d'Europe



Natolin



UNIVERSITÀ
DI TORINO



Collane@unito.it
Università di Torino

ISBN: 9788875902544



Quest'opera è distribuita con
Licenza Creative Commons Attribuzione.
Condividi allo stesso modo 4.0 Internazionale.

Special Issue - College of Europe 2022

De Europa
European and Global Studies Journal
www.deeuropa.unito.it

*Please note that the views expressed in this publication are those of the authors,
and do not represent the official position of the College of Europe.*

With the support of the
Erasmus+ Programme
of the European Union



Jean Monnet Chair
*The EU in a Challenging
World*



In cooperation with:



Six selected Master's theses by College of Europe students

Guest Editor

Georges Mink, *Titulaire de la Chaire
de Civilisation européenne, Collège d'Europe à Natolin,
Directeur de Recherche émérite au C.N.R.S. (ISP)*



Special Issue - College of Europe 2022

INTRODUCTION

Introduction <i>Georges Mink</i>	5
-------------------------------------	---

THESES

Les relations entre la Société Civile Polonaise et les institutions européennes face à la tentative d'une harmonisation du cadre légale de l'avortement à l'échelle de l'Union <i>Jade lafrate</i>	11
YouTubers and Streamer: Labour conditions in the EU <i>Antonino Matafù</i>	59
The EU use of social media in crisis management: From Afghanistan to Ukraine <i>Álvaro Garrote Fuentes</i>	99
The biased deficit bias: exploring heterogeneities in discretionary fiscal policy choices in the EU and the assumption of a deficit bias <i>Christina Stuart</i>	131
The use of scientific arguments as a mode of justification. What place does it have in politics and law? A case study of EU GMO regulation <i>Pierre Walckiers</i>	175
The trial of the prophet: the problematic relationship between Hegel and nazism <i>Lorenzo Cornettone</i>	211

Introduction

De Europa et le Collège d'Europe à Natolin se lancent pour la quatrième fois dans la publication des meilleurs mémoires de fin d'études réalisés par les étudiants, cette fois-ci de la promotion 2021-2022 ayant eu pour patronne la juriste « Éliane Vogel-Polsky » qui s'est distinguée par son apport au droit social européen.

À chaque fois, il s'agit d'un échantillon de travaux qui se démarquent par leur qualité intrinsèque et par la diversité de leurs centres d'intérêt, avec un point commun : celui d'être réalisés dans le cadre du programme interdisciplinaire d'études européennes de Natolin. Ainsi, on bâtit ensemble un lien académique fort, une sorte de tradition d'échanges et de partage, contribuant à la consolidation de l'espace académique européen.

Le Collège d'Europe est une institution unique, composée de deux campus, à Bruges et à Natolin. Il fait partie d'un petit nombre d'institutions universitaires qui ont produit et continuent de produire un si grand nombre de spécialistes de l'Europe et de cadres européens. Ses tâches principales sont d'enseigner l'UE et, plus largement, l'Europe dans le monde. Pour ce qui est du Collège d'Europe à Natolin, ses marques de fabrique et d'excellence sont :

- s'appuyer sur une riche interdisciplinarité destinée à développer tous les angles des études européennes ;
- créer une culture et un savoir sur l'Europe ;
- former les futurs cadres européens, citoyens imprégnés des valeurs fondatrices européennes et fins connaisseurs de l'histoire européenne et de sa civilisation.

Les mémoires de fin d'année, dont nous proposons une sélection ici, sont une forme de couronnement des efforts consacrés à l'obtention du Master avancé en Études européennes interdisciplinaires au Collège d'Europe à Natolin. Ces travaux ont une visée académique, mais aussi pratique, en ce qu'ils proposent des solutions et des recommandations, lorsque cela est possible. En cela, ces travaux sont une manifestation de l'ethos citoyen européen. Les critères auxquels ils obéissent correspondent parfaitement à des normes de qualité communément admises, théoriques et empiriques. Ils se conforment aussi à une série d'exigences méthodologiques, déontologiques et épistémologiques. Ces exigences sont consignées dans une sorte de code de bonne conduite, mais font aussi partie d'un important bloc d'enseignement appelé « Séminaire de recherche », où sont enseignées toutes les facettes de la bonne conduite déontologique (notamment en politique d'anti-plagiat) et de rigueur épistémologique (prévention devant des erreurs logiques et des évidences ou des idées fixes).

Il est important de préciser ici le cadre de ces travaux et le format que ce cadre impose. Les cours, les ateliers thématiques, les masterclass, les jeux de simulation sont enseignés par plusieurs dizaines d'enseignants ou de praticiens reconnus, réputés sur le plan international et venant du monde entier. Les abondantes activités extracurriculaires, comme les conférences internationales, les exposés des personnalités invitées, les débats thématiques, les sorties de terrain, complètent le contenu du programme interdisciplinaire. Chaque année, ce programme est mis à jour et adapté aux plus récentes évolutions contemporaines. Deux voies se dessinent devant les diplômés du campus de Natolin : ce sont surtout des études professionnalisantes ; mais un petit nombre de meilleur(e)s étudiant(e)s choisiront de poursuivre leurs études supérieures en s'inscrivant dans des cycles de PhD. Ils poursuivront ainsi, pour la plupart, une carrière académique.

La structure du programme fait que le format du mémoire de fin d'année dépend du temps dédié à l'exercice de la rédaction. Cependant, prévenus dès le début de l'année de ce défi, les étudiants choisissent leur sujet pratiquement dès le premier semestre et commencent à définir leur objet de recherche, lisent les travaux se rapportant au sujet à traiter, puis passent à la phase empirique. Cette dernière, forcément, ne peut être trop complexe ; car le temps pour la recherche empirique est relativement court. Cela n'empêche pas un recours fréquent à des entretiens préparés selon les canons des règles méthodologiques. On ne s'étonnera pas de constater qu'il s'agit, dans la plupart des cas, d'entretiens qualitatifs, semi-directifs. Le temps consacré à la vérification empirique des hypothèses de travail impose une méthodologie restreinte et bien contrôlée. Enfin, l'écriture finale intervient pendant les deux à trois mois de la fin du deuxième semestre, souvent en parallèle des activités incessantes et des cours du deuxième semestre. Et pourtant, malgré ces contraintes, un grand nombre de mémoires comportent des thèses innovantes, originales et prenant part à des débats intellectuels en cours.

L'échantillon des meilleurs mémoires que nous avons sélectionné donne une très bonne mesure et une riche représentation de la diversité des sujets choisis par nos étudiants, des objectifs ambitieux poursuivis, de l'élégance de l'écriture, du respect des normes et des règles en vigueur dans le monde académique, mais surtout du foisonnement d'idées inspirées par la qualité de nos enseignements. C'est une vraie gaure de bâtir une recherche qui n'a rien à envier par sa qualité aux travaux des étudiants qui consacrent, dans le cadre de Master 2, bien plus de temps à leur mémoire. Le choix de ces mémoires n'est guidé que par leur excellence. Au lieu de constituer un corpus thématique lié par un thème commun, ou une problématique analogue, ce corpus montre la liberté de choix de sujets dans leur grande diversité thématique. Le kaléidoscope des thèmes choisis recouvre aussi la pluridisciplinarité du programme de Natolin, ainsi que son caractère interdisciplinaire.

Parmi les travaux sélectionnés nous avons décidé de permettre aux lecteurs de De Europa de prendre connaissance d'abord d'une recherche mettant en lumière la

question des mobilisations sociales concernant un sujet « brûlant » dans l'UE. Sous le titre *Les relations entre la Société Civile Polonaise et les institutions européennes face à la tentative d'une harmonisation du cadre légal de l'avortement à l'échelle de l'Union*, Jade lafrate aborde la problématique du genre, de la juridiction nationale concernant le droit à l'avortement, dans un pays membre de l'UE, en l'occurrence la Pologne, enfin la question de la tentative d'alignement sur une juridiction communautaire dans ce domaine. Observer les mobilisations sociales autour de ces questions en Pologne signifie se pencher sur une actualité mais aussi essayer de tirer des observations plus générales.

Un tout autre sujet de grande actualité est abordé dans le mémoire d'Antonino Matafù sous le titre *YouTubers and Streamer : Labour conditions in the EU*. L'ambition de ce travail est de décrire et analyser les lacunes existantes dans le champ social face aux nouveaux métiers, notamment issus de la sphère des médias sociaux. Une interrogation qui mérite d'être mise en débat, les hypothèses formulées par Antonino devraient contribuer à la mise en valeur d'un objet de recherche autant neuf qu'important pour le législateur européen. Comment légiférer sur ces nouveaux phénomènes de communication, comment protéger socialement les nouveaux métiers ?

Le sujet de médias sociaux étant particulièrement d'actualité, beaucoup d'étudiants le choisissent comme objet de mémoire. C'est le cas également de Álvaro Garrote Fuentes qui se penche sur *The EU use of social media in crisis management*. Point besoin de souligner que son interrogation est intéressante pour éclairer l'utilité de l'usage des médias sociaux dans les différentes politiques de l'UE, comme dans sa politique étrangère, dans ses aspects stratégiques comme face à des problèmes tactiques spécifiques. Le recours aux médias sociaux, comme le démontre l'auteur, facilite grandement la transparence, au temps des crises de gouvernance, et garantit la légitimité démocratique des organes de l'UE.

La pluridisciplinarité des choix des thèmes par les étudiants du Collège à Natolin s'exprime aussi par le choix d'une discipline, parfois étroite, pour approcher un sujet de première importance pour les politiques de l'UE. C'est bien le cas du mémoire de Christina Stuart : *The biased deficit bias : exploring heterogeneities in discretionary fiscal policy choices in the EU and the assumption of a deficit bias*. Ce quatrième mémoire tourné vers la fiscalité explore l'hypothèse du biais du déficit qui sous-tend une grande partie du cadre fiscal actuel de l'UE. L'originalité de cette recherche tient au fait que très peu de travaux existent pour l'instant sur l'influence du changement du contexte économique sur les règles budgétaires que s'impose l'UE. L'auteure explore ainsi des voies alternatives pour comprendre pourquoi le biais de déficit est plus accentué dans certains pays que dans d'autres, au sein de l'UE.

La richesse des préoccupations de nos étudiants va jusqu'à se confronter à des méta sujets liés à la méthodologie et/ou à l'épistémologie. C'est le cas du mémoire de Pierre Walckiers : *The use of scientific arguments as a mode of justification. What place does it have in politics and law? A case study of EU GMO regulation*. Avec ce

travail nous sommes en plein dans les questions des légitimations des politiques et de leur judiciarisation, exemplifiés par la question des organismes génétiquement modifiés (OGM). Il s'agit d'un sujet de première importance dans les débats écologiques actuels qui traversent l'UE.

Le dernier mémoire choisi, celui de Lorenzo Cornettone, relève de la philosophie politique : *The trial of the prophet: the problematic relationship between Hegel and nazism*. On pourrait croire que cette recherche nous éloigne de la centralité des questions liées à l'UE. Bien au contraire, cette réflexion, extrêmement stimulante et très savante, nous oblige à revoir, via le travail critique de Karl Popper de la pensée de Hegel (par exemple la question du communautarisme opposé au libéralisme marchand), notre vision de l'intégration européenne.

Voici donc une palette pluridisciplinaire et interdisciplinaire des meilleurs mémoires de la promotion Éliane Vogel-Polsky 2021-2022. Sa richesse comme sa qualité sont un témoignage de la vitalité des études européennes et du rôle du Collège d'Europe à Natolin. Ce dernier, en offrant aux étudiants de chaque promotion l'occasion d'exprimer leurs talents, leur savoir, et enfin, leur engagement européen, joue un rôle incontournable dans la formation sur l'UE et pour l'UE.

Bonne lecture,
Professeur Dr. Georges Mink

Theses

Les relations entre la Société Civile Polonaise et les institutions européennes face à la tentative d'une harmonisation du cadre légal de l'avortement à l'échelle de l'Union

Jade lafrate

1. Introduction :

« Je souhaite que l'on consolide nos valeurs d'Européens qui font notre unité, notre fierté et notre force [...] que nous puissions actualiser cette charte, notamment pour être plus explicite sur la protection de l'environnement ou la reconnaissance du droit à l'avortement. »¹.

Emmanuel Macron, Président de la République française, 19 janvier 2022

Dans les jours suivant la prise de fonction de la France à la présidence du Conseil de l'Union européenne - CUE, Emmanuel Macron, Président de la République française, est venu présenter ses lignes directrices ainsi que son « projet politique commun » devant le Parlement européen. Force est de constater qu'il s'agissait de la première intervention d'un chef d'État sur la scène européenne en faveur du droit et à l'accès à l'avortement, également appelé interruption de grossesse - IVG. Prononcé au lendemain de la nomination de la maltaise Roberta Metsola, une membre du Parlement européen – MEP, ouvertement opposé à l'IVG² - à la présidence, ce discours se traduit comme un véritable appel à ouvrir le débat - du moins le chantier légal - sur l'accession de cette intervention médicale au titre de droit humain³. Toutefois, ce n'est pas un projet inédit car les Nations Unis - ONU, tout comme l'Organisation Mondiale pour la Santé - OMS, ont conclu que l'IVG est un droit inhérent à la dignité de l'Homme, et qu'il ne s'oppose pas au droit à la vie⁴. Aujourd'hui, l'avortement est majoritairement légal dans toute l'Union européenne - UE. Néanmoins, les ambivalences et les différences des régimes légaux en matière de droit humains viennent créer un inégal accès d'un pays à un autre. Le curseur de ces différences repose sur le délai légal d'accès ou

Jade lafrate, College of Europe in Natolin, jade.iafrate@coleurope.eu

¹ Conseil de l'UE « Discours du Président de la République devant le Parlement européen Strasbourg, le mercredi 19 janvier 2022 » (Strasbourg, 2022), Consulté le 24 avril 2022, <https://presidence-francaise.consilium.europa.eu/fr/actualites/discours-du-president-de-la-republique-devant-le-parlement-europeen-strasbourg-le-mercredi-19-janvier-2022/>.

² Virginie Malingre, « Roberta Metsola, une Maltaise antiavortement, prend la présidence du Parlement européen », *Le Monde*, 18 janvier 2022.

³ Ce droit permet aux femmes d'interrompre une grossesse par le biais d'une assistance médicale.

⁴ OHCHR, Human Right Committee, « General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life » (Suisse, 2018), consulté le 24 avril, 2022, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf.

ses modalités, ce qui rend la mise à disposition sur demande presque impossible⁵. À la suite des diverses tentatives de changement de la législation débutant en 2011 et allant jusqu'à la décision du Tribunal Constitutionnel du 22 octobre 2020, la Pologne a finalement restreint son accès à deux possibilités (1) lorsque la vie ou la santé de la personne enceinte est mise en danger par la poursuite de la grossesse et (2) lorsque la grossesse est le résultat d'un acte criminel (Bucholc 2022 : 73).

La tentative d'introduire une interdiction totale n'est pas nouvelle et se réanime particulièrement depuis les commencements de la refonte de la démocratie polonaise. En Europe centrale, l'IVG a été légalisé pendant la période soviétique en 1956. Bien que la Pologne ait été l'un des pays les plus libéraux d'Europe en la matière, elle a progressivement bousculé son système légal en décidant d'accéder aux initiatives civiques portées par les organisations en défaveur de cette intervention médicale – OFR⁶. L'accession du parti politique droit et justice – PiS, à la majorité parlementaire, et à la tête de l'exécutif, a concrétisé au fil des années cette interdiction presque totale⁷. Né en réaction, le cas de la lutte pour le droit de l'avortement est symbolique de la concrétisation d'une mobilisation d'essence féministe en Pologne. Il s'affirme également contre l'implication de l'Église dans la politique et les affaires gouvernementales. Ces organisations de la société civile favorables au choix de l'accès à l'avortement, et assurant la promotion d'un accès sans risque qui serait sécurisé par le corps médical et hospitalier – OFC⁸, tel que le mouvement *Strajk Kobiet*⁹, portent également des initiatives civiques tels que *Ratujmy Kobiety - Save the women* (Fafara 2018 : 41). Ce débat est nivelé à différente échelle qui marque une différence, ou parfois une confusion, entre l'accès à l'avortement sur demande et l'accès à l'avortement sans risque¹⁰. En formant une partie intégrante de la Société Civile Polonaise - SCP, elles s'intègrent depuis plusieurs années dans des mouvements de contestations transnationaux et fonctionnent en réseaux avec d'autres organisations ailleurs en Europe ou dans le monde. Au cours de ces dix dernières années, elles ont notamment poussé à l'interconnexion entre les États membres de l'Union européenne – EM, en provo-

⁵ Certaines législations conditionnent l'accès à l'avortement selon certaines modalités telles que : malformation ou risque de santé important pour le fœtus, risque de santé pour la personne portant le fœtus, grossesse résultant d'un viol. Quelques-unes de ces modalités permettent également d'allonger le délai initial d'accès à l'avortement dans certains pays.

⁶ Les organisations de la société civile en défaveur de l'IVG, militantes pour sa restriction ou pour sa délégalisation totale, seront identifiées comme les organisations favorable à la restriction.

⁷ De son appellation complète, *Prawica Rzeczypospolitej*, « la droite de la République » en français, est le parti politique majoritaire en Pologne depuis 2015. Il a été créé en 2001 par les frères Kaczyński. Placé sur la droite conservatrice de l'échiquier politique, ce parti est aussi considéré comme eurosceptique et appartient à l'Alliance des conservateurs et réformistes européen - CRE.

⁸ Les organisations de la société civile favorables à l'accès sur demande à l'avortement seront identifiées comme les organisations favorables au choix (OFC).

⁹ Plus de mille personnes dans cent-quarante villes et villages polonais ont manifesté en octobre 2016. Cette manifestation a été baptisée « un jour sans femmes/la grève des femmes » ou « *Strajk Kobiet* ». Elle a également été appelée « *Czarny Protest* », ou dans sa version anglaise « *Black protest* », en raison du code vestimentaire noir arboré par les militantes afin de symboliser le meurtre d'un droit substantiel. Depuis, ce nom est devenu celui d'une organisation en tant que telle dont les symboles, tels que l'éclair rouge, sont repris par plusieurs organisations des OFC en Pologne.

¹⁰ Se référer à la note définitionnelle de l'annexe n°1.

quant des réactions nationales et des actes de solidarités pour soutenir les femmes polonaises. Le rapporteur spécial de la commission des droits Humains de l'ONU estime que plus de 100 000 polonaises ont voyagé dans les pays voisins tels que la Tchéquie ou l'Allemagne où l'accès à cette intervention médicale est bien plus facilité¹¹. De fait, un phénomène de solidarité internationale s'est créé par le biais d'un « système de préférences généralisées » qui s'est étendu aux droits humains¹². En effet, les personnes souhaitant accéder à un avortement, auraient la possibilité de comparer « l'offre des droits nationaux » au sein de l'UE. Toutefois, cet argument est à reconsidérer dans le contexte réel de ce que représente la décision de recourir à un IVG ; c'est-à-dire un choix, attaché à une charge émotionnelle lourde, qui doit se prendre à la vitesse d'un délai spécifique, un investissement de temps et d'argent pour se déplacer d'un pays à un autre, et enfin un risque quant à l'infraction d'une norme légale enfreinte. De plus des EM comme la Belgique ont notamment pris la décision de fournir une aide financière afin de faciliter l'accès sur demande à l'IVG pour les femmes Polonaises¹³. En revanche, ces actions sont également frappées par la critique sous la dénomination de « tourisme médical ». Celle-ci est accompagnée par des tensions interétatiques comme cela est le cas avec la Tchéquie où le gouvernement polonais dénonce une volonté « *encourageant à violer le droit des citoyens Polonais* »¹⁴. Ainsi, la déclaration d'Emmanuel Macron fait notamment écho à la condamnation de la part de nombreux députés européens des lois restrictives adoptées en Pologne, tout comme au déni d'accès auxquelles les femmes doivent faire face dans de nombreux pays de l'UE¹⁵. Étant donné que la politisation de cette question est venue trouver une résonance européenne – par l'implication d'autres EM vis-à-vis du droit de la santé, droit qui touche à une compétence régalienne - cela démontre que caractériser la problématique de l'accès à l'avortement tend à s'interroger sur les compétences de l'Union ainsi que sur l'établissement de droits au rang de valeurs européennes.

1.1. L'intérêt de créer une réflexion sur les liens entretenus entre la Société Civile Polonaise militant pour le droit à l'avortement et les institutions de l'UE

L'intérêt de ce mémoire de recherche est de proposer une analyse des relations entretenues entre la Société Civile Polonaise - SCP et les institutions européennes (Commission européenne, Parlement européen, Conseil de l'UE ainsi que les agences

¹¹ OHCHR, « Poland has slammed door shut on legal and safe abortions - UN experts » (Suisse, 2020), Consulté le 15 mai 2022, <https://www.ohchr.org/en/press-releases/2020/10/poland-has-slammed-door-shut-legal-and-safe-abortions-un-experts?LangID=E&NewsID=26434>. 1

¹² Ce terme est à l'origine utilisé en référence au processus menant à effectuer des choix en fonction des avantages commerciaux et de spécialisations d'un pays sur un autre.

¹³ Le soir, « La Belgique le premier pays à financer des avortements pour les femmes polonaises », *Le soir*, 29 Septembre 2020

¹⁴ Claudia Ciobanu, "Poland government requests Czechia stop offering abortions to Polish women", *Reporting Democracy*, 3 mai 2021.

¹⁵ Le déni d'accès à l'IVG correspond à la situation où un médecin dispose d'un droit discrétionnaire pour accéder à la demande d'un patient ou d'une patiente souhaitant avoir recours à cette intervention.

de l'UE) car elle semble cristalliser une conduite spécifique de l'élaboration des politiques tout comme une volonté de faire émerger des valeurs européennes qui s'étendraient dans des domaines sortant du champ de compétences de l'UE. Le terme de société civile - concept sociologique dont la définition et la formation sont largement discutées - sera identifié comme « la catégorie composée d'acteurs à statut spécial, non étatiques et non marchands » (Gasior-Niemiec, Glinski 2007 : 29-41). Afin de mieux qualifier l'implication de la société civile au sein de la gouvernance de l'UE, Barbara Finke résume ce conflit à l'opposition entre la position communautaire et la position procédurale (Finke 2007 : 1135-1174). Ainsi, il existerait une position communautaire qui placerait au cœur de sa réflexion la solidarité en soulignant que les activités entretenues par les citoyens, ou au sein d'une communauté politique, comme une condition sociétale nécessaire à la démocratie. La position procédurale quant à elle préférerait observer la libre association des individus comme une possibilité offerte par le cadre législatif qui leur permet d'embrasser leur liberté de libre expression. Cette idée est affiliée à celle du livre blanc sur la gouvernance européenne adopté en 2001, qui considère que la société civile doit exprimer les préoccupations des citoyens et proposer des services pour répondre à leurs besoins, et, par conséquent met en avant que la multiplication de ces organisations - visant à mettre en œuvre cet objectif - serait la preuve de l'existence du bon fonctionnement de la démocratie. Dans le but de mieux caractériser ce concept, sans ouvrir la porte aux conflits définitionnels qu'il recoupe, nous suivons la réflexion pluraliste de Robert Dahl qui vient observer les activités portées afin de caractériser le rôle représentatif qu'elle incarne dans la « définition de l'agenda de la politique démocratique » afin de garantir la mise en évidence du « large éventail l'opinion publique » (FOA, EKIERT 2016 : 419-439). Par ailleurs, le débat académique sur la définition de la société civile est d'autant plus agrémenté par la chute du communisme et l'observation de la transition démocratique en Europe. Nous suivons aussi la réflexion tendant à affirmer qu'il n'y a pas eu de renaissance de cette société civile, mais bien plus une transformation et une stratégie d'adaptation à son nouvel espace (Devaux 2010 : 11). En effet, il existe un conflit scientifique divisant ceux qui argumentent sur le fait que la société civile des pays issus de l'espace post-soviétique serait déficiente (Howards 2002 : 157-169), face aux promoteurs de la théorie d'une transition vers la démocratie qui s'exécuterait conformément à l'intégration au sein de l'UE. En ce sens on observe l'exercice de transnationalisation de cette société civile comme un signal fort du renforcement de celle-ci par la mise en réseau de ses activités (FOA, EKIERT 2016 : 419-439). Ainsi, nous pouvons supposer que le dynamisme de la SCP sur la scène européenne démontrerait sa force, son activité et sa capacité à faire vivre la démocratie par la voie des réseaux citoyens en caractérisant une forme de démocratie participative. Recoupant des enjeux politiques multiples, à la croisée de la religion et du politique, la question du droit à l'avortement en Pologne n'est pas nouvelle et caractérise la politisation de son débat. Parallèlement, la libéralisation et l'envie grandissante de promouvoir une « union des valeurs » semble se heurter à la culture du compromis amorcée entre l'UE et la Pologne. Nous observerons les répercussions des contestations militantes portées par les OFC et leurs relations

avec l'Union. Plus précisément, il conviendra d'analyser et d'observer la mise en réseau de ces organisations et la légitimité qui leur est accordée par les institutions de l'UE. Notre recherche inclut également un intérêt aux OFR afin de comprendre comment le mimétisme se déplace de la scène nationale à l'échelle européenne.

1.2. Le féminisme et la réflexion autour du genre : un moteur de la politisation de l'avortement

Adossés à cette logique de réflexion, les concepts de genre et de féminisme seront également à l'étude en étant mis en rapport avec l'objet d'étude de cette analyse. En effet ils permettent de comprendre les enjeux et les dynamiques qui se dessinent dans le cadre de dialogues du local vers la scène européenne. La distinction entre le sexe et le genre a été faite dans les années 1950. Par la suite, le genre est devenu une catégorie heuristique dans les sciences sociales après avoir été utilisé pour la première fois dans le domaine de la psychiatrie aux États-Unis. Il sert de catégorie analytique en nous permettant de rendre compte du fait que la distinction binaire entre hommes et femmes est une construction sociale qui commence dès l'enfance (Butler 1990). Par l'usage, et l'expérience militante, il est devenu une catégorie globalisée et institutionnalisée d'action et de savoir (Marteu, Cîrstocea et Lacombe 2019 : 7-21). Concernant le féminisme, il s'agit d'un mouvement politique visant à mettre en œuvre les transformations nécessaires à la réalisation de l'égalité entre les sexes. Toutefois, ce mouvement se distingue par sa diversité plutôt que par son uniformité. Ces mouvements ont généralement défendu la distinction entre le sexe et le genre. En outre, le concept de « féminisme global » est fondamental pour notre réflexion car il nous permet de mieux comprendre comment refléter les intérêts des citoyens individuels des différents EM (Ibid). Il convient de souligner qu'après la Seconde Guerre mondiale, les groupes et les revendications féministes ont dépassé les demandes des suffragettes pour le droit de vote d'inclure d'autres catégories de droits, tels que les droits économiques (égalité de salaire, égalité d'accès à l'emploi) puis sociaux (accès à l'avortement, élimination de la violence à l'égard des femmes). L'ensemble de ces concepts en lien avec les études sur le genre nous permettront d'étudier l'influence et les stratégies de la OFC au sein des institutions de l'UE par son rayonnement au sein de la scène mondiale.

1.3. Conceptualiser un régime européen d'égalité des genres au sein de l'UE

Dans le cadre de notre analyse, il est intéressant d'observer le processus de construction du régime européen d'égalité des genres. On se réfère au concept de « régime d'égalité des genres » - REG comme une structure permettant la « promotion de l'analyse systématique de l'interaction des politiques, acteurs, institutions et discours centraux, destinés à atténuer les inégalités économique et sociales qui visent les femmes » (von Wahl 2021 : 44). Il a été placé sous la supervision d'une forme de gouvernance informelle qui entremêlent des acteurs étatiques avec des représentants de la société civile qui

incarnent un rôle d'expert (Woodward 2004 : 76-93). Nous pouvons constater la consolidation et la croissance des aspirations de ce REG, qui étaient initialement axées sur les thèmes de l'emploi et de la famille et qui ont pris la forme de quelques initiatives isolées. On peut l'observer, par exemple, dans la mise en œuvre des politiques européennes dédiées à cette thématique qui ont été produites sur des cycles quinquennaux depuis 2010. À travers les thèmes qui composent cet agenda, nous pouvons analyser une expansion notable des intérêts sur des sujets comme la violence, l'avortement, la migration, la race et la sexualité, y compris la question de la liberté d'orientation sexuelle et la représentation des minorités genrées (Ibid). Cette promotion de l'égalité s'est affirmée dans les processus d'eupéanisation des États candidat à l'UE par les logiques de *top-down* et *bottom-up* (Radaelli 2002 : 105-136), en faisant écho à l'usage de la conditionnalité politique préalable pour valider l'accession d'un EM à l'UE¹⁶. En plaçant sa promotion comme principe fondamental de la construction communautaire et du modèle social européen (Devaux 2005), l'UE est considérée comme un des systèmes politiques les plus progressistes au monde sur le sujet (Jacquot 2014 : 172-176). En ce sens, la notion de REG permet de marquer l'importance des politiques de genre au niveau supranational (von Wahl 2021). Ce cadre heuristique, quant à lui, permettrait d'étudier dans le temps et dans l'espace les politiques, les acteurs et les institutions. Angelika von Wahl rappelle l'utilité de cet outil comme jauge de l'acceptation de l'idée européenne par le public lors de la conceptualisation de ce REG. En somme, l'UE, et plus particulièrement la Commission européenne, s'efforce d'établir un espace juridique européen suffisant pour l'application et la réglementation des politiques publiques qui favorisent l'égalité des sexes. À cet égard, les États membres de l'UE sont liés par des responsabilités juridiques dans le domaine de l'égalité, notamment celles du Traité de l'UE (articles 2 et 3), ainsi que celles de la Charte des droits fondamentaux de l'UE (article 21)¹⁷. En revanche, l'avènement d'une légalité de l'égalité demeure, même après plus de trente ans, un chantier en cours de construction dont les outils politiques s'efforcent de se diffuser plus largement (Iafraite 2021). Plus précisément, nous étudierons dans le cadre de ce mémoire la politisation et l'avènement des mouvements 'anti-genre' comme un outil de contestation du projet européen.

Hypothèses et méthodologies

Étant donné que le REG repose sur une logique de gouvernance informelle, nos premières suppositions s'accorderaient à considérer que les réseaux d'actions de la SCP permettent aux institutions de l'UE de disposer d'une expertise locale afin de

¹⁶ Dans le contexte des négociations d'adhésion à l'UE, la préconditionnalité politique, ou conditionnalité démocratique, est désignée comme la "clause des droits de l'homme" en politique étrangère. Ses origines remontent aux traités de Rome et de Maastricht, et elle s'exprime dans une succession d'engagements qui ont abouti au traité de Nice (voir : Ode Jacquemin, « La conditionnalité démocratique de l'Union européenne. Une voie pour l'universalisation des droits de l'Homme ? Mise en œuvre, critiques et bilan », *CRIDHO Working Paper Université de Louvain*, 2006.

¹⁷ Parlement européen, « *L'égalité entre les hommes et les femmes | Fiches thématiques sur l'Union européenne | Parlement européen* » (Strasbourg, 2019), consulté le 10 avril 2022, <https://www.europarl.europa.eu/factsheets/fr/sheet/59/l-egalite-entre-les-hommes-et-les-femmes>.

mieux se saisir des enjeux nationaux dans le but de les harmoniser à l'échelle supranationale. Dans ce travail de recherche, trois hypothèses centrales viennent articuler notre réflexion :

- 1) La première démontre qu'il y aurait une affirmation d'une européanité à la polonaise, active sur les questions du genre, qui se déplacerait sur la scène européenne tout en se plaçant en contradiction de sa définition. En ce sens, nous étudierons le poids de l'Histoire et de la culture politique polonaise sur la question de l'avortement. Pris entre une désoviétisation et une européanisation hâtée, doit-on considérer que la garantie de sécurité d'accéder à une intervention médicale sans encourir de risque a été sacrifiée dans le compromis européen ?
- 2) La seconde place les institutions de l'UE comme un moteur favorisant un dialogue direct avec les OFC, en conscience du blocage institutionnel et légal que représente l'accès à une telle demande. En ce sens, peut-on considérer que les relations entre les OFC et ces institutions érigent les fondations d'une gouvernance informelle qui s'apparenterait à être une diplomatie du genre sans État ? L'existence d'une relation qui serait quasi-directe nous pousse à inclure l'existence d'une définition spécifique de la diplomatie qui encadrerait les relations entretenues par des entités non-étatiques qui se reconnaissent comme légitimes pour discuter de la conduite des relations internationales. En revanche, nous excluons la possibilité de l'existence d'une asymétrie dans le dialogue entre le gouvernement polonais et les institutions de l'UE car les principes unifiant les États Membres reposent sur la participation et l'intégration de chaque représentation gouvernementale dans sa définition.
- 3) Enfin, le dernier élément central de notre objet de recherche touche à la compétence de l'UE et à sa capacité à proposer un régime d'égalité des genres à l'intérieur de sa communauté qui engloberait les droits sexuels et génésiques. Véritablement, est-ce que les institutions de l'UE disposent d'une légitimité pour influencer les conditions d'accès au droit à l'avortement dans la mesure où aucun texte légal ne les pourvoit de cette compétence ? En observant l'intégration de l'égalité comme critère d'analyse du spectre de l'européanisation, on peut s'interroger sur l'habileté de son droit à s'inclure dans ce type de conditionnalité politique. En ce sens, nous analyserons la place donnée à la résolution juridique au cas par cas, qui a été portée devant la Cour européenne. Ainsi, l'intérêt est de considérer la place du domaine judiciaire. Notre hypothèse finale souligne la nécessité pour l'élaboration des politiques européennes de bénéficier d'un appui et d'un historique légal permettant de favoriser les changements où il n'existerait pas d'harmonisation du cadre légal européen et visant des domaines sortant des compétences de l'UE.

Ce travail de recherche s'appuie sur des méthodologies empruntées au domaine des sciences sociales particulièrement de la science politique et de l'Histoire. Il vient également puiser dans le domaine juridique afin de mieux démontrer l'usage judiciaire et militant du droit européen par les OFC. En effet, les liens vis-à-vis de la question de

l'avortement en Pologne soulèvent une série de questionnements juridiques qui matérialisent les relations complexes avec l'UE notamment sur l'État de Droit. Afin de proposer une analyse couvrant l'ensemble des problématiques de ce sujet, une littérature sur les concepts de société civile, d'eupéanisation, de régime d'égalité des genres au sein de l'UE et plus spécifiquement dans l'espace post-soviétique est venue nourrir ce travail. Dans les coulisses de ce travail de recherche, l'expérience enrichissante d'un stage au sein de la Commission européenne dans le domaine de l'égalité des genres (Direction Justice et Consommateurs) ainsi que la rédaction de deux mémoires de recherches sur les thèmes « Porter la cause des femmes en Républiques Tchèques : l'exemple de la journée internationale de la Femme » (2020) et « institutionnaliser la problématique et l'appellation des « violences fondées sur le genre » dans les normes de l'Union européenne : L'intégration de la question des violences en ligne au sein de la cause de l'Égalité des genres » (2021) ont appuyé la réalisation de cette étude. Une expérience personnelle de terrain complète cette enquête notamment par le biais d'observations et de participations à des événements organisés à Varsovie, tels que :

- Le suivi de la présentation du rapport de l'*European Parliamentary Forum for Sexual and Reproductive rights* – EPF intitulé « La partie émergée de l'iceberg : Extrémistes religieux - Les financeurs contre les droits de l'homme pour la sexualité et la santé reproductive en Europe » devant Parlement polonais en présence de la députée Polonaise Joanna Scheuring-Wielgus ainsi que de la sociologue Elżbieta Korolczuk et du journaliste d'investigation Tomasz Piątek.
- Le défilé organisé pour la journée nationale par le collectif Antyfa, soutenu par le Strajk Kobiet le 11 novembre 2021.
- Une veille des campagnes digitales organisées par les comptes Instagram du *Strajk Kobiet*, *Legalna Aborcja*, et *Aborcjny Dream Team* ; plus particulièrement celles en faveur de l'activiste Justyna Wydrzyńska accusée d'avoir assisté une femme « accéder à une IVG médicamenteuse ».
- Visite de l'exposition « *Qui écrira l'histoire des larmes des artistes sur les droits des femmes ?* » (2021), au Musée d'Arts Nouveau de Varsovie, une institution soutenue par le financement de l'UE.

La restitution des résultats de notre analyse suit un plan d'expositions thématiques en trois chapitres interdépendants.

2. De l'eupéanisation à l'eupéanité à la polonaise : la formation d'un régime d'égalité des genres au prime de l'élargissement de 2005

« Les processus de : a) construction, b) diffusion et c) institutionnalisation de règles formelles et informelles, de procédures, de paradigmes politiques, de styles, de « façons de faire les choses » et de croyances et normes partagées qui sont d'abord définis et consolidés dans le processus politique de l'UE et ensuite incorporés dans la logique du discours, des structures politiques et des politiques publiques nationales (nationales et infranationales). » (Radaelli 2004 : 1–26).

Le concept d'eupéanisation emprunte largement sa définition aux recherches portées par le Pr. Radaelli qui ont permis d'expliquer le processus politique illustrant les relations et dynamiques entre l'UE et les États candidats à l'accession. En ce sens, l'eupéanisation reposerait sur un processus de *top-down* qui partirait du niveau institutionnel de l'UE vers un EM. Ainsi, certaines normes, en tant que partie intégrante de l'acquis communautaire, se sont vu accéder au rang de conditionnalité politique¹⁸. Dans cette perspective, l'intégration des politiques du genre au sein des politiques européennes - et dans cette dialectique d'eupéanisation - est symbolique. Néanmoins, ce concept en lui-même demeure disputé par les critiques font valoir qu'il consiste trop souvent à étudier simplement la convergence ou la conformité avec les règles de l'UE (Forest 2021: 60-77) Toutefois, s'intéresser aux acteurs sociaux actifs dans le processus de transfert de modèle, démontre de la force du processus de *bottom-up*. Ce processus partant de la société civile, qui tenterait de se connecter aux valeurs promues par l'UE est un élément de de compréhension dans le cadre d'analyse de l'élargissement de l'UE 25.

2.1. Les politiques d'égalité du genre : un moteur d'eupéanisation propulsé par une logique de top-down aléatoire en Pologne

La chute de l'Union soviétique - URSS est venue mettre au défi les sciences sociales en ouvrant la voie à de nouveaux domaines d'études, parfois à la croisée de plusieurs concepts et disciplines (Forest, Mink 2004). Cela est particulièrement visible avec les questions du genre et d'eupéanisation qui dans un élan pluridisciplinaire s'entremêlent aux domaines des sciences politiques, historiques et juridiques. Les deux thèmes sont également intéressants à observer d'un point de vue institutionnel car ils permettent d'analyser l'inscription de politiques d'égalité entre les hommes et les femmes – à leurs débuts – dans la sphère des politiques d'adhésion¹⁹. En ce sens, le genre, comme un instrument de politiques sociales, s'est intégré progressivement aux valeurs européennes par l'usage de la méthode du *gender mainstreaming*²⁰. Comme Maxime Forest le souligne « *le genre est un bon test pour l'eupéanisation.* » (Forest 2021 : 60-77), néanmoins il a aussi été une mise à l'épreuve pour les institutions de l'UE qui ont tenté de modéliser un espace juridique européen satisfaisant pour l'application et la régulation des politiques publiques permettant l'égalité entre les genres (lafrate 2021). En effet, son usage serait le résultat d'une brèche dans le Traité de Rome qui s'est transformée en une « *véritable politique d'exception interven-*

¹⁸ Se référer à l'annexe n°3.

¹⁹ Au niveau de l'UE, les politiques en lien avec l'égalité ont d'abord été définies par les politiques d'égalité entre les sexes. À partir de 2010, le terme choisi sera « *stratégie d'égalité entre les genres* ». Il demeure aujourd'hui encore des ambivalences dans les traductions de l'anglais vers le français qui crée une confusion dans l'usage des concepts par l'UE.

²⁰ Sur la scène européenne, elle a été définie par le Conseil européen en 1998 comme un outil permettant de « *réorganiser, améliorer, développer et évaluer les processus politiques visant à intégrer l'égalité des sexes dans toutes les politiques, à tous les niveaux et à tous les stades, par les acteurs normalement impliqués dans l'élaboration des politiques.* » (Conseil de l'Europe, *What is gender mainstreaming?*, (Strasbourg, 2022), consulté le 10 avril 2022, <https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming>).

tionniste et autonome » (Jacquot 2009 : 247-277). Ce *gender mainstreaming* serait pourvu d'un potentiel à se manifester comme une Révolution de velours (Verloo 2001 : 5-23). D'un point de vue sociologique la comparaison naît du fait que ces politiques disposent d'une capacité à apparaître comme révolutionnaire tout en étant pacifique car elle marquerait une rupture remarquable dans les systèmes politiques nationaux. D'autres les identifieront comme un cheval de Troie (Hoskyns 1996), en expliquant que cet outil s'intègre au récit du « *spill over* », de la répercussion car il offre une logique de double conséquences et d'adéquation à l'eupéanisation (Forest 2021 : 60-77). En ce sens, l'intégration de la dimension du genre s'apparente à être "un exemple clair de succession ou d'adaptation des politiques, suscitée par le désir de surmonter les limites des politiques existantes, et la nécessité de répondre à un environnement politique modifié" (Mazey 2000). À la lecture de cette analyse, nous pouvons réfléchir à sa transposition au concept même d'eupéanisation qui serait cette fois-ci un processus d'adaptation à observer à l'intérieur des institutions. Finalement, l'UE, par le biais de la CE, réutilisera cette méthode en la décrivant comme une source de "bonnes pratiques et d'efficacité dans la conduite des politiques européennes." (Jacquot 2003 : 172-176).

« Lors de l'adhésion de la Pologne à l'UE, les participants aux marches des fiertés portaient des tee-shirts arborant le slogan « Europe = Tolérance », et les thèmes choisis pour ces manifestations insistaient sur une « culture de la diversité » considérée comme appartenant au projet européen » (Ayoub, Phillip M, David Paternotte 2016 : 55-70).

En Pologne, l'effet *bottom-up* a été visible depuis la société civile, enthousiaste à l'idée de faire la promotion et de défendre les valeurs européennes en les associant à celles de la solidarité et du mouvement *Solidarność*. Ainsi, l'eupéanisation est utilisée pour illustrer la manière avec laquelle les parties-prenantes vont être influencées par la mise à l'agenda de l'UE et comment ils agissent à ce niveau-là d'action mais aussi comment ils sont dans la capacité d'essayer de défendre leurs intérêts dans un cadre d'actions européens (Devaux 2009). Or, le genre, en entrant en politique, est devenu, ou a été très rapidement considéré comme, un objet supplémentaire, une forme de litige juridique qui vient alimenter l'opposition « est-ouest » dans leur conception de l'État de droit (Forest 2021 : 60-77). Si la volonté d'entrée dans l'UE a été portée par des mouvements multi-sectoriels, elle n'a pas poussé le projet à être accueilli de la même manière ou avec les mêmes espoirs de retombées dans les pays concourant à l'accession. En ce qui touche au domaine de l'égalité, la dialectique post-intégration a été adossée à celle de l'opposition en présentant les « bon candidats » et ceux qui pouvaient « améliorer leur système » par le biais d'un mode de comparaison notamment articulé par l'Institut européen d'égalité des genres. Cette méthode reposait principalement sur la volonté de faire naître des échanges de bonnes pratiques. Il faut également noter que l'égalité dans sa conception par les institutions de l'UE touchent premièrement les domaines économiques et exclu de fait certaines thématiques du débat européen, et conduit à replacer historiquement les attendus.

À l'aube de l'élargissement de 2005, le droit à l'avortement est complètement hors du champ de la discussion au sein des institutions de l'UE, il est même continuellement en débat au sein des échelles nationales ou régionales. En ce sens, garantir le droit à l'avortement n'a jamais été une conditionnalité politique envisageable. En réalité, il est à considérer qu'il y aurait une éventuelle convergence dans la volonté d'*omertà* de certains sujets qui apparaîtrait comme trop controverses à l'approche de la célébration de la première moitié de siècle de l'Union. C'est pourquoi il faut considérer le débat dans sa réalité historique, soit en face de l'absence légale de protection suffisante pour accéder à l'avènement de droits sociaux touchant au domaine de la santé. Deux ans plus tard, la signature du Traité de Lisbonne viendra néanmoins créer un espace de droit et liberté européen qui permettra à tout citoyen de disposer d'informations sur les droits des autres EM et, de pouvoir voyager pour bénéficier de droits qu'ils pourraient juger comme plus libéraux, sans risquer d'être poursuivi par de quelconques sanctions. Sans le savoir, l'UE a ouvert la possibilité aux soins génésiques transfrontaliers en garantissant la protection des femmes qui tenteraient d'avoir accéder à l'avortement dans des EM aux lois plus libérales (Blagojević, Ivana Tucak 2020). Vraisemblablement, la politisation de cette intervention médicale au niveau européen n'a été possible que dix ans plus tard à la suite de la somme de régressions de son accès dans certains pays et les contestations provoquées de fait, tout comme par les tensions diplomatiques entre les EM qui mettent en avant des oppositions de système de valeurs et de libertés.

2.2. « La Pologne au cœur de l'Europe » : un programme fondé sur la promotion de la famille traditionnelle

Comme dans la plupart des pays sortant de l'orbite soviétique, il a fallu démêler les notions d'égalité, de féminisme et de genre en Pologne. Considérant qu'avant 1989 le féminisme était perçu comme un luxe que les démocraties s'autoriseraient, et que, le genre ne jouait aucun rôle dans l'État soviétique par l'absence distinction binaire dans le statut de travailleur, il y a eu un réel enjeu définitionnel dans le processus de *top-down*²¹. En effet, l'invention du mythe de la « *mère travailleuse* » a impliqué les femmes à égale titre dans les politiques de l'emploi soviétique en favorisant l'institutionnalisation de lois libérales permettant d'accéder à des système de garderies ou encore blanchisserie collective pour les travaux domestiques (Mespoulet 2006 : 63). Bien que l'égalité fût un concept théorique, et qu'elle n'ait jamais souhaité atteindre l'égale répartition des tâches domestiques, ou même l'égalité des salaires, elle a induit l'implication des femmes dans la société. Cette inclusion s'est aussi étendue aux mouvements de contestation polonais car les femmes étaient actives et impliquées dans le *Solidarność*. Elles ont particulièrement été les mains de cette résistance dans les aspects touchant à la communication et à la diffusion (distribution de

²¹ "We frequently use the same words . . . yet their content is different because different historical experiences underlie the same concept" Jirina Šiklová, « Feminism and the Roots of Apathy in the Czech Republic », *Social Research*, vol. 64, n°2 (1997) 258-280.

tracts et de pamphlets, presse clandestine) (Černá 2006 :73). Par exemple, un groupe de femmes étaient notamment à la tête de la publication hebdomadaire clandestine, *Tygodnik mazowsze*, qui étaient la plus importante et partagée à hauteur de 60 000 copies (Penn 2005). Ainsi, dans le modèle de transition démocratique, l'égalité a plus été perçue comme un héritage soviétique, fondamentalement peu nécessaire, qu'un idéal à atteindre. Le processus de désoviétisation a particulièrement visé à discuter le retrait de l'ordre légal d'un nombre considérable imposé par l'envahisseur. À ce titre, l'avortement a été mis sur la table des négociations en ce qu'il a été libéralisé dans les périodes d'occupation, et plus particulièrement au cours de la phase soviétique. Parallèlement, le renforcement de l'Église dans la démocratie naissante en Pologne a eu un impact considérable dans la compréhension et l'appropriation de ces concepts de genre et de féminisme (Mink 2015 : 466). De l'encouragement empli de solidarité du Pape Jean-Paul II en 1978 à sa comparaison de l'avortement d'un fœtus aux victimes de l'Holocauste dans un discours en 1991, on peut observer le poids et la résonance



« Votre corps est un champ de bataille »,
Barbara Kruger (1989)

du religieux dans la sphère morale polonaise (Ibid). De plus, l'Église a voulu incarner cette aide à la désoviétisation légale, et, de fait à installer le débat au sein de la société polonaise en opposant le droit à la vie et l'accès à l'avortement. Cette position a notamment contribué à la mise en péril de l'accès à l'avortement sans risque par la critique de la loi de 1956, qui dès 1993 - après trois ans de débat public - a été délimité à des motifs précis²². Progressivement, le dialogue religieux est venu se confondre au dialogue éthique en soulignant la vive opposition de l'Église à son accès. Cela ne s'est pas passé sans résistance de la part de la société civile qui a dénoncé « une perte de droit dans un espace où l'indépendance et la démocratie ont été réinstallées »²³.

De l'accession à l'UE à celle du parti politique PiS au pouvoir, il existe une attitude hostile à l'accès à l'avortement dans un contexte institutionnalisé. En ce sens, son accès n'est pas encouragé, il est même largement découragé et mal perçu au sein de la société (Cullen, Korolczuk 2019 : 6-19). Leur étroite collaboration avec l'Église catholique est particulièrement remarquable en ce qui concerne leurs visions du rôle des femmes dans la famille (Sloat 2005 : 427-452). Au cours de ces dix dernières an-

De l'accession à l'UE à celle du parti politique PiS au pouvoir, il existe une attitude hostile à l'accès à l'avortement dans un contexte institutionnalisé. En ce sens, son accès n'est pas encouragé, il est même largement découragé et mal perçu au sein de la société (Cullen, Korolczuk 2019 : 6-19). Leur étroite collaboration avec l'Église catholique est particulièrement remarquable en ce qui concerne leurs visions du rôle des femmes dans la famille (Sloat 2005 : 427-452). Au cours de ces dix dernières an-

²² L'avortement a été limité aux cas de grossesse faisant suite à des actes illégaux, ou à la suite d'une malformation du fœtus.

²³ Wanda Nowicka, *Contemporary women's hell Polish women's stories*, FEDERA publication papier, 2005.

nées, l'Église catholique s'est aussi engagée dans une campagne de censure contre le "genre" et le "sexisme" en portant celle-ci avec ses propres mœurs (Ibid). Peu à peu, le dialogue antagoniste vis-à-vis de l'UE s'est cristallisé par la mobilisation d'un discours chrétien protégeant les valeurs de la famille traditionnelle. À l'instar de la Hongrie, la Pologne a également fait le choix de défendre son concept d'européanité qui s'ancre dans la tradition familiale chrétienne (Siim, Fiig 2021 : 472). Vis-à-vis de l'établissement de politiques du genre, elle dénonce particulièrement le comportement de l'UE comme une tentative de destruction de ses valeurs. Dans la période de l'accession jusqu'à 2016, il est vrai que les décisions et discours polonais défavorables au droit à l'avortement en Pologne étaient absent de tout dialogue entre l'UE et cet EM. Ainsi, au lieu de construire un dialogue d'intégration, il semblerait que l'objectif de l'UE se soit transformé en une dialectique de face à face avec le PiS qui mènerait à la confrontation de modèles de valeurs. Au sein des discours politiques en Europe centrale, la montée de l'euroscpticisme s'appuie notamment sur un discours d'européanité ancré dans les valeurs familiales chrétiennes qui seraient sapées par des normes libérales visant à promouvoir la liberté des corps et des mœurs au mépris de ces traditions (Forest 2021 : 60-77). Dans les discours politiques du PiS, cela se traduit par des références antagonistes au concept de genre qui est dénoncé comme une idéologie. Ces discours sont aussi des actions politiques avec des symboles forts car le gouvernement combine cette rhétorique avec des « politiques anti-libérales, anti-avortement, anti-pluralistes et anti-féministes » (Siim, Fiig 2021 : 491). Sous couvert de valeurs européennes, les groupes nationalistes et ultra-conservateurs cooptent le(s) programme(s) des droits Humains en présentant l'agenda des politiques du genre visant les droits des femmes et ceux de la communauté LGBTQI comme dignes d'être protégés au même titre que la croissance de la population non-européenne, ce qui résume finalement à les exclure (Forest 2021 : 60-77).

2.3. Mimétisme et transpositions des dynamiques nationales polonaises sur la scène européenne : Ordo Iuris, une chambre d'écho gouvernementale ?

« Ce qui s'est passé en Pologne ne s'est pas produit parce que la Pologne est traditionnellement conservatrice et catholique. Ce n'est qu'une partie de l'histoire. En fait, la direction que prend le pays est le résultat des actions délibérées de certains individus et organisations, agissant non seulement au niveau national mais aussi au niveau international. »²⁴

Neil Datta²⁵, Secrétaire général de l'EPF²⁶, Novembre 2020

²⁴ Asia Leofredd, « Interview with Neil Datta : "The anti-abortion offensive in Poland is part of a global strategy." *Frankfurter Kunstverein*, 11 novembre 2021.

²⁵ En tant que secrétaire général de l'EPF, Neil Datta a été directement visé par des plaintes à son égard de la part d'Ordo Iuris qui dénonce l'utilisation d'information manipulées lors de sa présentation devant le Parlement européen et qui violeraient les droits de l'institut.

²⁶ *European Parliamentary Forum for Sexual&Reproductive rights* est une organisation rassemblant un réseau de parlementaires qui souhaitent s'engager pour la promotion et la défense des droits sexuels et génésiques. L'organisation est notamment financée par des programmes des Nations Unies et de l'Union européenne. Ses travaux d'expertises sont particulièrement réputée, et, leurs présentations et restitutions s'effectuent dans l'enceinte de parlement nationaux et du PE.

Comme mentionné, la force de l'Église catholique a précipité l'émergence de restrictions sévères sur l'avortement. Toutefois, ce discours anti-avortement a globalement été supporté par des organisations de la SCP. En l'espèce, deux initiatives citoyennes portées par la *Fundacja Pro-prawo do życia* - Fondation pour le droit de vivre, et la *Fundacja życie i rodzina* - Fondation pour la vie et la famille, ont plaidé en faveur de lois plus restrictives (Fafara 2018). Particulièrement associé à la première fondation, *Ordo Iuris*, ou *l'Institut pour la culture légale Ordo Iuris*, a contribué à produire l'ébauche du projet de loi réduisant complètement le champ des modalités d'accès à l'IVG en 2016. Se présentant comme un institut légal basé à Varsovie, et avançant l'expertise de ses membres avocats, ou professeurs, cette organisation n'est en réalité qu'une fondation issue de la société civile abritée par la loi polonaise depuis 2013²⁷. Toutefois, elle défend son statut d'expert en proposant des conférences scientifiques à dimension légale, bioéthique, économique, ou historique, et en valorisant une large série de publications associées à son « institut » depuis 2015. Elle s'est lancée également dans le domaine de l'édition en proposant sa revue scientifique, *Kultura Prawna*, portant sur le droit de la famille et son devoir envers « la morale chrétienne » en 2018²⁸. Par ailleurs, l'organisation dispose d'un soutien financier accordé par l'État polonais qui soutient ses activités. Il apparaît parfois comme une chambre d'écho aux politiques menées par le PiS, et, certains anciens membres accèdent à des postes haut placés au sein du gouvernement, de la justice ou de la science. Avant l'année 2020, on comptait déjà : deux nouveaux juges à la Cour suprême, vice-ministre des affaires étrangères, un consultant national en génétique, un membre du *Rady Narodowego Instytutu Wolności* - Conseil de l'Institut National de la Liberté et un membre du Conseil national de développement auprès du Président de la République de Pologne²⁹. En étant proche du pouvoir en place, et en ayant la capacité de proposer des ébauches de politiques publiques adoptées quasiment à l'identique par le *Sejm*, l'organisation capitalise une légitimité et une influence difficilement concurrencée par les organisations travaillant sur la réciproque.

« 33 membres du personnel, 16 experts permanents, quatre organisations partenaires étrangères. Des formations pour les étudiants afin d'identifier les futurs leaders. Un cercle des amis [...] Ce n'est pas une organisations non gouvernementales - ONG ordinaire. C'est une machine d'influence politique en marche. »³⁰.

Comme le rappelle une note préparatoire proposée par l'EPF, les avocats d'*Ordo Iuris* ont contribué à rédiger les textes des projets de loi visant à interdire l'avortement (2016), criminalisant l'éducation sexuelle par l'initiative « *Stop à la pédophilie* » (2021), restreignant la fécondation in vitro (2021)³¹, la charte créant les « zones sans

²⁷ EPF, « Foundation Ordo Iuris Institute for Legal Culture, EPF Intelligence briefing », EPF, 2021, Consulté le 15 avril 2022, <https://www.epfweb.org/node/816>

²⁸ Wikipedia, « Fundacja Instytut na rzecz Kultury Prawnej Ordo Iuris », *Wikipedia*, Consulté le 20 avril 2020, https://pl.wikipedia.org/wiki/Fundacja_Instytut_na_rzecz_Kultury_Prawnej_Ordo_Iuris.

²⁹ Anna Mierzyńska, « Podboje Ordo Iuris. To rozpędzona maszyna polityczna fundamentalistów », *OKO.press*, 6 janvier 2020.

³⁰ Ibid.

³¹ EPF, « Foundation Ordo Iuris Institute for Legal Culture, EPF Intelligence briefing », 2021.

LGBT » (2021). En ce sens, l'EPF dénonce les activités de cette organisation comme étant porteuses d'un « projet religieux extrémiste » qui a permis la rédaction des lois les plus restrictives pour la santé et droits sexuels et génésiques. Dans son rapport « la face émergée de l'iceberg » présenté devant le Parlement polonais en mai 2022, l'EPF démontre les liens de connexions de l'organisation sur la scène internationale en soulignant que son indépendance pourrait être compromises par les financements de quelques bienfaiteurs européens, russes et américains³². En 2019, l'organisation avait notamment déclaré aux autorités publiques avoir généré la somme de 6,34 millions de zloty polonais, l'équivalent de 1,39 million d'euros - ce qui la place comme l'une des plus grandes organisations du pays³³.

Sur la scène internationale, l'organisation gagne également en popularité en étant membre d'un réseau international appelé Tradition, Famille et Propriété - TFP, une organisation qui propose un mouvement social et politiquement ancrée dans les valeurs religieuses et la défense de la famille traditionnelle. Depuis la fin des années 1990, le réseau dispose de son siège à Cracovie, et s'est étendu aux pays voisins de la Pologne, en faisant de l'Europe centrale son nouveau centre de gravité. De plus, l'exemple d'*Ordo Iuris* est particulièrement intéressant car il s'agit de l'une des OFR les plus actives dans la bulle bruxelloise vis-à-vis des institutions de l'UE et, plus largement sur la scène européenne face au Conseil de l'Europe et à la Cour européenne des droits de l'Homme - CEDH. Par le biais de son site internet, l'organisation propose de nombreux articles en anglais comme en polonais pour décrire et décrier les méthodes utilisées par l'administration européenne dans l'élaboration de politique qui sortirait hors de leurs champs de compétences. Par exemple, le rapport Matic³⁴, a notamment suscité la mise en place d'une pétition sur un site spécialement créé pour l'occasion, traduit dans dix langues, pour « stopper le rapport Matic ! »³⁵. L'organisation déploie également un très large lobbying passant par la remise d'opinion auprès des institutions et plus particulièrement des commissions parlementaires. En outre, *Ordo Iuris* est aussi intervenu comme partie tierce dans le cadre de procédures judiciaires et administratives polonaises et internationales. En l'espèce, l'organisation a pu présenter ses observations écrites dans le cadre de nombreux procès devant la CEDH. Enfin, *Ordo Iuris* est également encouragé par la délégation polonaise. Ce support est notamment illustré par la proposition de candidature d'Aleksander Stępkowski, fondateur de l'organisation et porte-parole de la Cour suprême polonaise, au poste de juge à la Cour de Strasbourg au titre de la Pologne. Bien que sa candidature ait été refusée, cela met en avant l'importance donnée à *Ordo Iuris* et de son consensus au plus haut niveau de la représentation de l'État polonais.

³² EPF, « La partie émergée de l'iceberg : Extrémistes religieux - Les financeurs contre les droits de l'homme pour la sexualité et la santé reproductive en Europe », EPF, 2021, consulté le 10 mai 2022, https://www.epfweb.org/sites/default/files/2022-03/EPF_EN_TOTI_9SEP%20DEF%20-%20FR.pdf.

³³ EPF, "Foundation Ordo Iuris Institute for Legal Culture, EPF Intelligence briefing", 2021.

³⁴ Portant le nom de son rapporteur le MEP Croate, Fred Matic, ce rapport propose une évaluation de la situation concernant la santé et les droits génésiques et sexuels dans l'Union, dans le cadre de la santé des femmes. Il est particulièrement critique à l'égard de la Pologne.

³⁵ Pétition « Non à la violation des traités européen », *Stop matic report*, consulté le 10 avril 2022, <https://stopmaticreport.org>.

3. Observer la politisation de l'accès à l'avortement en Pologne depuis les institutions européennes

Depuis les années 2010, on observe une multiplication des contestations face aux menaces de restrictions de l'IVG. L'UE représenterait un espace de liberté plus susceptible d'accueillir les mobilisations féministes grâce à sa promotion d'un ensemble de normes et de valeurs plus élevées que d'autres pays. Les exemples de l'Irlande, de Malte, et de la Pologne s'illustrent par un « triangle de réaction négatif » qui a provoqué des rassemblements de centaines de milliers de personnes dès lors que des oppressions et des restrictions sont annoncées (Ahrens 2018 : 77–97). De fait, ces pays ont ouvert la voie à des changements législatifs particulièrement dangereux pour la santé des femmes en limitant l'accès à l'avortement. De plus, d'autres lois restrictives sont débattues dans divers parlements des EM, tels que la Croatie, la Slovaquie ou encore la Lituanie, et permettent d'autant plus de se saisir de l'importance donnée à la politisation des questions d'accès à ce droit au sein de l'espace de libertés de l'UE. De fait, la politisation de la question de l'accès à l'avortement sans risque sur la scène européenne ne doit pas être observée comme un phénomène nouveau. Toutefois, par l'exemple de la Pologne, elle renvoie à divers paradoxes et notamment à la volonté d'ajouter une dimension du genre à la théorie de l'europanisation en temps de « déseuropanisation » (Forest 2021 : 60-77). Véritablement, cette volonté politique vient créer une convergence des contestations nationales vis-à-vis d'une Europe qui tente de s'établir dans une dimension plus sociale qu'économique. Or, la focale des institutions de l'UE sur le respect de l'État de droit provoque une attention déployée encore plus particulière de la part de celle-ci sur les demandes de la société civile favorable aux valeurs identifiées comme démocratique et européenne. Ainsi, il semblerait que la perception des prises à parties sur la question de l'accès à l'avortement accentuerait un clivage qui opposerait libéralisme et conservatisme. Céder face à ce bras de fer serait pour de part et d'autre comme un échec sensible face à la promotion des valeurs qu'ils souhaitent.

3.1. La mise en réseau des organisations favorables au droit à l'avortement : une promotion d'une société civile européenne nécessaire à l'établissement de nouvelles valeurs européennes

Depuis la chute de l'URSS, *Strajk Kobiet* incarne sans doute le mouvement militant pour les droits des femmes le plus dynamique et le plus influent d'Europe centrale. Six ans plus tard, ses actions continuent d'être massives et d'impacter les réseaux transnationaux féministes. Force est de constater que le *Strajk Kobiet* est une organisation militante polonaise qui, au cours des années, a affirmé sa volonté de se déployer sur la scène internationale en étant active, et réactive, face à toutes restrictions de l'avortement en proposant des actions de communications et des mobilisations dénonçant la menace de l'accès à ce droit sur la scène européenne (Irlande, « Manifeste des 343 européennes »), et, américaine (États Unis, et, Chili). Il s'agit également d'une organi-

sation polymorphe qui promeut les questions LBGTQI+, environnementales mais aussi mais aussi plus récemment géopolitiques (l'invasion russe en Ukraine et plus spécifiquement les violences sexistes et sexuelles commises sur les réfugiées)³⁶. Son succès est lié à sa capacité à influencer et à créer des symboles qui ont la capacité de devenir des outils de communication. À l'heure où l'Internet est devenu un outil de restructuration et de transformation du répertoire d'actions du mouvement féministe (Jouët, Niemeyer, Pavard 2017 : 21-57), le mouvement a su utiliser cet outil, particulièrement à travers Twitter et Instagram. Par exemple, le #strajkKobiet – dans sa version polonaise et non traduite vers l'anglais – s'est imposé de manière spontanée dans les tendances de Twitter et dans les recherches internet dès le mois d'octobre dans une période coïncident aux fortes contestations (Paradowski 2021 : 239-268). En écho à cette réflexion, une exposition à Varsovie est venue illustrer les combats des femmes Polonaises, portugaises et irlandaises en retraçant leurs histoires par l'interrogation « Qui écrira l'histoire des larmes des artistes sur les droits des femmes ? » à l'hiver 2021³⁷. En choisissant l'art comme moyen de dénoncer, l'exposition nous rappelle la force des mouvements féministes portés dans ces deux pays et leurs capacités à s'incarner dans des symboles de protestations qui marquent les esprits et accélèrent leurs circulations. L'utilisation de l'éclair rouge a notamment été globalement repris dans diverses manifestations pour militer pour la cause des femmes et s'apparente aux nouveaux registres des symboles féministes du XIX^e siècle (lafrate 2020). De plus, c'est ce symbole qui a notamment permis au mouvement de gagner en influence grâce à sa diffusion dans les contestations et par sa reprise sur les pancartes, en maquillage, ou vestimentaires dans le monde.

Outre le fait que le mouvement du *Strajk Kobiet* se déploie sous la forme d'antennes dans les villes, mais aussi dans les universités polonaises, il a aussi une vocation à rassembler ses partisans dans les grandes villes d'Europe sur la base de la mobilisation de la diaspora polonaise, et sur le fonctionnement d'un réseau de solidarité, qui déplace la cause polonaise dans un espace européen de contestation³⁸. Cet élan de solidarité a été particulièrement visible dès lors que le Tri-



« Regagner la liberté, pouvoir confisqué. », Elektra KB, présent au sein l'exposition au Musée d'Arts Nouveau (2021)

³⁶ Se référer à l'annexe n°2.

³⁷ « Qui écrira l'histoire des larmes des artistes sur les droits des femmes ? », Exposition au Musée d'Arts Nouveaux à Varsovie, du 26/11/2021 au 13/02/2022.

³⁸ Suite à la décision du TCP, de nombreuses manifestations intitulées « Strajk kobiet (i nie tylko!) lizbona/ manifestation contre la nouvelle restriction de l'avortement en Pologne » ont trouvé leur écho dans des villes comme Brussels, Paris, ou encore Lisbonne.

bunal Constitutionnel Polonais - TCP a fait l'annonce de son changement législatif en 2020. Par exemple, plus de deux cents ONG de la société civile mondiale se sont opposées à la proposition de loi. Cette demande a également reçu le soutien de l'ONU et du PE. Le mouvement qu'il a créé peut-être lu comme la somme des frustrations d'un problème de longue date arrivant à son point culminant (Gurr 1980). En 2018, le manifeste des 343 européennes : « *My Body, My Rights* » a été publié, avec pour titre un hommage à la pétition française « Manifeste des 343 » lancée le 5 avril 1971. Cette dernière présentait une liste de 343 femmes françaises, connues soit dans la sphère publique, qui affirmaient avoir subi un avortement à un moment de leur vie. Son objectif était d'encourager la dépénalisation de l'interruption de grossesse en France en soutenant le projet de la loi Veil. De son côté, le manifeste européen est élaboré dans un contexte unique car il rassemble des militantes d'organisations féministes de toute l'Europe. Il s'agit d'une demande aux gouvernements des États membres et à la Commission européenne de développer et de garantir un haut niveau de protection des droits des femmes. Il plaide pour une égalité dans la légalisation de l'avortement dans tous les pays européens et l'ouverture de son accès sur demande. Néanmoins, cette mise en réseau des OFC polonaises avec d'autres ONG n'est pas issue d'un phénomène spontané mais résulte d'un long travail entrepris depuis la chute du mur. Avec l'exemple de l'organisation polonaise de la Fédération pour les femmes et la planification familiale – FEDERA nous pouvons observer l'existence d'une promotion et d'une défense des intérêts de la société polonaise favorable à l'accès à l'IVG portée au niveau international grâce à un travail en collaboration avec les organisations internationales. En effet, cette structure se consacre à la promotion de la santé et des droits reproductifs depuis 1991 suite à la mise en réseau de cinq organisations³⁹. En 1999, la Fédération s'est vue accorder le statut consultatif spécial auprès du Conseil économique et social des Nations unies et plus largement, est reconnue sur la scène internationale en tant qu'expert⁴⁰. Également, elle est membre du réseau Astra, composé de plus de quarante organisations, qui est un réseau pour la santé et les droits sexuels et reproductifs dont la focale géographique est celle de l'Europe centrale et orientale. Elle est également le seul membre européen de la *Sexual right initiative* qui est issue de coalition nationale et régionale entre le Canada, l'Inde, l'Égypte, l'Argentine et l'Afrique du Sud. Ainsi, nous pouvons en déduire qu'il y a une intégration du récit polonais dans la stratégie de promotion et de défense des intérêts du lobby. De plus, FEDERA, elle-même, dispose également d'une stratégie de représentation des intérêts polonais sur la scène européenne qui témoigne de cette volonté de faciliter la création d'un dialogue privilégié avec les experts de la OFC :

« Nous travaillons sur le forum de l'Union européenne, où nous essayons d'encourager les gouvernements à s'engager plus activement pour les droits des femmes.

³⁹ Les cinq organisations originales étaient : Ligue des femmes polonaises (*Ligii Kobiet Polskich*), l'Association féministe polonaise (*Polskiego Stowarzyszenia Feministycznego*), l'Association Pro Femina (*Stowarzyszenia Pro Femina*), l'Association pour un État idéologiquement neutre "Neutrum" (*Neutrum – Stowarzyszenia na rzecz Państwa Neutralnego Światopoglądowo oraz Stowarzyszenia Dziewcząt*) et l'Association des filles et femmes chrétiennes YWCA Pologne (*Kobiet Chrześcijańskich Polska Y.W.C.A.*).

⁴⁰ FEDERA, « À propos de nous », FEDERA, 2022, consulté le 15 avril 2022, <https://en.federa.org.pl/about-us/>.

Nous sommes actifs dans diverses institutions européennes et nous suivons et faisons connaître les activités des députés européens de Pologne et du gouvernement polonais »⁴¹.

L'intégration de réseaux d'organisations cadres est une autre méthode utilisée par les organisations de la SCP pour diffuser leurs intérêts sur la scène nationale et dans les mouvements d'actions transnationaux. Par exemple, *le réseau Network of East and Western Women -Europe* a rejoint le lobby européen des femmes - EWL basée en Brussels dans les années de sa création. Cette organisation est notamment consultée par la Commission européenne dans le cadre de l'élaboration de ses politiques, mais est aussi invitée au Parlement européen par la commission FEMM. Le statut de membre leur donne notamment pour mission d'assurer la coordination de projets internationaux et régionaux propulsés par la gouvernance du lobby. De plus, cette mise en réseau et présence à l'international a été permise par l'utilisation des réseaux sociaux et a largement favorisé son influence en permettant de déployer son rayonnement en dehors des frontières du pays. Elle ouvre notamment la possibilité de mieux penser la stratégie internationale de ces OFC, et particulièrement celle visant à la recherche de financements sur la scène européenne. Or, réagir aux appels à projets nécessite l'utilisation d'outils spécialisés ainsi qu'une certaine connaissance des politiques européennes. La très grande majorité des autres mouvements féministes polonais demeure considérablement limité par le manque de financements publics. Cependant, en raison de son rayonnement et de son impact à l'international, il a reçu des fonds d'un certain nombre de programmes européens. Les institutions européennes en assurent également leur promotion. Par exemple, en 2019, *Ogólnopolski Strajk Kobiet* a reçu le prix de la société civile, organisé par le Comité Économique et Social européen (CESE) sur le thème : « davantage de femmes dans la société et l'économie européenne »⁴². En outre, la mise en réseau permet également d'accéder à des financements de la part d'organisations internationales. En ce sens, nous pouvons noter que FEDERA fait partie du réseau ASTRA qui est lui-même financé par le Fond Global pour les femmes et par la coalition internationale pour la santé des femmes.

3.2. Le Parlement européen, un allié institutionnel et un gage de légitimité pour les organisations défendant un meilleur accès à l'avortement

« Au cours des derniers mois, le gouvernement polonais a fait tout ce qu'il pouvait pour [...] priver de leur pouvoir de décision sur leur propre corps [...] Par sa décision, le soi-disant 'Tribunal constitutionnel' s'attaque aux droits des femmes dans toute l'Europe. »

Evelyn Regner, Membre du Parlement européen, Présidente de la commission des droits de la femme et de l'égalité des genres du 10 juillet 2019 au 24 janvier 2022

⁴¹ FEDERA, « Stratégie de lobbying et d'advocacy auprès de l'UE », FEDERA, 2022, consulté le 15 avril 2022, <https://en.federa.org.pl/activities/international-activity/the-european-union/>.

⁴² Le CESE œuvre à l'établissement de la société civile européenne et encourage à la démocratie participative. Depuis 2008, il propose un prix de la société civile afin de « récompenser l'excellence dans les initiatives de la société civile » par des bourses de financement. Chaque année, un thème est arrêté par le biais d'un appel à candidature.

En créant et en intégrant des relations stratégiques avec la société civile, dans le but d'élaborer ses politiques – au sens de *policy making* - l'UE institutionnalise encore plus le *gender mainstreaming* en réduisant le déficit démocratique et en encourageant la participation des acteurs aux politiques publiques (Jacquot 2003 : 172-176). Dans un ouvrage collectif, Jens STEFFEK, Claudia KISSLING et Patrizia NANZ délimitent l'existence de trois groupes de théories autour de la question des origines de la participation de la société civile dans la gouvernance européenne (Steffek, Kissling, Nanz, 2008). Dans leur exposé, ils démontrent que l'une des théories de cette participation se justifie grâce à la reproduction du modèle de l'institution parlementaire représentative (Ibid). Élu au suffrage universel depuis 1979, cette théorie s'appuie sur le Parlement européen car il représente le moyen le plus démocratique de représentation des citoyens au sein de l'UE (Iafrate 2020). D'autres constatent que le problème prédominant est lié aux manques de responsabilités publiques des décideurs de la politique à l'international (Steffek, Kissling, Nanz, 2008). Enfin, les derniers se concentrent au cœur d'un espace global de démocratie et de délibération vis-à-vis de la gouvernance européenne (Ibid). Au regard de ces observations, les auteurs concluent que l'on ne peut pas vraiment faire état d'une plus grande efficacité pour l'une de ces stratégies. Ils font un constat simple, qui consiste à faire émerger de nouvelles modalités face à cette nouvelle réalité institutionnelle. Par conséquent, la société civile cherche à exercer un pouvoir sur une démocratie qu'elle estime être en déficit, que ce soit dans un espace local, national ou supranational. (Iafrate 2020). L'intérêt est de concourir à renforcer l'efficacité de la proposition de gouvernance démocratique. En réalité, il appartient à la société civile de se saisir des moyens qu'elle considère comme les plus adaptés. Au cours de ses six dernières années, le Parlement européen a développé une capacité à promouvoir l'égalité des genres en mettant à l'agenda l'adoption de résolutions fortes en symboles - sans pour autant être garantie par le socle conventionnelle des traités de l'Union (Siim, Fiig, 2021). En ce sens, Fiig et Siim ont étudié les relations entre l'institution et les mouvements populistes qui s'emparent de la question du genre. Ainsi, l'enceinte du Parlement européen est elle-même mise au défi par la montée des parties d'extrême droite, tels qu'Identité et démocratie - ID ou, l'Alliance des conservateurs et réformistes européen – CRE, dont les représentants sont majoritairement hostiles à l'avortement. En labelisant le genre comme une « idéologie illégitime », ils repoussent l'implication de l'UE en favorisant les politiques nationales. Toutefois, il semblerait que le Parlement demeure en capacité de maintenir une présence et un environnement favorable pour assurer la promotion de l'égalité des genres en normalisant la présence de l'opposition (Ibid). C'est pourquoi, les résolutions adoptées par la commission des droits de la femme et de l'égalité des genres – FEMM du Parlement européen vis-à-vis des décisions entreprises par le gouvernement polonais pour restreindre l'accès à l'IVG sont particulièrement significatives car elles marquent une forte opposition et un « support aux valeurs libérales en relation avec la famille et les questions du genre. » (Ibid). En six ans, le Parlement a défendu le vote de huit résolutions en session plénière visant à dénoncer les mesures prises par le gouvernement polonais sur l'accès

à l'avortement⁴³. Ces résolutions, parfois assez courtes, s'intègrent dans un plus large conflit entrepris par les institutions de l'UE vis-à-vis de la violation de l'État de droit en Pologne. Placées au centre de celles-ci l'intégration et la promotion des questions du genre, d'éducation et de santé deviennent des arguments permettant de démontrer les entraves constatées à la démocratie polonaise, et de promouvoir une gouvernance européenne. La capacité de cette mobilisation à être transpartisanes et à rassembler plusieurs MEP sans qu'ils soient issus de la même coalition est aussi intéressante. Par exemple, les partis PPE, *Renew*, S&D, Greens/EFA GUE/NGL sont présents dans les votes en faveur de la première résolution visant à condamner le Tribunal constitutionnel en 2020.

« *La Pologne de 2020 est un enfer pour les femmes* », Evelyne Regner lors de son discours pendant la discussion de la résolution du 26 octobre 2020



En outre, on peut noter l'expression de la solidarité au *Strajk Kobiet* par la présence de symboles en assemblée. Plusieurs députés ont notamment porté des t-shirts avec les symboles du mouvement ; d'autres ont préféré la tenue en noir afin d'y faire référence. En les étudiant, on observe aussi l'utilisation et la référence au *Czarny Protest*, tout comme aux statistiques présentées par l'organisation polonaise de la Fédération pour les femmes et la planification familiale - FEDERA. Il s'agit d'un élément important qui prouve la connaissance et les liens qui existent entre l'institutions de l'UE et les OFC. Dans sa résolution du 11 novembre 2021, le Parlement européen viendra souligner les efforts de l'organisation internationale *avortement sans frontières* en soulignant l'aide fournie à plus de « 34 000 personnes originaires de Pologne » pour accéder à un IVG. Dans les considérants, la commission FEMM s'est également appuyée sur les données fournies par la FEDERA en rapportant que seulement 300 femmes avaient légalement pu accéder à cette intervention médicale au cours de l'année suivant la décision constitutionnelle⁴⁴. En écho, FEDERA viendra souligner que le Parlement européen a été « très actif vis-à-vis de la dégradation de l'État de droit et des droits humains en Pologne » et qu'il existe « *une solide relation entre les membres de la fédération et le MEP de Pologne et d'autres EM* » dans son rapport annuel en 2021⁴⁵. Cette organisation est notamment mise en cause par son propre gouvernement car elle est accusée d'encourager à enfreindre les lois po-

⁴³ Se référer à l'annexe n°3: liste des résolutions adoptées par le Parlement européen en lien avec la Pologne et le non-respect de l'État de droit et présentations de leurs principales vocations.

⁴⁴ Parlement européen, « Résolution du Parlement européen du 11 novembre 2021 sur le premier anniversaire de l'interdiction de fait de l'avortement en Pologne », consulté le 15 avril 2022, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0455_FR.html.

⁴⁵ FEDERA, « Rapport annuel », FEDERA, 2021, consulté le 10 mai 2022, <https://en.federa.org.pl/2021-annual-report/>.

lonaises. La soutenir et valider ses propos correspond à un signal fort de l'institution qui vient légitimer les activités de celles-ci. De plus, ces résolutions encouragent à financer les actions non supportées au niveau national par l'UE : « invite le Conseil et la Commission à fournir un financement adéquat aux organisations nationales et locales de la société »⁴⁶. En émettant une telle déclaration, le Parlement européen s'affirme dans sa volonté libérale. Véritablement, il met en place un fonctionnement différent de la diplomatie européenne qui tendrait à connecter l'UE directement à un ancrage plus local pour faciliter l'émergence d'une démocratie participative et encourager les activités de la société civile d'un EM qui répondraient aux critères du socle des valeurs européennes. De plus, il existe un suivi actif de l'actualité polonaise et des démonstrations militantes du *Strajk Kobiet* qui parfois trouve leur écho sur la place du Luxembourg à Bruxelles. Cette présence MEP est aussi effectuée par un soutien sur les réseaux sociaux via Twitter ou Instagram qui, en signe de soutien, s'abonnent à des pages dont la diffusion est complètement en polonais dans le but de faire grandir le nombre d'abonnés de ces organisations. Enfin, la nomination récente du MEP Polonais Robert Biedrón à la tête de la commission FEMM est aussi symbolique car il représente l'opposition sur la scène polonaise. Il est également engagé sur les questions LGBTQI+. Anciennement élu au Parlement Polonais, le *Sejm* et, représentant de la délégation polonaise pour l'assemblée parlementaire du Conseil de l'Europe de 2011-2014, il a pu observer l'avènement des débats sur les questions du genre qu'il s'agisse des discussions de sortie de la Convention d'Istanbul comme des divers épisodes juridiques de restrictions de l'avortement. Il fut également un membre du groupe consultatif sur la thématique « genre, déplacement forcés et protection des réfugiées » créée par le Haut-commissaire des réfugiés des Nations Unies - UNHCR. En 2020, il avait lancé un appel à la Commission européenne pour élargir le spectre de l'article 7 du TEU afin de protéger l'accès sans risque à l'intervention médicale. En réalité, il est possible que sa promotion au rang de président de la commission puisse permettre d'augmenter la sensibilité du Parlement européen à la cause des femmes Polonaises, et, permettre un renforcement des liens avec les OFC. Toutefois, sa contestation sur la scène nationale peut aussi être une difficulté car il renforcera les critiques d'une « idéologie du genre » dont l'accès au débat ne s'ouvriraient pas à des groupes - comme *Ordo Iuris* - qui se complaisent dans cette exclusion⁴⁷.

4. Intégrer l'avortement au cadre légal européen des droits Humains : entre échos à la Société Civile Polonaise et limites institutionnelles

Bien que l'objectif de défendre la légalité de l'égalité semble être institutionnalisé au niveau européen, les moyens restent entre les mains des gouvernements nationaux

⁴⁶ Parlement européen, « Résolution du PE du 26 novembre 2020 sur l'interdiction de fait du droit à l'avortement en Pologne, Parlement européen », consulté le 10 mai 2022, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0336_FR.html.

⁴⁷ *Ordo Iuris*, "EU to push pro-abortion agenda in UN – radical European Parliament resolution", *Ordo Iuris*, 2020, consulté le 14 mai 2022, <https://en.ordoiuris.pl/life-protection/eu-push-pro-abortion-agenda-un-radical-european-parliament-resolution>.

car la majorité des objets abordés par la gouvernance de genre sont hors du champ de compétence de l'Union (lafrate 2021). Il en est de même pour les réflexions liées au droit à l'avortement et à son accès qui lient étroitement un autre domaine exclu de ce champ : la santé. Les stratégies d'égalité des genres de l'UE sont à repenser dans le spectre de rationalité des efforts de l'administration européenne vis-à-vis de la volonté des États à s'impliquer davantage dans le projet d'une Europe politique. Dans ce contexte, bien que portés par l'aspiration de produire des politiques ambitieuses sur la question de l'égalité, ou du moins de protection des droits de la santé des femmes, les fonctionnaires travaillant sur ces questions se doivent de concentrer leurs efforts dans le spectre d'une certaine rationalité (Dratwa 2014 : 86-121). À cet effet, le concept introduit par Radaelli sur les modèles technocratiques de rationalité dans l'élaboration des politiques peut être utilisé pour caractériser le processus décisionnel conduisant à la formulation des choix politiques dans le processus d'élaboration des politiques. Entre rationalité, possibilité légale, et opportunités de sécuriser un haut niveau de promotion et de matérialisation des droits humains, l'accès à l'avortement semble répondre à une série de défis qui rendent une uniformisation du cadre légal de l'UE difficile à envisager. Ainsi, il est intéressant de repenser l'accès à cette intervention médicale par les possibilités légales accordées à l'UE tout en considérant la mise au défi indexée par la Société Civile Polonaise et le Parlement européen.

4.1. Créer, défendre et construire une stratégie européenne d'égalité des genres : le défis du consensus institutionnel

De la période allant de son accession jusqu'à 2016, les décisions et discours polonais défavorables à l'accès sur demande de l'avortement en Pologne ont été absents de toutes interactions entre cet EM et l'UE. Toutefois, la constatation de différences de système de droits humains aux frontières des EM composant l'Union est apparue très rapidement sur la scène politique européenne comme problématique à l'ouverture de l'espace de droit et liberté. Proposant une libre circulation des citoyens et citoyennes européennes, celle-ci a amené à des tensions diplomatiques entre les États se disputant la possibilité de voir leurs systèmes légaux contournés. Nous pouvons également voir une faille dans l'idéal de vivre ensemble promu par l'institution qui apparaît dans cette logique de comparaison de ce que pourrait contenir leur « troisième corbeille. »⁴⁸. Au cœur de notre étude, nous avons pu constater que le domaine de l'égalité s'intègre dans cet espace de liberté et parmi valeurs promues par l'UE. Or, créer, défendre et construire une stratégie européenne d'égalité des genres à l'échelle européenne est un exercice difficile dans l'espace légal offert par l'UE. Par ailleurs, cette stratégie est limitée par la part relativement faible dédiée au sein du budget de l'UE pour agir afin d'entreprendre des actions dans ce domaine (lafrate 2021). En effet, ces politiques européennes ont occupé une position instable dès leur apparition dans le

⁴⁸ Référence à l'expression utilisée pour inclure la question des droits de l'Homme dans les négociations entreprises entre le bloc de l'Est et de l'Ouest au cours de la Conférence sur la sécurité et la coopération en Europe qui s'est étendu de 1973 à 1974.

cadre européen. Ceci est directement lié à l'imprécision de la référence juridique dans laquelle elles puisent leur validité (Jacquot 2006 : 33-54). En ce sens, les questions du genre ont dû être placées sous la supervision d'une gouvernance informelle (Woodward 2004, 76-93). La théorie du « triangle de velours » défend notamment la situation dans laquelle les acteurs gouvernementaux, les experts et les « *fémocrates* »⁴⁹ interagiraient dans le but de parvenir à l'élaboration d'un tel projet politique (Woodward 2004, 76-93). En ce sens, ériger une réflexion sur les questions du genre s'apparente à valider la légitimité d'acteurs non-institutionnels souhaitant prendre part à la réflexion. Or, comme nous avons pu le voir avec les contestations formulées par *Ordo Iuris*, mais aussi d'autres mouvements anti-genre, cette chambre d'écho créée pour faciliter la réflexion peut être mise en cause pour son détachement de la globalité de la représentation des idées. Cette supposition mènerait à observer une forme de discussion seulement ouvert aux organisations défendant des valeurs plus libérales. Toutefois, elle est rationalisée par l'appui des travaux de consultations d'opinion ouvertes aux citoyens, d'analyse d'impact et d'évaluation menées en amont des directives par la CE. Par ailleurs, les réflexions autour du REG peuvent voir leurs ambitions et propositions vidées de leurs sens dès lors qu'elles se déplacent dans une arène institutionnelle de discussion différente, et potentiellement plus hostile à son établissement par la pluralité conceptuelle existant autour de la définition du genre. Cela est particulièrement visible au niveau du CUE qui, dans la continuité du train législatif, vient donner son aval ou bien frapper de son opposition les directives proposées par la Commission européenne et le PE. Véritablement, il semblerait que les EM soient confrontés à deux ambitions. D'une part, les leurs et celles de leurs sociétés civiles, qui peuvent entrer en coalition, d'autre part celles des accords bilatéraux ou internationaux au sein desquels il s'est engagé. En ce sens, les discussions finales au sein du CUE sont le gage ultime de contrôle du respect du spectre de rationalité. À cet effet, la directive « *women's on board* – la représentation des femmes dans les conseils d'administration » est restée bloquée au CUE pendant plus de dix années⁵⁰. De fait, il peut exister un temps réellement long entre la concordance des stratégies du REG et la disponibilité des EM à rendre ses attentes réelles. Ce temps peut parfois rendre la réflexion complètement dépassée. En l'espèce, la Convention d'Istanbul est symbolique dans cette observation car elle constitue le principal outil et socle de valeurs et de standards à mettre en place et défendre dans ce domaine⁵¹. Néanmoins, elle repose sur des bases fragiles car cer-

⁴⁹ Le mot « *fémocrates* » ou « *féministes étatiques* » désigne les féministes, ou anciennes militantes pour le droit des femmes, qui travaillent au sein de la fonction publique en continuant de défendre ces idéaux. Par leur légitimité elles sont en capacité de constituer des relais entre l'État et le mouvement féministes.

⁵⁰ Parlement européen, « Représentation des femmes dans les conseils d'administration: feu vert pour lancer les négociations avec les États membres », (Strasbourg, 2022), Consulté le 24 avril 2022, <https://www.europarl.europa.eu/news/fr/press-room/20220314IPR25412/parite-dans-les-entreprises-feu-vert-aux-negociations-avec-les-etats-membres>.

⁵¹ La Convention d'Istanbul, Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes. Elle a été ratifiée par vingt-un État membre. La sortie de la Turquie, à l'anniversaire des trente ans de la convention en 2021, a particulièrement mis en évidence les difficultés d'harmonisation des pays partis au Conseil Européen sur les questions d'égalité. Cette convention est notamment une base utilisée par les institutions de l'UE dans l'élaboration de son REG.

tains EM ne l'ont pas encore signée ou ratifiée, tandis que d'autres, comme la Pologne, menace de revenir sur leurs promesses. En outre, le récent débat sur la ratification de l'UE est toujours en suspens, rythmé par les conclusions peu enthousiastes de l'avocat général, et dans l'attente de l'arrêt définitif de la Cour de justice.

Par cet exposé, nous pouvons en déduire que la Commission européenne, dans sa force d'initiative préliminaire visant à répondre aux stratégies fixées par la Présidence, demeure limitée dans sa manœuvre. Cependant, le déplacement de la politisation du débat portant sur l'IVG sur la scène européenne amène l'institution à observer plus attentivement la carte de son accès en Europe afin de caractériser l'existence ou d'un problème justifiant son intervention (figure 1). Or, une fois encore, la sortie du champ de compétences demeure problématique.

La récente proposition d'une directive en lien avec la criminalisation des violences fondées sur la base du genre, et, sa réception sur la scène internationale démontre de la crainte d'une perte de souveraineté des États. En ce sens, penser un accès différentiel à un droit inhérent à la condition humaine, comme celui de l'avortement, dans le cadre des violences fondées sur la base du genre, a été exclu de la discussion. Toutefois, le spectre de rationalité imposée par la volonté d'établir un REG a sans doute fermé cette fenêtre d'opportunité. Afin qu'une norme européenne puisse voir le jour il est nécessaire établir le degré d'acceptation des États composant la table de négociation, mais aussi des parlementaires se mobilisant pour l'amendement du texte proposé. Ainsi, l'avortement s'est distinct du débat des violences bien qu'il soit remis en évidence par les discussions parlementaires de la commission FEMM. À ce jour, la Commission, en tant qu'institution portant pour mission de défendre la valeur européenne, ne s'est pas positionnée sur la tentative d'établir une harmonisation du cadre légal de l'avortement. Dans ses prises de parole en public, la Commissaire en charge du portefeuille de l'égalité des genres, fait simplement le rappel aux EM de leur obligation de se conformer et de respecter le cadre international des droits humains. Elle manifeste également sa solidarité des « femmes Polonaises qui démontrent leur résilience et leur résistance » dans la perspective où elle défende

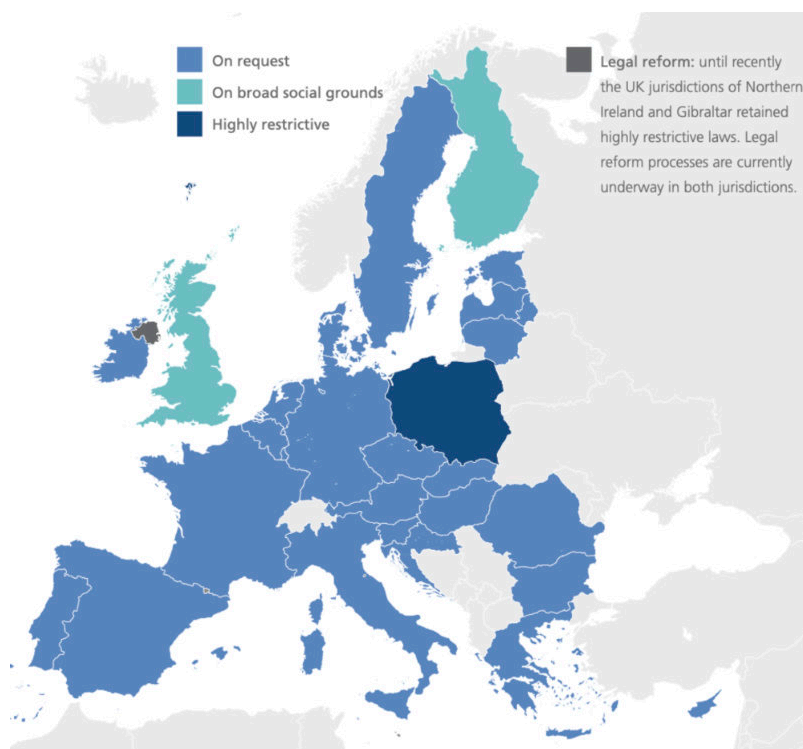


Figure 1: Accès à l'IVG en Europe, Center for Reproductive Rights (2021)

un niveau plus haut et plus fort de protection du droit des femmes⁵². En tant que femme Maltaise, elle appelle également à émettre des réflexions sur les changements de lois à tendance restrictive dans son pays et « pas seulement sur la Pologne »⁵³.

En outre, la prise en compte et la construction d'un dialogue privilégié entre la SCP militante en faveur de l'accès à l'avortement sans risque est notamment marqué par le rapport parlementaire Matic adopté en 2021. Ce texte démontre de l'intérêt et l'urgence d'accéder à un socle de droit sexuels et génésiques au niveau de l'Union. Il vise directement les pays qui ont opté pour le choix de la restriction comme Malte et la Pologne. S'inscrivant dans un contexte post-COVID, il souligne également le recul des droits des femmes à la suite de la pandémie, et note particulièrement l'influence de ce facteur sur l'accès à l'avortement qui a été mis à mal par des refus et réorientations ou désorientations des femmes souhaitant y accéder. De fait, il défend le besoin de bénéficier d'un socle de valeur en la matière tout en caractérisant son soutien pour les organisations militant pour conserver un haut degré de protection. Au cours de leur travail, les députés ont notamment subi des pressions en faisant l'objet de messages d'appel à la haine sur la sphère en ligne par le biais de courriels, d'attaques sur les réseaux sociaux, comme physiques avec des courriers et manifestations à leurs égard. En tant que rapporteur, Fred Matic a notamment été comparé à Hitler et a reçu des poupées en plastiques représentant des fœtus à son bureau⁵⁴. Ceci démontre de la capacité à agir des organisations anti-genre et anti-avortement pour interpeller les parlementaires amenés à établir des régulations dans le domaine. Par ailleurs, il faut noter que ce rapport a également controversé à l'intérieur même du Parti populaire européen - PPE qui avait proposé deux alternatives différentes à ce texte⁵⁵. Ainsi, bien que transpartisanes, la question de l'avortement ne provoque pas un consensus à tout niveau, même dans l'enceinte parlementaire où le débat et les condamnations envers l'état polonais sont vivement clamés.



En somme, la promotion et défense de l'accès à l'avortement semble s'imager par un échiquier institutionnel contrarié pour un sujet probablement encore plus controversé que l'ensemble des questions inhérentes à l'agenda des questions du genre.

Twitter, photo illustrant le tweet de Raphael Glucksmann, MEP du Socialiste & Démocrates- S&D : « *Tous les fœtus en plastique envoyés par des associations fanatiques n'ont pas empêché les députés européens d'adopter à l'instant le rapport Matic sur le droit à l'avortement et la liberté de choix des femmes au sein de l'UE. Par 378 voix vs 255, nous avons vaincu les dingues !* »

⁵² Giedre Peseckyte, « EU Parliament condemns Poland's restrictive law on abortion », *Euractiv*, 12 novembre 2021.

⁵³ Laura Calleja, « Not just Poland: Dalli called to reflect on Malta abortion ban », *Malta Today*, 24 février 2021.

⁵⁴ Maïa de la Baume, « Abortion debate in the European Parliament sparks division and hatred », *Politico*, 23 juin 2021.

⁵⁵ Ibid.

4.2. Dépasser les restrictions à l'avortement : une énigme judiciaire qui se résout au cas par cas

Bien que le verrou institutionnel européen soit conséquent dès lors que l'on s'attache à réfléchir hors de son champ de compétence, les mécanismes judiciaires peuvent être des canaux permettant de sécuriser l'avènement de droits et libertés fondamentaux. En réalité, la voie de la judiciarisation européenne, par le biais de la CEDH, est un pivot intéressant vis-à-vis de l'État de droit. Lorsqu'un justiciable, ressortissant des États parties au Conseil européen, a épuisé les voies législatives internes au système de droit de son État, il peut déposer une requête devant ce juge. Par la suite, la CEDH examine les requêtes et rends des arrêts contraignants qui peuvent permettre aux justiciables de se voir dédommager et reconnaître raison. Ces décisions peuvent notamment indexer des changements législatifs dans le cadre où, par exemple, une non-conformité des traités internationaux, ou une irrégularité de la procédure judiciaire seraient constatées. Les arrêts de la Cour, en incarnant une jurisprudence, constituent une source du droit européen. Au sujet de la question de l'accès à l'avortement, on observe l'existence d'un travail de publicisation de la part de certaines organisations de la SCP, plus particulièrement des OFC, consistant à mettre en avant la possibilité de poursuivre son État devant la CEDH. Pour FEDERA, cela passe par une représentation ou un soutien direct vis-à-vis des femmes qui ont subi des dommages causés par le manque ou le refus d'accès à l'avortement sans risque. L'organisation met notamment en avant sa participation dans les procès victorieux menés contre la Pologne : *Tysiąc* (2017), *P. et S.* (2012), et *R.R.* (2017)⁵⁶. Ces affaires sont symboliques car elles caractérisent les violations des droits humains en confirmant la recevabilité de ces affaires. Après la décision du TCP de 2020, l'enjeu pour les plaignants est de démontrer que même les modalités d'accès légal à l'IVG ne sont pas uniformisées et garanties à l'échelle du pays. Les disparités régionales et les clauses de conscience offertes au corps médical viennent réduire sa légalisation. En mars 2022, un nouveau décès d'une femme Polonaise âgée de 37 ans suite à un déni d'accès à l'avortement de la part du corps médical, a été provoqué de vives condamnations de la part de la SCP devant le siège du PiS à Cracovie, tout comme dans d'autres villes⁵⁷. Mère de deux filles âgées de dix-neuf ans et de douze ans, mais également d'un fils de huit ans atteint d'autisme, le traitement que cette femme a reçu à l'hôpital a provoqué d'important retentissements au sein des médias et de la sphère publique polonaise. En effet, elle met le gouvernement face aux réalités et aux risques encourus par la décision de prioriser le fœtus sur la vie des femmes. Elle rompt également avec la dialectique de promotion d'une famille traditionnelle car dans ce cas la mère décédée laisse derrière elle une famille avec des enfants. De plus, ces contestations ont été alimentées par les déclarations de la famille qui réclame justice et dont l'affaire pourrait être prochainement propulsée devant la Cour de Justice polonaise⁵⁸.

⁵⁶ FEDERA, « The European Court Of Human Rights », FEDERA, 2022, consulté le 10 mai 2022, <https://en.federa.org.pl/activities/international-activity/the-european-court-of-human-rights/>.

⁵⁷ Euronews via AFP, « Polish activists condemn abortion law after death of another pregnant women » Euronews, 26 janvier 2022.

⁵⁸ Anita Karwowska, Waldemar Paś, « Każdą Polkę może spotkać to, co moją siostrę » *Wyborcza*, 4 février 2022.



Affiche du Strajk Kobiet en souvenir d'Agnieszka (2022)

Lors de sa 1 419^{ème} réunion, le Comité des ministres du Conseil européen a pris une décision concernant la Pologne, et les trois décisions précédemment citées, où il l'exhorte vivement à adopter, sans plus attendre, des procédures claires et unifiées pour tous les hôpitaux, afin de garantir l'accès aux soins et aux informations en matière d'avortement. La décision souligne particulièrement l'enjeu médical visant à assurer la santé des patientes enceintes. Elle vient également mettre en évidence la multiplication des contestations portées par les femmes pour donner suite à leur refus d'accès à l'avortement pour des raisons médicales et demande à

l'état d'agir pour garantir les modalités d'accès, rendu légal par la décision du TCP. De telles prises à partie peuvent être bénéfiques pour propulser les changements légaux visant à protéger l'intégrité des personnes et leurs droits humains. En somme, la transnationalisation des questions de droits a notamment permis d'accéder à de nombreux avènements en matière d'agenda du genre. Par exemple, la reconnaissance des mariages entre les personnes de mêmes sexes dont l'union a eu lieu dans un autre pays a donné lieu à une reconnaissance du juge européen. Sans forcer l'instrumentalisation d'un REG harmonisé, il semblerait que le juge européen emprunte un certain élan libéraliste pour reconnaître et faire converger certaines normes européennes.

Ces procès entrepris par les citoyennes européennes sont également à replacer dans le cadre d'un bras de fer entre la Commission européenne et la Pologne qui se déplace dans la Cour de Justice de l'UE - CJUE. La période de 2015 à 2020 illustre cette mise en cause du PiS par l'UE qui souligne ses inquiétudes vis-à-vis de l'indépendance de la justice polonaise. D'abord le Parlement européen a émis des résolutions non-contraignantes afin de dénoncer le non-respect de l'État de droit (voir annexe n°3). Puis progressivement, cette opposition a été instrumentalisée dans les discours politiques du PiS pour dénoncer une atteinte à la souveraineté. En ce sens, ces déclarations clament la supériorité du droit polonais sur le droit européen. Contrairement à ce qui a été clamé aux commencements du processus d'intégration à l'Union - soit la volonté d'« une européanisation comme un processus de modernisation » même en l'absence de *droit dur* par les parlementaires polonais - il semblerait qu'il ait une affirmation concrète de la tentative de « déseuropéanisation » (Forest 2021 : 60-77). Dès 2017, la Commission européenne a menacé le gouvernement

polonais de déclencher la procédure de l'article 7 du TUE⁵⁹. Elle engagera une première procédure le 29 juillet en conséquence de la mise en place d'une loi propulsant le départ anticipé des juges à la retraite. Puis, une seconde le 2 juillet pour donner suite à une seconde mise à jour de ce régime de retraite. Ces deux procédures déboucheront sur la suppression de ces lois de l'ordre juridique polonais⁶⁰. Pour donner suite à divers rappels, et à la quatrième opposition de la Pologne qui a adopté une loi permettant de sanctionner les juges qui critiqueraient les réformes entreprises dans le domaine de la justice, elle a lancé une procédure d'infraction⁶¹. En somme, il est à considérer que ses oppositions judiciaires alimentent les discours du PiS qui affirme encore plus une européanité polonaise par la protection de sa souveraineté nationale. De fait, le genre et la promotion de l'égalité ont été instrumentalisés et pris à partie au sein d'un débat populiste comme un outil d'opposition.

Toutefois, la judiciarisation européenne s'affirme dans un temps extrêmement long car il est soumis aux rouages des institutions à la fois nationales et internationales. Ainsi, la projection d'un changement légal grâce à l'indexation de la jurisprudence libérale de la CEDH ne serait satisfaire l'agenda contrarié des questions du genre dont les débats apparaissent de plus en plus clivants sur la scène européenne. Néanmoins, il constitue un gage révélateur de la nécessité de penser le débat et de l'ouvrir à un degré institutionnalisé pour l'Union. En revanche, les procédures d'infractions de la Commission européenne semblent bénéficier d'un poids juridique plus efficace et s'affirment dans un temps plus rapide. Or, il est à considérer que l'institution ne peut poursuivre l'intégralité des mesures polonaises qui ne sauraient satisfaire les valeurs européennes. Cela reviendrait à une remise en cause qui renforcerait le discours du PiS et isolerait d'autant plus le pays de la sphère européenne. En conséquence, le curseur des sanctions et du dialogue doit se balancer dans cette dichotomie visant à valoriser l'acquis communautaire sans rompre les relations diplomatiques avec un EM et en garantissant un haut degré de protection du droit des femmes. En somme, ce dilemme cornélien matérialise l'énigme de l'agenda du genre en matière d'harmonisation du cadre légal de l'avortement au niveau européen.

5. Conclusion et réflexions

L'avènement de l'avortement en tant qu'intervention médicale est à la croisée de débats bioéthiques, religieux et moraux. S'il ne fait aucun doute que l'interruption de grossesse volontaire existe par la pratique, son accès sécurisé et sans risque reste l'enjeu des discussions autour de sa légalisation. L'objectif de cette recherche était de mettre en lumière le déplacement des contestations et dialectiques d'opposition de

⁵⁹ Cette procédure amène à la contestation par les vingt-six autres EM d'un risque « *d'une violation grave de l'état de droit* » en Pologne. Elle entraîne de fait la démission des fonctions de droit de vote au Conseil. Elle n'a pas pour l'heure jamais été activée.

⁶⁰ Lucas Da Silva, « Etat de droit : chronologie du conflit entre l'Union européenne, la Pologne et la Hongrie », *Toute l'Europe*, consulté le 10 mai 2022. <https://www.touteurope.eu/fonctionnement-de-l-ue/etat-de-droit-chronologie-du-conflit-entre-l-union-europeenne-la-pologne-et-la-hongrie/>.

⁶¹ Ibid.

la Société Civile Polonaise au sujet de l'avortement sur la scène polonaise vers la scène européenne. En considérant le degré de la politisation qu'elle a acquis depuis 2016, force est de constater que la saisie de cette question passe par l'analyse des possibilités légales d'harmonisation envisageables au niveau des institutions européennes. Bien que notre recherche se concentre sur la société polonaise pour comprendre les demandes portées par sa société civile, il faut rappeler que le recul de l'accès à ce droit est visible dans plusieurs pays membres de l'Union, et interpelle un nombre grandissant de décideurs politiques. En réalité, l'Union européenne ne dispose d'aucune compétence pour assurer la prise en charge de ce débat, elle ne peut que s'en saisir en ayant la garantie légitime citoyenne, c'est-à-dire en observant des mouvements de contestation qui s'institutionnaliseraient, et s'incarneraient par des décisions judiciaires, démontrant de la nécessité d'un changement pour protéger les droits humains. Le « triangle de velours » proposé par l'agenda des questions du genre vient induire une gouvernance informelle qui appelle les institutions à doubler d'effort pour tenter d'indexer des transformations et garantir les ambitions de l'établissement d'un régime d'égalité des genres. Le débat autour de l'IVG a notamment entraîné la confusion entre les demandes militant pour l'accès à l'avortement sans risque et l'avortement sur demande. Il est particulièrement intéressant d'observer la position du Parlement européen qui depuis six ans, s'attache à incarner, de manière de plus en plus affirmée, la promotion et la défense de ce droit. Les liens qu'ils existent entre cette institution et les organisations en faveur de l'accès sans risque et sur demande à l'IVG reflètent la mise en place d'un court-circuit dans le dialogue interétatique. Ces relations permettent notamment de financer et de donner une légitimité aux organisations qui bien que contestée à leurs échelles locales, assument un rôle de promoteur des valeurs européennes. En outre, la vivacité des organisations de la société civile, en faveur de l'ouverture comme de la restriction doivent être analysée selon leurs forces à s'incarner dans une sphère en dehors de leur échelle nationale. Cet élément vient notamment mettre à mal les théories décriant la faiblesse des sociétés civiles des pays étant sorties de la sphère soviétique. De façon évidente, elle vient même souligner leur capacité à être les moteurs d'une démocratie européenne.

En revanche, ouvrir le débat sur l'harmonisation de l'avortement à l'échelle européenne est une mission particulière à l'heure de la « déseuropeanisation » polonaise induite par le programme politique du PiS. La protection de la souveraineté de l'État, et la promotion d'une européanité à la polonaise, appuyée par l'Église et assurée par des relais de la société civile, s'accordent à dénoncer le genre comme une idéologie et tente de réduire le rôle que les institutions de l'UE pourrait jouer dans l'écriture d'une législation touchant à l'égalité ou à la santé. C'est pourquoi l'observation de la politisation des questions du genre en Pologne est à lire comme une stratégie de plus grande ampleur visant à justifier la mise en récit d'une vision spécifique de l'Europe. Dans le même temps, elle est à analyser dans un contexte de division de la société Polonaise qui hésite et se déchire entre le choix de l'apostasie et le renforcement des prérogatives de l'Église dans la politique de l'État. Ainsi, l'avortement n'a pas été la grande question sacrifiée du compromis européen mais bien plus une prise de risque

impossible à amener sur les tables des négociations du Conseil de l'UE. Incapable d'obtenir une ratification de la Convention d'Istanbul et un consensus, il semble difficile d'imaginer une éventuelle régulation sur un sujet heurtant à tant de problématiques et considérations sociales au niveau européen. De plus, il existe une difficulté résiduelle dans le fait que la prise de position en faveur de l'avortement demeure limitée au cercle de la commission des droits des femmes et de l'égalité des genres, soit à l'enceinte d'un des vingt-trois groupes de travail de l'institution, qui est davantage sensibilisé face à la nécessité de faire évoluer le cadre légal européen de l'égalité. Pour l'heure, bien que la déclaration du Président Emmanuel Macron résonne comme une volonté d'ouvrir le débat, elle apparaît comme hasardeuse face à l'immense chantier légal et les tensions interétatiques et religieuses qui se cachent derrière l'avortement. En ce sens, il semblerait que sacraliser l'accès à l'avortement sans risque au rang de droit Humains, et en faire une valeur promue par l'UE, s'apparente davantage à un dialogue religieux qu'à un défi strictement légal. En somme, consacrer l'avortement sans risque témoignerait de la première éventualité, et admettre son accès sur demande par surcroît, un pari rejoignant les deux enjeux. Ainsi, le débat sur l'avortement oscille entre consécration des valeurs européennes et consensus interétatiques.

Comprise comme une réelle mise à l'épreuve du régime européen d'égalité du genre, une réelle fenêtre d'opportunité apparaît pour les institutions de l'UE quant à l'uniformisation de la légalisation mieux établie de cette intervention médicale. Il s'agirait notamment de satisfaire les critères onusiens en garantissant un degré de protection de la santé des femmes dans le domaine des droits sexuels et génétiques. En ce sens, les procédures d'infractions prises à l'encontre de la Pologne permettent de protéger – en rappelant la possibilité d'une criminalisation - l'État de droit. Par ailleurs, l'éventualité que la saisine du juge européen puisse avoir un effet positif sur de futures régulations n'est pas à exclure. La multiplication des affaires venant condamner la Pologne pourrait constituer au fil des années une source juridique permettant de justifier l'intervention de l'UE. Penser ce débat revient à comprendre le jeu des limites institutionnelles afin de mieux évaluer les possibilités d'action émanant du spectre de rationalité institutionnelle. Bien que la Commission n'ait pas admis cette possibilité, l'inégal accès à l'avortement sans risque au sein de l'espace européen de liberté pourrait se voir définir comme une inégalité d'accès entre les genres dans le domaine de la santé. Au prisme d'une Union souhaitant agir dans le domaine sanitaire après l'épisode pandémique de la COVID-19, la réflexion de l'avortement pourrait être ouverte dans ce qu'elle nécessite une harmonisation de l'accès à l'information et aux soins médicaux de l'ensemble des citoyens.

À la lumière de cette recherche quelques prospections sont à faire quant à l'avenir de ce débat. Tout d'abord, il est fascinant d'observer que le gouvernement polonais a pris la décision historique en avril 2022 de poursuivre une militante ayant facilité l'accès à la pilule abortive - Justyna Wydrzyńska – faisant suite à la demande d'une femme souhaitant avorter d'une grossesse résultant de violences domestiques. L'ouverture de la possibilité de poursuivre les militants est particulièrement

inquiétante car elle pourrait se transformer en un recours fréquent qui pourrait reviendrait à saper l'énergie déployée par les militants en les plaçant dans l'illégalité et par la même nuire aux principes de représentation de l'ensemble des intérêts au sein d'une démocratie.

De plus, les récents témoignages tel que celui de la famille d'Agnieszka, commence à mettre en avant l'existence d'une irrégularité dans le système légal de l'avortement actuel. L'appui de la CEDH en ce sens pourrait être un pivot nécessaire pour vérifier et veiller au respect des normes – très restrictives – polonaises.

En outre, il faut explorer la possibilité selon laquelle la guerre en Ukraine pourrait créer une reconfiguration de la promotion et défense des intérêts sur la scène nationale. En effet, en réactivant l'opposition à la Russie, plus précisément, anti-Poutine, les relais de la société civile insistent sur la crainte de l'envahisseur russe et cherche à exclure ces derniers des réseaux d'influence dans l'espace public. Cette dialectique est particulièrement utilisée par le mouvement polymorphe *Strajk Kobiet* qui tente dorénavant de se saisir des questions géopolitiques afin de mieux dénoncer *Ordo Iuris* et ses liens avec ses financeurs. Décriée pour ses liens avec certains oligarques russes, il est possible que l'organisation soit confrontée à un procès social qui pourrait la conduire à exprimer davantage de transparence sur son bilan financier. Ainsi, les événement futur et la force de cette contestation pourraient être déterminants sur la scène nationale, en particulier à l'approche des élections du Parlement polonais en 2023.

Enfin, la force et l'influence de la Présidence française du Conseil de l'Union européenne, et, la brève mention consacrant l'accès à l'avortement au rang d'une valeur européenne sera à observer dans la continuité des trois semestres qu'elle a initiées. Ainsi, il s'agira d'observer s'il existe une continuité de ce débat dans les présidences Tchèques et Suédoise et si celle-ci marquera le curseur de ces priorités à un accès sécurisé ou sur demande au niveau européen.

Annexe n°1

Définitions et concepts autour de l'avortement

L'avortement, ou interruption volontaire de grossesse, est définie par l'intervention médicale à laquelle les femmes enceintes peuvent recourir pour interrompre leur grossesse. En ce sens, il s'intègre aux droits sexuels et génésiques.

Dans le cadre médical, il existe deux méthodes d'interruption :

- IVG chirurgical
- IVG médicamenteuse

D'un point de vue juridique, l'avortement est légal en Europe à l'exception du Vatican et d'Andorre. En revanche, chaque législation conditionne l'accès à l'avortement selon certaines modalités telles que : malformation ou risque de santé important pour le fœtus, risque de santé pour la personne portant le fœtus, grossesse résultant d'un viol ou d'un inceste. Le délai d'accès est également un enjeu permettant de valoriser et d'évaluer l'avènement de ce droit.

Dans le cadre de nos recherches, le droit à l'avortement est central. Faire état de la défense et de ce droit amène à particulièrement différencier deux intérêts découlant de sa conceptualisation :

- **Accès à l'avortement sans risques :** correspond à l'accès à l'interruption de grossesse volontaire dans un cadre garantissant un égal accès aux informations, au corps médical et hospitalier.
- **Accès à l'avortement sur demande :** correspond à l'accès à l'interruption de grossesse volontaire qui ne comporteraient aucune limite spécifique. Cela correspond à la situation où la légalité de l'avortement serait totale ou du moins limité seulement par un délai indiqué.

De manière concomitante, la promotion et la défense de l'accès à l'avortement sur demande entraîne le soutien de la rhétorique de son accès qui doit être assuré par le corps médical et hospitalier.



Carte de la légalité de l'avortement par pays ou territoire
(Wikipedia, 2022)

Annexe n°2

Compte Instagram du Strajk Kobiet, mise en évidence des campagne anti-Poutine et contre la guerre en Ukraine, 12 mai 2022



Annexes n°3

Liste des résolutions adoptées par le Parlement européen en lien avec la Pologne et le non-respect de l'État de droit et présentations de leurs principales vocations :

Au cœur de cette annexe, chacune des résolutions adoptées par le Parlement européen dans la période allant de 2016 à 2022 est brièvement mis en lumière par ses principaux buts et objectifs. L'intérêt de cette note était d'appuyer le propos avancé dans le chapitre 2 au sujet de l'implication de cette institution européenne dans l'établissement d'un cadre normatif harmonisé visant l'accès à l'avortement sans risque dans l'ensemble de l'UE.

Résolution du Parlement européen du 14 septembre 2016 sur les récentes évolutions en Pologne et leurs conséquences sur les droits fondamentaux inscrits dans la charte des droits fondamentaux de l'Union européenne : est la première décision venant directement souligner l'absence d'un « *tribunal constitutionnel pleinement fonctionnel* » et marquer sa pré-occupation que « *pourraient constituer des violations du droit de l'Union, de la jurisprudence de la Cour européenne des droits de l'homme et des droits fondamentaux, y compris les droits des femmes* ».

Résolution du PE du 15 novembre 2017 sur la situation de l'État de droit et de la démocratie en Pologne : affirme son soutien vis-à-vis des OFC, et, critique toutes restrictions sur l'accès à l'avortement : « *critique vivement toute proposition législative qui interdirait l'avortement en cas de malformation grave ou fatale du fœtus (...) réaffirme fermement son soutien aux organisations de défense des droits des femmes, étant donné qu'elles ont récemment été la cible de poursuites judiciaires* ».

Résolution du Parlement européen du 14 novembre 2019 sur la criminalisation de l'éducation sexuelle en Pologne : dénonce des décisions en lien avec la santé et l'éducation, soit deux compétences hors du champs de l'UE : « *réaffirme avec vigueur que l'accès à des informations complètes, et adaptées à l'âge de la personne ciblée, sur le sexe et la sexualité ainsi que l'accès à des soins de santé sexuelle et reproductive, y compris l'éducation à la sexualité, les services de planification familiale, les méthodes de contraception et un avortement sûr et légal, sont essentiels pour faire en sorte que l'approche de la sexualité et des relations sexuelles soit positive et respectueuse* ».

Résolution du Parlement européen du 17 septembre 2020 sur la proposition de décision du Conseil relative à la constatation d'un risque clair de violation grave, par la République de Pologne, de l'état de droit : propose un volet thématique sur la « *santé et droits sexuels et génésiques* » afin de dénoncer les tentatives de limitation du droit à l'avortement et souligner qu'elles ont été « *interrompues en 2016 et en 2018 en raison de l'opposition massive des citoyens polonais exprimée dans les «Marches noires»* ».

Résolution du PE du 26 novembre 2020 sur l'interdiction de fait du droit à l'avortement en Pologne : pour la première fois condamne directement une décision prise par une instance suprême de juridiction : « *condamne vivement l'arrêt du Tribunal constitutionnel et le recul de la santé et des droits des femmes en matière de sexualité et de procréation en Pologne* ».

Résolution du Parlement européen du 24 juin 2021 sur la situation concernant la santé et les droits génésiques et sexuels dans l'Union, dans le cadre de la santé des femmes : fait acte des précédentes résolutions visant à condamner la décision prise par le Tribunal polonais en 2020, et, place dans ses considérants une dénonciation du poids des OCR dans les changements juridiques des législations nationales.

Résolution du PE du 11 novembre 2021 sur le premier anniversaire de l'interdiction de fait de l'avortement en Pologne : réaffirme sa décision prise un an auparavant en notant qu'aucune volonté de changement n'a été entreprise par le gouvernement.

Résolution du Parlement européen du 5 mai 2022 sur les auditions en cours au titre de l'article 7, paragraphe 1, du traité UE en ce qui concerne la Pologne et la Hongrie : fait référence dans ses considérants à la résolution du 11 novembre 2021 et par la même l'utilise comme motif pour caractériser le non-respect de l'État de droit.

Annexe n°4

Observation participante - Présentation du rapport de l'European Parliamentary Forum for Sexual and Reproductive right – EPF intitulé « *La partie émergée de l'iceberg : Extrémistes religieux - Les financeurs contre les droits de l'homme pour la sexualité et la santé reproductive en Europe* » devant le Parlement polonais.



Le 13 avril 2022, l'European Parliamentary Forum for Sexual and Reproductive rights - EPF a présenté son rapport en présence de la députée polonaise Joanna Scheuring Wielgus membre du réseau, ainsi que de la sociologue Elżbieta Korolczuk et du journaliste d'investigation Tomasz Piątek. La présentation dirigée par Neil Datta s'est étendue sur une heure et n'a été marquée par aucune intervention de la part de l'opposition. Moins d'une dizaine de personnes étaient présent dans la salle, et, quatre ont suivi la réunion en ligne. Celle-ci était retransmise sur le site officiel du Parlement. Le rapport a été mis à disposition dans sa version polonaise et anglaise.

Les relations entre la Société Civile Polonaise et les institutions européennes face à la tentative d'une harmonisation du cadre légal de l'avortement à l'échelle de l'Union

Annexe n°5

Photos personnelles de l'exposition « Qui écrira l'histoire des larmes des artistes sur les droits des femmes ? » (2021), au Musée d'Arts Nouveau de Varsovie.





Pancartes utilisées par les manifestant polonais lors des manifestations contre la décision du Tribunal Constitutionnel en octobre 2020 (bas), Drap en tissu utilisé par les manifestants lors des manifestations en faveur de l'avortement en Irlande en 2016 (haut).

Annexe n°6

Photos personnelles du défilé organisé pour la journée nationale par le collectif Antyfa, soutenu par le Strajk Kobiet le 11 novembre 2021.



Photos montrant en avant les manifestants marchant avec le drapeau de la fierté représentant la communauté LGBTQI+. De la même manière, un certain nombre de participants était habillé d'une couverture de survie destinée à dénoncer le manque d'aide internationale et gouvernementale vis-à-vis des réfugiés situés à la frontière Bélarus-polonaise.

Bibliographie

Ahrens Petra (2018). "Indirect Opposition: Diffuse Barriers to Gender Equality in the European Union". In: Verloo Mieke. *Varieties of Opposition to Gender Equality in Europe*. London: Routledge, 77-97

Ayoub Phillip M., Paternotte David (2016). « L'International Lesbian and Gay Association (ILGA) et l'expansion du militantisme LGBT dans une Europe unifiée ». *Critique internationale*, 70/1, 55-70.

Blaive Muriel (2006). *Le communisme à partir des sociétés. Communism from the viewpoint of societies*. Prague : Les cahiers du Cefres. 30.

Bielecki Tomasz (2020). « Polki mają dość! ». *Europa o strajkach i zakazie aborcji*. *Polytika*, 25.11. 2020.

Brzezinski Zbigniew (1989). « Le post-communisme et la question nationale ». *Politique étrangère* 54, n° 4, 61528.

Bucholc Marta (2022). "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon". *Hague journal on the Rule of Law*, vol 14, 73-99.

Butler Judith Pamela (1990). *Trouble dans le genre. Le féminisme et la subversion de l'identité*. Paris : La Découverte.

Calleja Laura (2021). « Not just Poland: Dalli called to reflect on Malta abortion ban ». *Malta Today*, 24.2.2021.

Černá Marie (2006). "Women under socialism: what degree of emancipations?". In: Blaive Muriel (eds). *Communisme à partir des Sociétés*. Prague : Cahier du Cefres, n°30, 75-86.

Ciobanu Claudia (2021). "Poland government requests Czechia stop offering abortions to Polish women". *Reporting Democracy*.

Cîrstocea Ioana (2018). « Le genre comme « plateforme » transnationale de socialisation féministe en contexte postsocialiste (Europe de l'Est 1990-2000) ». In: Cîrstocea Ioana, Lacombe Delphine, Marteu Elisabeth (eds). *La Globalisation du genre Mobilisations, cadres d'actions, savoir*. Rennes : Presses universitaires de Rennes, 25-44.

Cîrstocea Ioana (2015). « La « sororité » à l'épreuve : pratiquer l'internationalisme féministe au lendemain de la guerre froide ». *Critique internationale*, 66/1, 85101.

Cîrstocea Ioana (2011). « Genre, féminisme et promotion démocratique postcommuniste ». *Multitudes*, 47/4, 5459.

Cîrstocea Ioana (2008). « Between the past and the west : le dilemme du féminisme en Europe de l'est postcommuniste ». *Societes contemporaines*, 71/3, 727.

Conseil de l'Europe (2022). *What is gender mainstreaming?*. Strasbourg : Conseil de l'Europe. Consulté le 10 avril 2022. <https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming>.

Conseil de l'Union européenne (2022). « Discours du Président de la République devant le Parlement européen Strasbourg, le mercredi 19 janvier 2022 ». Strasbourg : Conseil de l'Union européenne. Consulté le 24 avril, 2022. <https://presidence-francaise.consilium.europa.eu/fr/actualites/discours-du-president-de-la-republique-devant-le-parlement-europeen-strasbourg-le-mercredi-19-janvier-2022/>.

- Cullen Pauline, Korolczuk Elzbieta (2019). "Challenging abortion stigma". *Sexual and Reproductive Health Matter*, 27/3, 6-19.
- De La Baume, Maïa (2021). « MEPs condemn Poland's near-total abortion ban ». *Politico*, 09.02. 2021.
- De La Baume, Maïa (2021). « Abortion debate in the European Parliament sparks divisions and hatred ». *Politico*, 23.06.2021.
- Devaux Sandrine (2010). « Le renouveau du secteur associatif tchèque : logique des acteurs et transformation des structures ». *Cahiers du CEFRES*, 16/11.
- Devaux Sandrine, Sudbery Imogen (2009). *Europeanisation - Social Actors and the Transfer of Models in EU-27*. Prague : CEFRES.
- Devaux Sandrine (2005). *Engagement associatif et postcommunisme : Le cas de la République Tchèque*. Paris : Belin.
- Dezalay Yves (2004). « Les courtiers de l'international ». *Actes de la recherche en sciences sociales*, 151-152/1, 435.
- Dobry Michel (2009). *Sociologie des crises politiques*. Paris : Presses de Sciences Po.
- Dratwa Jim (2014). "How values come to matter at the European Commission. Ethical experimentations of Europe". *Politique européenne*, 45/3, 86-121.
- Erdman Joanna N (2017). "Theorizing Time in Abortion Law and Human Rights". *Health and Human Rights*. 19/1, 29-40. Special Sections: Abortion and Human Rights Drug Control and Human Rights,
- Euronews via l'AFP (2022), « Polish activists condemn abortion law after death of another pregnant woman ». *Euronews*, 26.01.2022.
- Fafara Alexia (2018). "Save the women" or "Stop abortion": when Polish citizens seize the political sphere, *Civil society's strategies to change the abortion law in Poland (2016-2018)*". Université de Strasbourg et Jagiellonian University.
- Finke Barbara (2007). "Civil society participation in EU governance". *Living Review in European Governance*, 2/2, 1135-1174.
- Foa Roberto Stephan, Ekiert Grzegorz (2016). "The weakness of postcommunist civil society reassessed". *European Journal of Political Research*, 56/2, 419-439.
- Forest Maxime (2021). "Europeanization". In: Abels Gabriele, Krizsán Andrea, Mac Rae Heather, van der Vleuten, Anna (eds). *The Routledge Handbook of Gender and EU Politics*. London: Routledge, 60-77.
- Forest Maxime (2006). « L'enjeu de l'égalité hommes-femmes au prisme de l'élargissement à l'est de l'UE ». *Politique Européenne*, 20/3, 10119.
- Forest Maxime, Mink Georges (2004). *Post-communisme : les sciences sociales à l'épreuve*. Paris : L'Harmattan.
- Gasior-Niemiec Anna, Glinski Piotr (2007). "Europeanization of civil society in Poland", *Revija za Socijalnu Politiku*, 14/1, 29-47.
- Grzegorz Ekiert, Kubik Jan, Wenzel Michal (2017). "Civil Society and Three Dimensions of Inequality in Post-1989 Poland". *Comparative Politics*, 49/3, 33150.
- Guenther Katja (2011). "The Possibilities and Pitfalls of NGO Feminism: Insights from Postsocialist Eastern Europe". *Signs*, 36/4, 86387.

- Gurr Ted Robert (1980). *Handbook of Political Conflict: Theory and Research*. Detroit: Free Press.
- Hoskyns Catherine (1996). *Integrating Gender. Women, law and politics in the European Union*. London: Verso.
- Howards Marc (2002). "The weakness of Postcommunist Civil Society". *Journal of Democracy*, 13, 157-169.
- Hutchinson Lorna (2020). « The Poland of 2020 is a hell for women': MEPs slam Polish abortion ban ». *The Parliament Magazine*, 26.11.2020.
- Hutchinson Lorna (2020). « Parliamentarians call Polish abortion ban 'straw that broke the camel's back' ». *The Parliament Magazine*, 24.11.2020.
- Hutchinson Lorna (2020). « European Parliament political group presidents decry 'barbaric' Polish abortion ruling ». *The Parliament Magazine*, 02.11.2020.
- Hutchinson Lorna (2020). « MEPs express outrage over Poland's near-total ban on abortion ». *The Parliament Magazine*, 24.10.2020.
- lafrate Jade (2021). « Institutionnaliser la problématique et l'appellation des "violences fondées sur la base du genre" dans les normes de l'UE : l'intégration de la question des violences en ligne au sein de la cause de la stratégie pour l'égalité des genres (2020-2025) ». Aix-Marseille Université – Sciences Po Aix.
- lafrate Jade (2020). « Porter la cause des femmes en République Tchèque : l'exemple de la journée internationale de la femme ». Aix-Marseille Université - Sciences Po Aix.
- Le soir (2020). « La Belgique le premier pays à financer des avortements pour les femmes polonaises ».
- Lagroye Jacques (2003). *La politisation*. Paris : Belin.
- Leofredd Asia (2021). « Interview with Neil Datta : The anti-abortion offensive in Poland is part of a global strategy ». *Frankfurter Kunstverein*.
- Lombardo Emanuela, Forest Maxim (2012). *The Europeanization of Gender Equality Policies: A Discursive-Sociological Approach*. Basingstoke: Palgrave Macmillan.
- Jacquemin Ode (2006). « La conditionnalité démocratique de l'Union européenne. Une voie pour l'universalisation des droits de l'Homme ? Mise en œuvre, critiques et bilan ». *CRIDHO Working Paper 2006/03*, 1-27.
- Jacquot Sophie (2014). « L'égalité au nom du marché ? Emergence et démantèlement de la politique européenne d'égalité entre les hommes et les femmes ». *Politique européenne*, 46/4, 172-176.
- Jacquot Sophie (2009). « La Fin D'une Politique d'Exception : L'émergence du gender mainstreaming et la normalisation de la politique communautaire d'égalité entre les femmes et les hommes ». *Revue française de science politique*, 59/2, 247-277.
- Jacquot Sophie (2006). « L'instrumentation du gender mainstreaming à la commission européenne : entre 'ingénierie sociale' et 'ingénierie instrumentale' ». *Politique européenne*, 20/3, 33-54.
- Jacquot Sophie (2003). « La question de l'égalité dans les politiques européennes à travers l'étude du gender mainstreaming. ». *Politique européenne*, 10/2, 172-176.
- Jouët Josiane, Katharina Niemeyer, Bibia Pavard. « Faire des vagues ». *Réseaux*, 201/1, 2157.

Kaplan Temma (1998). "Community and Resistance in Women's Political Cultures". In: Diamond Marie J. (eds). *Women and Revolution: Global Expressions*. Dordrecht : Springer Netherlands, 395409.

Karwowska Anita, Paś Waldemar (2022). « Każdą Polkę może spotkać to, co moją siostrę ». *Wyborcza*, 04.02.2022.

Kulczycki Andrzej (1995). « Abortion Policy in Postcommunist Europe: The Conflict in Poland ». *Population and Development Review*, 21/3, 471505.

Kunovich Sheri (2003). « The Representation of Polish and Czech Women in National Politics: Predicting Electoral List Position ». *Comparative Politics*, 35/ 3, 27391.

Malingre Virginie (2022). « Roberta Metsola, une Maltaise antiavortement, prend la présidence du Parlement européen ». *Le Monde*.

Mazey Sonia (2000). « The emergence of gender mainstreaming in the EU policy succession in hard times », papier dans le cadre du *Mainstreaming Gender European Public Policy: A Workshop at the University of Wisconsin-Madison*.

Mespoulet Martine (2006). « Les femmes dans la société soviétique. ». In : Blaive Muriel (eds). *Communisme à partir des Sociétés*. Prague : Cahier du Cefres, n°30, 63-74.

Mierzyńska Anna (2020). « Podboje Ordo Iuris. To rozpędzona maszyna polityczna fundamentalistów ». *OKO.press*.

Mink Georges (2015). *La Pologne au cœur de l'Europe de 1914 à nos jours*. Paris : Buchet Chastel.

Oberschall Anthony (1993). *Social Movements: Ideologies, Interests, and Identities*. New Jersey: Transaction Publishers.

OHCHR - Human Right Committee (2022). General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life. ». Suisse, OHCHR. Consulté le 24 avril, 2022. https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf.

OHCHR (2020). *Poland has slammed door shut on legal and safe abortions - UN experts*. Suisse : OHCHR. Consulté le 15 mai 2022. <https://www.ohchr.org/en/press-releases/2020/10/poland-has-slammed-door-shut-legal-and-safe-abortions-un-experts?LangID=E&NewsID=26434>.

Paradowski Rafał Piotr (2021). "Women's Strike in Poland as a Communication Phenomenon on Twitter". In: Dziwak Ewelina, Gheorghe Kamila (redakcja). *Wokół strajków kobiet*, Kraków : ArchaeGraph, 239-268.

Parlement européen (2022). Highlights of the Committee on Women's Rights and Gender Equality. » Brussels : Parlement européen. Consulté le 10 avril 2022. <https://www.europarl.europa.eu/committees/en/femm/home/highlights>

Parlement européen (2022). « Représentation des femmes dans les conseils d'administration: feu vert pour lancer les négociations avec les États membres." Strasbourg: Parlement européen. Consulté le 24 avril 2022. <https://www.europarl.europa.eu/news/fr/press-room/20220314IPR25412/parite-dans-les-entreprises-feu-vert-aux-negociations-avec-les-etats-membres>

Parlement européen (2022). Résolution du Parlement européen du 5 mai 2022 sur les auditions en cours au titre de l'article 7, paragraphe 1, du traité UE en ce qui concerne la Pologne et la Hongrie.

Parlement européen (2021). Résolution du PE du 11 novembre 2021 sur le premier anniversaire de l'interdiction de fait de l'avortement en Pologne.

Parlement européen (2021). Résolution du Parlement européen du 24 juin 2021 sur la situation concernant la santé et les droits génésiques et sexuels dans l'Union, dans le cadre de la santé des femmes.

Parlement européen (2020). Résolution du PE du 26 novembre 2020 sur l'interdiction de fait du droit à l'avortement en Pologne.

Parlement européen (2020). Résolution du Parlement européen du 17 septembre 2020 sur la proposition de décision du Conseil relative à la constatation d'un risque clair de violation grave, par la République de Pologne, de l'état de droit.

Parlement européen (2019). Résolution du Parlement européen du 14 novembre 2019 sur la criminalisation de l'éducation sexuelle en Pologne.

Parlement européen (2019). « L'égalité entre les hommes et les femmes | Fiches thématiques sur l'Union européenne | Parlement européen ». Strasbourg : Parlement européen. Consulté le 10 avril 2022, <https://www.europarl.europa.eu/factsheets/fr/sheet/59/l-egalite-entre-les-hommes-et-les-femmes>.

Parlement européen (2017). Résolution du PE du 15 novembre 2017 sur la situation de l'État de droits et de la démocratie en Pologne.

Parlement européen (2016). Résolution du Parlement européen du 14 septembre 2016 sur les récentes évolutions en Pologne et leurs conséquences sur les droits fondamentaux inscrits dans la charte des droits fondamentaux de l'Union européenne.

Penn Shana (2005). *Solidarity's secret: the women who defeated communism in Poland*. Ann Arbor: University of Michigan Press.

Peseckyte Giedre (2021). « EU Parliament condemns Poland's restrictive law on abortion ». *Euractiv*, 12.11.2021.

Radaelli Claudio (2004). « Europeanisation : Solution or Problem? ». *European Integration online Papers*, 8/16, 1–26.

Radaelli Claudio M. (2002). « The domestic impact of european union public policy: notes on concepts, methods, and the challenge of empirical research ». *Politique européenne*, 5/1, 105-136.

Saurugger Sabine, Yves Surel (2006). « L'europanisation comme processus de transfert de politique publique ». *Revue internationale de politique compare*, 13/ 2, 179211.

Schrupp Antje (2018). "Bringing Together Feminism and Socialism in the First International: Four Examples". In: par Bensimon Fabrice, Deluermoz Quentin, Moisand Jeanne (eds). *Arise Ye Wretched of the Earth: The First International in a Global Perspective*. Leiden: Brill, 34354.

Siim Birte, Fiig Christina (2021). "The populist challenge to gender equality". In: Abels Gabriele, Krizsán Andrea, Mac Rae Heather, van der Vleuten Anna (eds). *The Routledge Handbook of Gender and EU Politics*. Routledge International Handbooks, 472-487.

Šiklová Jirina (1997). « Feminism and the Roots of Apathy in the Czech Republic ». *Social Research*, 64/2, 258-280.

Sloat Amanda (2005). « The Rebirth of Civil Society ». *European Journal of Women's Studies*, 12/ 4, 43752.

Steffek Jens, Kissling Claudia, Nanz Patrizia (2008). *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?*, London: Palgrave Macmillan.

Tarrow Sidney (2000). « La contestation transnationale ». *Cultures & Conflits*, 3839, 1-24.

Traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne 13 décembre 2007, OJ C306/01 (2007).

Tucak Ivana, Blagojević Anita (2020). "Abortion in Europe". In: Duić Dunja, Petrašević Tunjica (eds). *EU 2020 – Lessons from the past and solutions for the future*. Faculty of Law, Josip Juraj Strossmayer, University of Osijek, 1135-1174. <http://doi.org/10.25234/ecliv/985>

Verloo Mieke (2001). « Another Velvet Revolution? Gender Mainstreaming and the Politics of Implementation ». *IWM Workings Paper*, no. 5, 5-23.

von Wahl, Angelika. "The EU as a gender equality regime". In: Abels Gabriele, Krizsán Andrea, Mac Rae Heather, van der Vleuten Anna (eds). *The Routledge Handbook of Gender and EU Politics*. London: Routledge, 44-60.

Woodward Alison (2004). « Building Velvet Triangles: Gender and informal Governance ». *Informal Governance and the European Union*, 76-93.

Sources internet

Amnesty International, « Pologne, un an après, la décision sur l'avortement nuit aux femmes, 20 octobre 2021. » Consulté le 15 avril. <https://www.amnesty.be/infos/actualites/article/pologne-decision-avortement-nuit-femmes>.

EPF, « Foundation Ordo Iuris Institute for Legal Culture, EPF Intelligence briefing. » *EPFweb*, 2021. Consulté le 15 avril. <https://www.epfweb.org/node/816>.

EPF, « La partie émergée de l'iceberg : Extrémistes religieux - Les financeurs contre les droits de l'homme pour la sexualité et la santé reproductive en Europe. » *EPFweb*, 2021. Consulté le 10 mai 2022. https://www.epfweb.org/sites/default/files/2022-03/EPF_EN_TOTI_9SEP%20DEF%20-%20FR.pdf.

FEDERA, « Rapport annuel, FEDERA. » *FEDERA*, 2021. Consulté le 15 avril 2022. <https://en.federa.org.pl/2021-annual-report/>.

FEDERA, « Stratégie de lobbying et d'advocacy au près de l'UE, FEDERA », 2022. Consulté le 15 avril 2022. <https://en.federa.org.pl/activities/international-activity/the-european-union/>.

FEDERA, « Federa And Sri's Report To The Un Human Rights Council On Sexual And Reproductive Rights Violations For The Upr Of Poland. » 2022. Consulté le 15 avril 2022. <https://en.federa.org.pl/report-upr-2022/>.

Ordo Iuris, "EU to push pro-abortion agenda in UN – radical European Parliament resolution", *Ordo Iuris*, 2020. Consulté le 15 avril 2022. <https://en.ordoiuris.pl/life-protection/eu-push-pro-abortion-agenda-un-radical-european-parliament-resolution>.

Sexual Right Initiative, « About us », *Sexual Right Initiative*. Consulté le 15 avril 2022. <https://sexualrightsinitiative.com/>.

Strajk Kobiet, « Nous suivre. », *Linktr.Strajk Kobiet*, 2022. Consulté le 15 avril 2022. <https://linktr.ee/StrajkKobiet>.

Stop matic report, « Non à la violation des traités européens », *Stopmaticreport.org*. Consulté le 15 avril 2022. <https://stopmaticreport.org>.

Wikipedia, "Fundacja Instytut na rzecz Kultury Prawnej Ordo Iuris", *Wikipedia*. Consulté le 15 avril 2022. https://pl.wikipedia.org/wiki/Fundacja_Instytut_na_rzecz_Kultury_Prawnej_Ordo_Iuris.

Da Silva, Lucas. « Etat de droit : chronologie du conflit entre l'Union européenne, la Pologne et la Hongrie. » *Toute l'Europe*, consulté le 10 mai 2022. <https://www.touteurope.eu/fonctionnement-de-l-ue/etat-de-droit-chronologie-du-conflit-entre-l-union-europeenne-la-pologne-et-la-hongrie/>

Autres sources

Nowicka Wanda (2005). « *Contemporary women's hell Polish women's stories* », Publication papier FEDERA.

« *Qui écrira l'histoire des larmes des artistes sur les droits des femmes ?* », Exposition au Musée d'Arts Nouveaux à Varsovie, du 26/11/2021 au 13/02/2022.

YouTubers and Streamers: Labour Conditions in the EU

Antonino Matafù

Introduction

Within the Gig Economy phenomenon, an emerging trend is increasingly gaining economic and mediatic relevance: the Creators' Economy.

As a matter of fact, in the last years, the Gig Economy's academic and legislative focus was on the working realm of 'riders'. However, since the launch of platforms such as YouTube and Twitch, 'content creators' have gradually conquered a fundamental piece of the market, which allows them to make a living by creating content. Moreover, after the Covid-19 pandemic, this phenomenon had another significant boost due to the suitability of this profession to respect the distancing measures imposed by governments all over the world.

As the data collected by SignalFire shows (figure 1.), with more than 50 million workers in more or less ten years, being a content creator is the fastest-growing type of small business. In the 'Benchmark Report 2021', NeoReach, in partnership with Influencer Marketing Hub, estimated the total Creator Economy market size as around \$104.2 Billion, on the road to reaching trillions shortly (Geysler 2022).

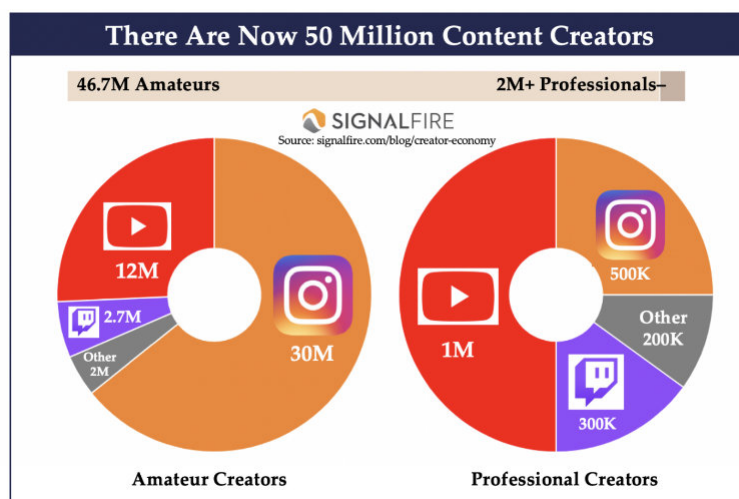


Figure 1: TAM (total addressable market) analysis provided by SignalFire (Constine, Yuan 2021)

As usual in the working relationship, and maybe even more than the average due to the size – and consequential negotiating power – of these platforms, there is an evident asymmetry of power between the two bargaining parties.

The ambiguity of the policies, the sudden and not concerted changes in the algorithms, the lack of human assistance by the platforms' staff, and the disciplinary sanctions without a way of appeal are just examples of how the content creators are inevitably and strongly affected by unilateral platforms' decisions.

This category of workers clearly needs protection¹. Thus, the legislator should stop considering the creator economy a minor phenomenon or, worse, understating content creators as amateurs and not as workers. In fact, the heated debate on the 'categorisation' of content creators – if they have to be considered employees, self-employed or whatever other categories – should not impede the ultimate goal of granting the protections of their fundamental rights.

The object of this work is the assessment of the labour conditions of the content creators working in the European Union.

However, it is essential to understand how it is impossible to build a single reconstruction of the whole category of content creators. Depending mainly on the platform (be it YouTube, Twitch, Instagram, TikTok, or else), but also on the nature of the content they provide (even within the same platform), they have a completely different job routine and, consequently, different issues.

Thus, the scope of this research, inherently limited by the nature of a Master's Thesis, will be limited to a partial overview of the labour condition of creators who produce audio-visual content on YouTube and Twitch. Moreover, even if I will draw upon different aspects of the working life of these creators, the focus of this dissertation will be on the issues of content moderation and disciplinary measures adopted by the platform.

My intention is to show the academic and legislative *lacuna* on the topic by analysing the creators' economy from a new labour perspective that goes beyond the categorisation and the formal grant of rights to the creators, focusing instead on the obligations upon their counterparts (*i.e.* the platforms) and the practical enforceability of the resulting rights for creators. The end goal is to identify – within the fragmented EU legal framework on this topic – the lack of protection and, consequently, to propose which safeguards should be implemented at the European Union level.

Following this introduction – devoted to providing background, current situation, and relevance of the content creators' economy – the first section will be a premise on the essential definitions for this topic.

After that, the second section will deal with the actual labour condition of EU content creators. For the sake of effectiveness, I have conducted interviews with content creators working in different EU member states to know their personal stories and problems with the platforms. I would like to express to them my heartfelt gratitude for the time they have devoted to me.

Afterwards, the third section will be focused on reconstructing the scarce and fragmented EU legal framework that relates to content creators – there is no provision addressing them directly and comprehensively – with the aim of pointing out the lack of protection. The research design has been the legal analysis of the various

¹ See *Uber BV and others v Aslam and others*, No. UK Supreme Court (19 February 2021). This judgement on Gig Economy shows how employment law – whose purpose is to protect vulnerable workers from unfair treatment due to contractual imbalance – must adapt to new categories of workers. No matters the division adopted by the national labour legislation – the UK differentiates between employees, workers and independent contractors (self-employed) – it is essential to go beyond the formal categorisation. If there are elements of subordination and/or dependency (from the platform), the workers have to be protected by the government.

present EU legal instruments indirectly addressing the work of content creators, plus the scrutiny of specific legislative proposals which are likely to change their legal situation in the near future.

This analysis will be the starting point for the fourth section, in which the findings of the previous two sections will be put in relation. After shortly summing up the problems experienced by creators, we will assess if the EU Legal Framework – both present and future (under discussion) – is capable of addressing them. If there is a lack of protection, we will suggest how to intervene at the EU level.

Lastly, the conclusion will be drawn based on the findings of the previous sections.

1. Definitions

In order to understand the scope of this research, a premise on the definitions is essential.

Within the Gig Economy, it is possible to distinguish two types of work.

On the one hand, in ‘On-location work’, (a) the matching is online, while (b) the execution phase takes place in the physical world. An example is that of riders².

On the other hand, in ‘On-line work’, both (a) the matchmaking between demand and supply of labour and (b) the execution of the work is virtual. An example is that of content creators³.

The former’s work relationship resembles more of an employment type, thus requiring some of the cautions normally granted to employees. Whereas the latter is most likely to fall within the scope of self-employment or small entrepreneurial realities, which nonetheless need protection in terms of fairness and transparency of the conditions and the decisions imposed by the platform through which they exercise their activity (Scialdone, Greco, Bennato 2021). In fact, this hybrid categorisation – formally independent contractor but, as a matter of fact, economically dependent on the platforms’ policies and decisions – is the leading cause of the lack of protection.

Consequently, due to the intrinsic differences in the relationship with the platform, it is crucial to resist the temptation of copying or extending the regulatory solution adopted for the riders or for other on-location works. We should avoid an automatic ‘riderisation’ of digital creatives; they cannot be categorised as employees⁴. However, tailor-made legal protection is much needed.

Next, it is fundamental to draw another distinction, this time with the category of the ‘influencers’. These actors stipulate a contractual relation with third-party brands, agreeing on conveying promotional messages through the creation of content – which will be spread on online platforms – to influence the market choices of followers in favour of that brand (Antonucci, Biagioni, Notarianni 2021). The plat-

² Other examples are drivers, domestic cleaning services or other manual work matched online.

³ Other examples are translation, programming or other services matched and executed via platforms.

⁴ A similar attempt has been made by the 11th Permanent Commission of the Italian Chamber of Deputy (Public and private employment). In the fact-finding survey on ‘workers engaged in digital content creation activities’, made from 28/04/2021 to 09/03/2022, the starting point was the assessment of “the possibility of extending to these categories of workers [content creators] the principles and protections recently introduced for digital platform home delivery workers [riders]”.

forms through which they convey this content are the same as we are analysing. In fact, content creators often work as 'influencers': thanks to the size and connection with their community, they are very appealing subjects for third-party brands.

Nonetheless, branded content is a source of earnings for content creators that do not stem directly from the platform. Thus, it goes outside the scope of this research. Moreover, a significant part of the creators' income depends, instead, on the platform on which they work, as we are going to see in the second section.

Thus, it would be reductive to overlap these two working profiles.

Lastly, another critical distinction, this time within the same category of content creators, is the one between 'amateur' and 'professional'.

The extent of the amateur's categorisation is often debated, especially for those who go against the consideration of content creators as workers. For the sake of this work, in the second section, we will draw a clear line between 'amateurs' and 'professionals' thanks to the platforms' policies, which clearly state the requirement for the partnership.

Moreover, it is essential to point out that legislative protection is needed not only for the 'stars' of these platforms – which usually constitute medium or large-sized companies – but especially for the minor professional who, nonetheless, make a living with the creation of content.

2. The Actual Labour Conditions of YouTubers and Streamers

This section will be devoted to the analysis of the labour conditions of EU content creators operating on Twitch and YouTube.

These two platforms have a lot in common: the audio-visual nature of the content delivered; the existence of a partner program; the role of AI in the control procedures; the business users and the consumers' basis. Moreover, both are in a position of contractual imbalance in their favour due to the fact that they entirely arrange the contract.

Nonetheless, in the following sub-sections, some crucial elements that distinguish the two platforms – thus, justifying their existence and competition – will be pointed out. For this reason, a comparative analysis can be helpful to understand better the different features of the working relationship with content creators.

In order to understand the concrete problems of this category of workers, thus transforming a mere theoretical work into an effective one, I have conducted interviews with content creators from several EU member states to hear their actual stories.

For the discussion, I have preferred a flexible scheme, rather than a fixed script, in order to give them the possibility to tell their job story and the difficulties they face in their working life. I would like to thank once again all of them for their contribution. It was essential.

The working framework of content creators will be divided into (1) substantial rights and obligations and (2) procedural rights and obligations. The focus of this dis-

sertation will be on the procedural aspect, where we will see the crucial role played by AI and algorithms in the reporting system and the very discretionary power of the platforms, especially with regard to content moderation and disciplinary measures.

2.1 Twitch

Twitch is an interactive live-streaming service owned by Amazon.com, launched on the market on 06 June 2011. In the light of its 'live' nature, hereinafter, we will use the terms 'streamers' or 'broadcasters' in reference to content creators on Twitch.

The platform is built on a system of two programs that allow streamers, at the fulfilment of specific requirements, to enjoy economic and technical benefits.

The first step is the 'Affiliate Program', thanks to which broadcasters can start earning revenues. The requirements to satisfy are (Twitch.Tv - Affiliate Program):

- a) Stream for at least 500 total minutes over the last month;
- b) At least seven unique broadcast days within the last month;
- c) Average concurrent viewership of 3 or more over the last month;
- d) At least 50 Followers.

The process, complete through the Creator Dashboard, will lead the streamer to sign the Twitch Affiliate Agreement agreeing to the terms of the program.

After becoming an 'Affiliate', the streamers have the possibility to adhere to the 'Partner Program'. In order to do so, they need to fulfil the following requirements (Twitch.Tv - Partners):

- a) Stream for at least 25 hours over the last month;
- b) At least 12 unique broadcast days within the last month;
- c) Concurrent viewership of 75 viewers within the last 30 days.

The passage from 'Affiliate' to 'Partner' is not automatic. It needs a formal request made by the streamer, which will be assessed by the platform. Moreover, some of the streamers complain about the slowness of this process, whose pace seems to vary depending on the number of actual partners and requests for partnership⁵.

The main advantages of becoming a Partner consist of (1) the possibility to negotiate the earning shares⁶; (2) channel customisation (e.g. Verified User Badge); (3) the extension of VOD storage⁷; (4) priority support; (5) Video Transcodes – e.g. quality options, which allow viewers to adjust the quality in which they view a broadcast (Twitch.Tv - Partners).

⁵ This was the case for Mario Sturniolo.

⁶ During the interviews the creators confirmed that there is the possibility to negotiate with Twitch the shares. Yet, evidently, the bargaining power changes with respect to the size of the channel. The more significant is your audience, the more favourable shares you can negotiate with the platform. Moreover, these favourable clauses are often followed by a specific target to fulfil by the streamer (like a 'bonus'). For instance, having at least X hours of streaming for Y number of days in order to bring Twitch's shares down to Z%.

⁷ "A VOD (Video on Demand) is an archive of content previously streamed live on Twitch. Utilizing VODs can help grow your channel and also allow your community to watch content they may have missed otherwise" (Twitch.Tv - Video On Demand).

This last feature seems to be most wanted by the affiliates. This is because a large part of the viewers does not have an internet connection capable of following a full HD live stream. Thus, the possibility of downsizing the quality of the broadcast means having more viewers. This makes a huge difference for the streamers (fl0nki 2022).

2.1.1 Substantive Rights And Obligations

2.1.1.1 Earnings

There are four ways through which streamers can make a living on Twitch.

Firstly, the subscriptions (hereinafter, 'Sub'). This tool allows the audience to economically support the broadcaster in exchange for 'rewards', building as well fidelisation of the viewer. Different Sub's levels (also called 'tier') correspond to different prices to pay and to different rewards obtained. From the Sub, Twitch withholds, on average, 50% of the price (Twitch.Tv - Affiliate Agreement)⁸. Moreover, the subscription to Amazon Prime gives the possibility of a free Sub to one streamer for a month. In this way, Amazon pays the price for the Sub, granting support to the streamer and fidelisation to the viewer.

Secondly, the advertisement (hereinafter, 'ADS'). Twitch gives the broadcaster the possibility to air ads every 8 minutes⁹. The more live viewers there are when they air, the more the streamer earns. However, partners only earn a share of the revenue, which is agreed upon in the partnership agreement and "may change from time to time in Twitch's sole discretion". Moreover, it cannot exceed 75% of applicable Net Advertisement Revenues (Twitch.Tv - Affiliate Agreement).

Thirdly, the 'bits'. These constitute a sort of Twitch's cryptocurrency. The users convert money into bits that they can use to buy digital goods or services from the streamer (e.g. emoji, alert)¹⁰. In the end, the bits collected by the streamer will be added to the monthly payments by Twitch.

Lastly, the donations. Users can donate any amount at any moment; thus, it is a very volatile source of earnings on which streamers do not rely too much. The streamer is going to receive the donation with fees already detracted by the payment system (mostly PayPal). In order to foster donations, the broadcaster integrates them into their formats by linking each donation made to a happening during the live show (e.g. start of a specific song).

To conclude, all these earnings coming from the platform¹¹ – after already being subjected to low shares imposed by the platform in a position of monopoly – need to be (1) converted from the dollar to the streamers' national currency and (2) taxed following the specific national legislation.

⁸ Moreover, some creators state that usually the partner agreement set Twitch's shares depending on the level of the tier: lv.1 50%, lv.2 40%, lv.30%.

⁹ Partners can determine the length and frequency of mid-roll advertisements through their dashboards.

¹⁰ For instance, the viewer can buy via bits an audio alert – set in advance by the streamer – which will be reproduced during the livestream.

¹¹ Aside from the earnings related to Twitch, the streamers can make a living through private contracts for Live Events and Branded content.

In order to monitor these sources of income, Twitch offers the Channel Analytics tool for a comprehensive look at the streamer's revenue, viewer and engagement statistics over a defined date range (figure.2). The forecast changes day by day, for instance, due to the end of the individual subscription. Moreover, it is essential to notice that it is the platform that has complete control of the metrics and thus over the calculation of remuneration.

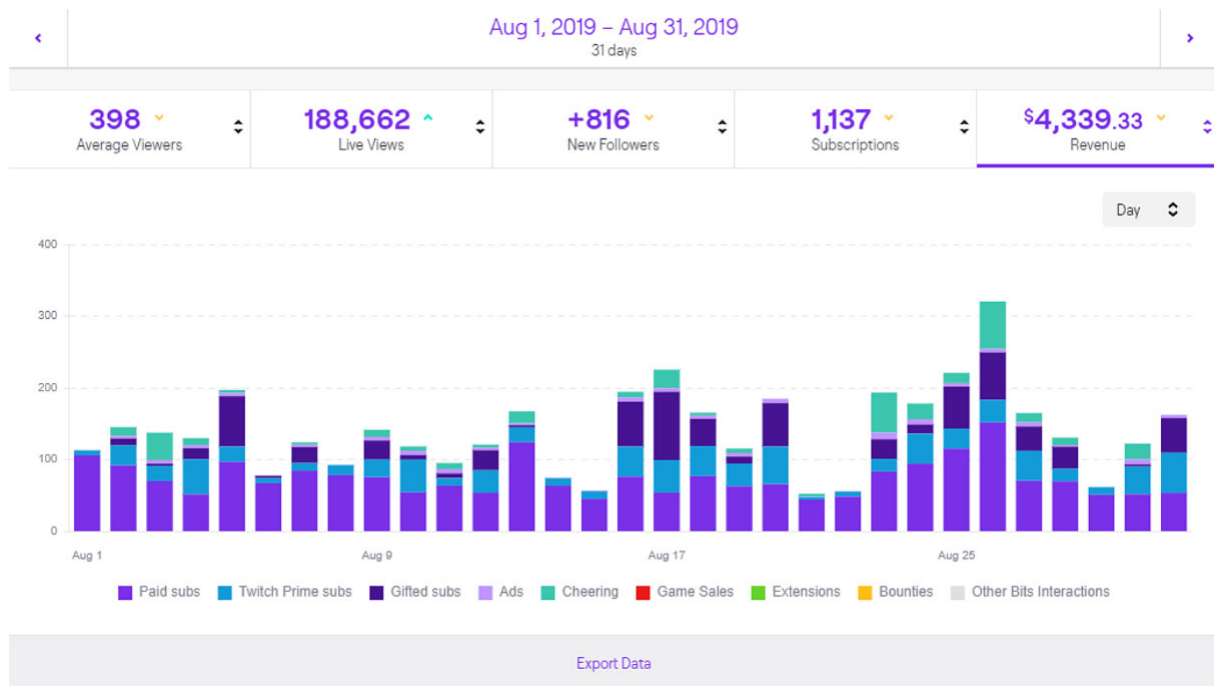


Figure 2: Twitch Stats Chart (Help.Twitch.Tv - Channel Analytics)

In conclusion, Twitch's policies and AI system are the key elements which influence the visibility of the streamer and, thus, the earnings. Consequently, a lack of clarity on the visibility rules and best practices (e.g. how to get to the Front Page¹²) is very detrimental to the streamers' work (f10nki 2022)¹³.

2.1.1.2 Community Guidelines

The Twitch streamers' code of behaviour is set by the Community Guidelines (Safety.Twitch.Tv - Community Guidelines). These Guidelines encompass a series of conducts that undermines the safety of the community. The violation of these rules will lead to the disciplinary procedure we are going to see in the following sub-section.

As it is unrealistic to regulate every possible human behaviour, the Guidelines need to be as comprehensive as possible. However, there is a significant presence of

¹² Twitch's 'Front Page' is the first webpage users see when accessing on the platform. Thus, being shown in there, automatically means a significant boost in visibility.

¹³ During the interview, the Dutch streamer 'f10nki' complained about the discoverability on Twitch. In order to start a new channel, she suggested using other online platforms to make yourself visible.

ambiguities that not only lead to unjustified discrimination between streamers¹⁴ but also are exploited by Twitch in the disciplinary process.

There are countless examples of different interpretations of the same rule, which resulted in different treatment for similar cases and, thus, unfair competition. Just to take one example, let us see the case of Twitch's policy banning nudity – even partial nudity – with some exceptions.

The streamer 'Amouranth' started a trend, later called 'hot tube', where she streams wearing a swimming costume in a small inflatable pool in her room. The purpose of her action is clear: to circumvent Twitch's policies due to their ambiguity and thus attract more audience thanks to her body.

Firstly, Twitch indefinitely suspended the sponsorship activities of her channel without any notice to her. This shows how a behaviour allowed can, with no change in the platform's rule, be suddenly prohibited in a totally discretionary manner by the platform on the grounds that it is not suitable for advertisers.

Then, Twitch changed its idea. The most critical on the web argue that after the ban – which served to set the platform as a "champion of morals and justice" – Twitch realised that there was a significant drop in revenues. The format of 'Amouranth' – later on adopted by other streamers – was very effective; thus, the platform flipped its values following the profit: it made for them a separate category named "Pools, Hot Tubs, and Beaches", in which wearing a swimsuit is considered as "contextual exception" to nudity and attire policy (McLaughlin 2021).

Following this case, other streamers – such as xQc – complained about the disparity of treatment by Twitch. Mentioning his words

the same rule violations, five times in two months are only worth three days ban? I was afraid of being permabanned after violating it twice, permabanned for repeated violations eight months apart! (Powned.it 2021)

Lastly, the Italian Twitch community already gathered to argue for lack of transparency which leads to avoidable suspension "Streamers were banned for inciting violence when simply commenting on the news, others were banned for self-harm behaviour because they were doing slapstick humour" (NoStreamDay.com 2021).

We are going to develop this aspect in section 2.1.2.3.

2.1.1.3 Live Content Exclusivity

One of the most distinguishing features of Twitch is the exclusivity clause on 'Live Twitch Content'¹⁵, upon which streamers need to agree in order to become partners.

This clause obliges the broadcaster to "nor permit nor authorise any third party to broadcast, stream, distribute, exhibit and otherwise make available such Live Twitch Content in any manner" for 24 hours. Thus, such Live Twitch Content is exclus-

¹⁴ Discrimination between streamers can result either from technical problems – such as the insufficient number of moderators, or the lack of reports (in this respect, in the next subsection we are going to see the disparity between large and smaller channels, with the former receiving many more reports) – or from corporate choices, like in the example of the 'Hot Tube' streamers.

¹⁵ Any live audio-visual work provided by the streamer constitutes 'Live Twitch Content'.

ive to Twitch (even to the streamer) for one day. After this period, the streamer gains full ownership of the content (Twitch.Tv - Affiliate Agreement).

The impact of the exclusivity clause on the content creators' work is significant due to the fact that this kind of worker often operates on different platforms at the same time.

As a matter of fact, this clause cut off from the competition's live content on YouTube. In fact, most of the creators have changed their habits by (1) leaving YouTube, (2) using YouTube as a repository for the Lives hosted on Twitch, and (3) changing the format of the video on YouTube from Live to pre-recorded.

Moreover, this is an aspect that affects remuneration and termination of the working relationship. Thus, it should be subject to negotiation, which will lead to the adequation of the streamers' earnings.

2.1.2 Procedural Rights and Obligations

2.1.2.1 Reporting System

Twitch's reporting system relies very much on reports by the viewers due to the numeric limitations of the human moderation team¹⁶. This lead to discrimination due to the fact that, for the same behaviour, a bigger channel risk to be reported more than a smaller channel.

In this regard, Gianpiert explained to me that the tendency of Twitch's biggest streamers is to delete the VOD or to keep them just for the subscribers. This strategy works as a disincentive for the group of organised flaggers, which gather together to intentionally damage the streamer's channel for personal reasons (so-called 'haters'). If those people need to pay the sub in order to flag, they might give up on their plan of a massive flag (Santoro 2022).

The reporting system has problems also on the other side of the coin: moderation of the users. The Dutch streamer 'f10nki' talked with me about the different communities on Twitch and the hard time streamers' – especially women¹⁷ – have in moderating toxic users (f10nki 2022).

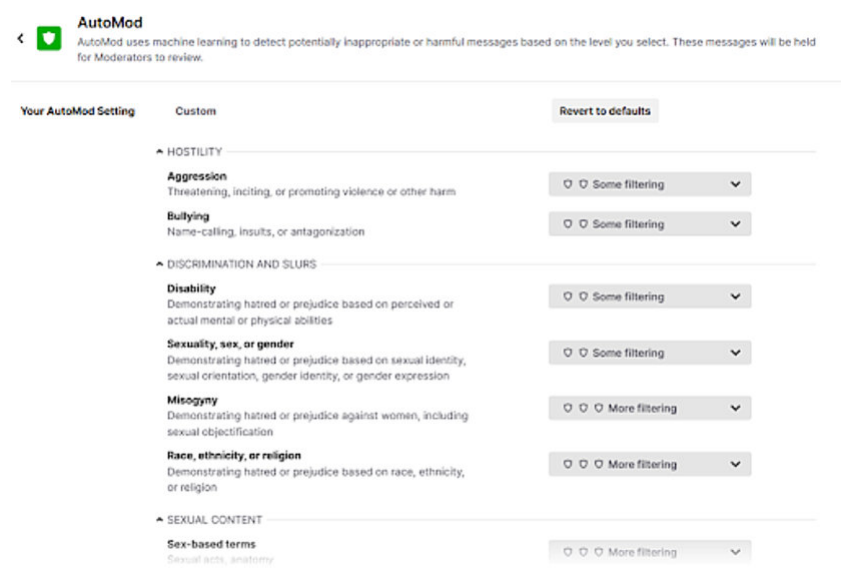


Figure 3: An example of Auto-Mod tools offered by Twitch to the streamers (dashboard.twitch.tv)

¹⁶ During the interviews none of the creators was able to give me a number on the dimension of the platform team.

¹⁷ We must not forget the gender dimension in a society, historically, more dangerous – both psychologically and physically – for women exposed to the public.

Twitch provides different tools for streamers to auto-moderate their community (figure.3). Nonetheless, often the joint work of the automatic system, streamers and volunteers¹⁸ is not enough. Therefore, recently, the platform has changed some policies in order to enhance streamer protection. For instance, it built a system of IP tracking

to avoid ban evasion (figure 4).

In conclusion, the problems due to the shortage of Twitch's human moderation team – openly criticised by the Italian community¹⁹ – also reflects on the next part of the procedure: the disciplinary.

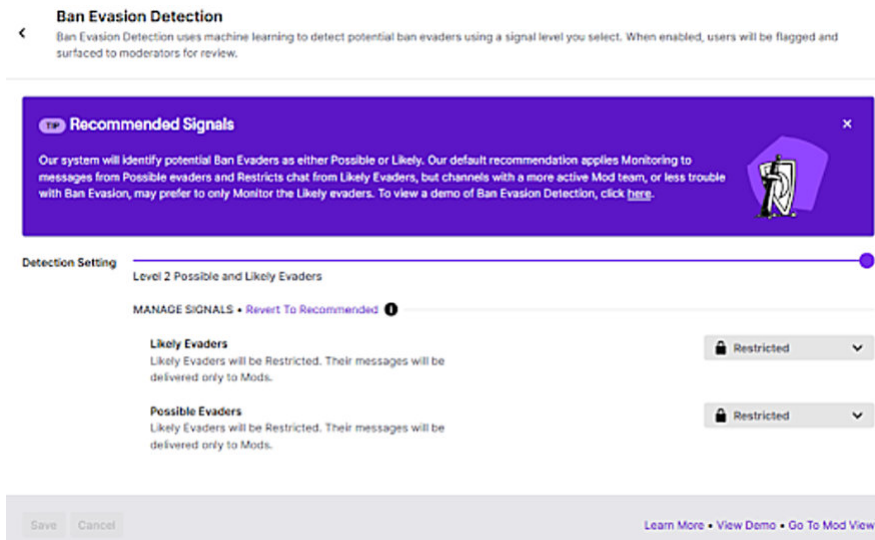


Figure 4: The tool to avoid ban evasion (dashboard.twitch.tv)

2.1.2.2 Disciplinary Procedure

Twitch issues 'enforcements' against accounts that violate the Terms of Service and/or Community Guidelines (Help.Twitch.tv - About Account Enforcements and Chat Bans).

The least significant measure is the 'warning', which is a courtesy notice for more minor violations. It might be associated with the removal of controversial content.

The most intrusive measure is the suspension (more generally known as 'ban') from using Twitch's services. The suspension can be temporary ('temporary ban') – ranging from 1 to 30 days – or indefinite ('permaban'). The latter is a unique feature of Twitch.

In either case, it is possible to file a request for appeal to the platform. However, this appeal is just an *ex-post* measure, which will not interrupt the negative consequence of the ban during the length of the assessment process, nor will it lead to compensation for the economic losses and the damage to his image in case of a successful appeal.

Moreover, the streamers' community asks for the right to have a human checks on the previous content, the streamer's history, and an in-depth evaluation of the case before proceeding with the suspension. Nevertheless, it all goes back to the shortage of the local Twitch moderation team, which does not have the resources to grant this right.

¹⁸ Volunteer moderating the live-stream chat, with no economical agreement with the streamer.

¹⁹ The #NoStreamDay Manifesto states: "Moreover, we ask to discuss the expansion of the Italian moderation team. The number of streamers is increasing rapidly and they need support that, right now, cannot be supplied."

Nonetheless, there are other measures – not declared by the platform – related to the visibility of the channel and/or its content. The absolute power of the platform goes from the de-indexation of the channel's content to the so-called 'shadow ban'²⁰. In both cases, everything operates secretly on the back end with consequences on the front end of the platform²¹. In short, the streamer visibility will be penalised without any notice nor – eventually, if the creator realises the situation – explanation. Consequently, as seen in the previous sections, less visibility automatically means a proportional drop in earnings.

2.1.2.3 Permaban: the case of Sdrumox

During the suspension, the streamer is wholly cut off from the Twitch community.

It is fundamental to understand that this implies not only the prohibition of creating other accounts; in fact, even showing up – physically or just as a voice – in the stream of a third-party channel (for instance, a friend or a flatmate) will cause a 'domino' ban to the channel in question. Therefore, a banned streamer has to be constantly worried to be the possible cause of a ban for his colleague.

This has enormous implications for a worker who is used to living in the same environment as her/his colleagues, be it in an office, house, or community event. The permabanned streamer is going to be cut off from the previous community life for the sake of the others' working safety²². This has clearly significant psychological implications.

On 9 December 2020, the Italian community of Twitch streamers launched the #NOSTreamDay, a strike to protest against Amazon during which streamers did not go live, and participating viewers did not join Twitch.

The whole initiative was born after the permaban imposed on Sdrumox (nickname of the streamer Daniele Simonetti) with an objectionable procedure. The streamers do not contest the ban itself but rather Twitch's abuse of the disciplinary process. In fact, for months, the platform suspended 'Sdrumox' – thus, blocking his primary source of income – and gave him conflicting and inconclusive information about the status of the disciplinary process. In the meantime, he was unable to "see his friends when they were streaming and out of a job without the chance to stream on other platforms". In the end, after six months, he discovered that the ban would have been permanent. "This would not be allowed in any workplace" (NoStreamDay 2021). Below is a snapshot of part of the Manifesto (Figures 5,6.). Nonetheless, the protest did not lead to any policy change.

²⁰ The 'Shadow Ban' implies the total or partial block of the user or of its content. The creator, or the content, will be invisible for part of the community. This may operate on multiple aspects: notification to subscribers, general feed or trending, search bar, and so on. However, within the interviews with creators, I found out that nor Twitch nor YouTube commonly arrive at the extreme of shadow banning the user *per se*. More frequently, their action directly affects the content, thus indirectly the creator's earnings.

²¹ A website's 'back end' is constituted by all the processes on the 'backstage', hidden to the public, but essential to process and send the information to the front end, where the end result will be displayed to the user.

²² "A lot of streamers do live IRL, which means in real life: they go around commenting on what they see. If you've been banned, for example, you'd better avoid Games Week, because if you end up in someone else's livestream, they'll be banned too. Or, and this has happened, you should be afraid to go to a club where your streamer friends are, because if you end up in a live IRL of one of your colleagues, you make him lose his job too". Comment from the creator Mr Marra (Open 2020).

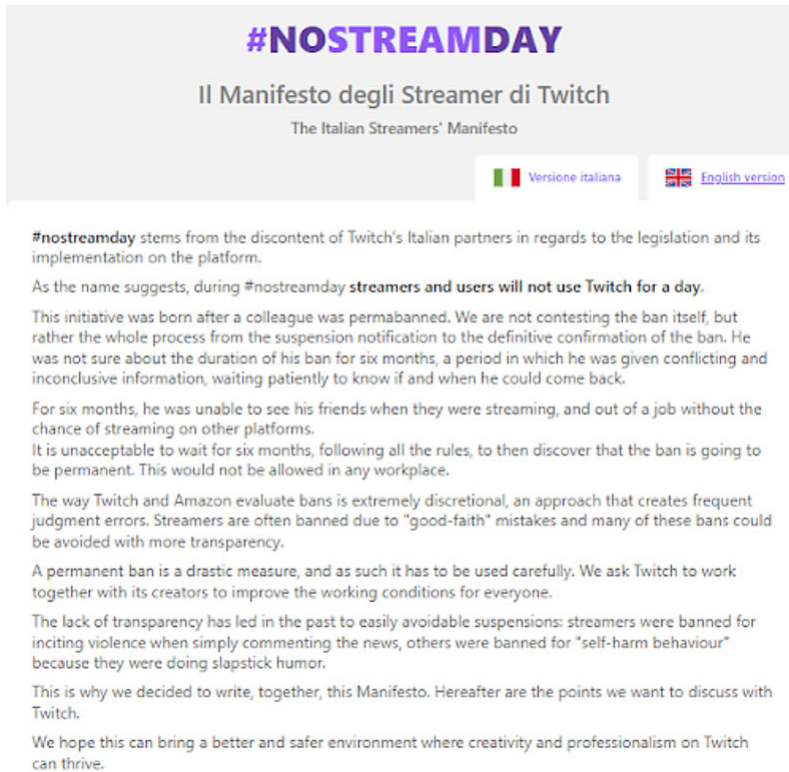


Figure 5: Manifesto NOSTreamDay (NoStreamDay.com 2021)

4. The effects of a "permaban"

We ask to consider the impact that a "permaban" can have on a streamers' life. Such a hard measure needs to be taken while taking into consideration that a streamer's friends are often colleagues.

It is not acceptable how the platform is putting at risk personal relationships between streamers. A banned streamer cannot go out with friends if they are streaming IRL. We ask to reconsider this rule, considering the psychological impact this rule can have (and has had) on people.

Obviously, this does not apply when the permaban comes for incontestable reasons: pornography, violence and racism should not have space on the platform.

Moreover, we ask to discuss the expansion of the Italian moderation team. The number of streamers is increasing rapidly and they need support that, right now, cannot be supplied.

In conclusion, we hope this will not be seen as an attack towards Twitch, but rather as a call for help. It is becoming hard to work with this level of uncertainty and anxiety. "Democracy dies in darkness", as Bob Woodward said: this is why we are ready to work together to address all the topics listed above.

Figure 6: Manifesto NOSTreamDay - The effects of a permaban (NoStreamDay.com 2021)

live with the viewer at the moment of the publication (so-called 'Premiere'). In this regard, it is also worth noticing that YouTube has no Live Content Exclusivity clause.

Other distinctions stem from the procedural side. As opposed to from Twitch, YouTube's reporting system is mainly governed by algorithms. Moreover, the disciplinary procedure relies mainly on the sanction of exclusion from monetisation.

YouTube is built solely on one system – called 'YouTube Partner Programme' – which allows YouTubers, at the fulfilment of specific requirements, to enjoy technical and economic benefits: (1) Creator Support teams, (2) access to the Copyright Match Tool, (3) access to monetisation features.

The key player in this process is the advertisement agency 'Google Ads', into which the YouTubers need to open an account and submit an application via a registration form.

2.2 YouTube

YouTube is a platform that allows multimedia content to be shared and displayed on the network. It is owned by Google LLC, and it was launched on 23 April 2005. Hereinafter, we will use the word 'YouTubers' in reference to content creators on YouTube.

The first clear distinction between YouTube and Twitch is that, while the latter is based on live streaming, the former relies much more on the upload of pre-recorded content.

This has several consequences on how the YouTubers organise their work, mainly due to the possibility to pre-record, pre-upload and then plan the publication of the videos.

However, this does not mean that YouTube has no live functions. In fact, Google's platforms offer the possibility to (1) live stream and (2) upload a pre-recorded video as a live stream in a way to follow

To participate in the monetisation of a YouTube channel, one needs to have (YouTube Help - YouTube Partner Earnings Overview):

- a) more than 400 hours of valid public views in the last 12 months; and
- b) more than 1000 subscribers

The YouTuber must sign a contract that is unilaterally prepared by the platform – there is no way to negotiate – agreeing to follow “YouTube’s Community Guidelines, Terms of Service, Copyright, Google AdSense program policies, and Advertiser-friendly content guidelines” (YouTube Help - YouTube Channel Monetization Policies).

2.2.1 Substantive Rights and Obligations

2.2.1.1 Earnings

The primary source of YouTubers' earnings – within the relationship with YouTube²³ – is the so-called ‘monetisation’ of the videos, that is, the micro advertisements placed by the platform before the videos. The content generates earnings as much as it is viewed. This is a fundamental point for several reasons.

Firstly, the revenues of the YouTuber are deeply dependent on the indexation on the platform. YouTube decides the indexing through its algorithm, unilaterally set by the platform and changed quite often. Consequently, YouTubers' earnings are subject to variations independent of their action²⁴ because of (1) unclear rules on some of the main visibility features of the platform²⁵, (2) the lack of transparency and explainability of the algorithm – which forces the YouTuber to a trial and error approach to testing the algorithm response²⁶–, (3) the sudden changes of the algorithms operated by the platform, which nullify the previous effort of the creator and put at risk all her/his investment²⁷.

Secondly, YouTubers argue that the platform does not do enough to protect them from the viewers' usage of ‘Ad-Blocking systems’, which significantly impact their income.

Lastly, the platform's discretionary and forced manipulation of streamers' visibility, as we are going to see in section 2.2.2.

²³ Aside from the earnings related to YouTube, the streamers can make a living through private contracts for Live Events and Branded content.

²⁴ It is important to reflect on the fact that the Streamers' competitive advantage depends on mechanisms over which they have no control.

²⁵ The problem we have seen for Twitch's Front Page here is similar to the YouTube Trending Pages. Moreover, YouTube's rules on visibility are also problematic on how actually make the content visible on the thread of the followers, this is why YouTubers always push viewers not only to subscribe but also to activate the ‘bell’.

²⁶ During the interview with Matteo Flora, I found out that the algorithm has a different impact on the reach of a view depending on the dimension of the channel. While for him it impacts around 50% of the visual, for a bigger channel it can reach 90%.

²⁷ Just to provide an example: if a content creator builds her/his format on talking about a given topic (for instance, cigarettes) and the platform suddenly decides to ban that specific topic from the monetisable ones, the creator loss abruptly her/his main source of income without any possibility of planning in the past another solution – since there is no previous communication of the platform – nor appealing the decision.

On this source of earnings, the platform holds a share, depending on the term of the specific partner agreement (YouTube Help - YouTube Channel Monetization Policies). On average, Google keeps between 6% and 45% for itself. Moreover, it is Google that counts the views and makes them known to the creators; the creator has no possibility to verify and compare what has been communicated to him by the platform (Scialdone, Greco, Bennato 2021).

The second source of earnings offered by the platform is related to a paid subscription (called 'Channel Membership'), on which YouTube hold 30% after local sales tax and other fees are deducted, with the payment processing fees currently covered by the platform (YouTube Help - Become a Channel Member on YouTube).

Lastly, YouTube has a system of donations related to its Premiere's feature, named 'Super Chat'. Basically, a viewer watching the pre-recorded video on Livestream can make a donation in order to fix their comment in the upper part of the chat in such a way that it gets visibility for a period of time proportional to the amount of the donation (YouTube Help - Manage YouTube Super Chat & Super Stickers for Live Chat).

2.2.1.2 Community Guidelines

As we have seen, respect for Community Guidelines, Terms of Service, Copyright, Google AdSense program policies, and Advertiser-friendly content guidelines is necessary to monetise videos. This economic dependence on the platform, in light of ambiguity and the discretionary interpretation of such terms, put in danger the YouTubers, both on a community level and on an individual one.

Firstly, on the community level, the most important event in the history of YouTube is the so-called 'YouTube Adpocalypse Crisis' (hereinafter, Adpocalypse), which started in May 2017.

After the monetisation of controversial content²⁸, the investors started to fear repercussions on their brand and, thus, threatened YouTube to quit the advertisement system if this situation would not be fixed soon. The answer of the platform was the creation of two categories – which the YouTuber has to select in the upload of her/his video – 'clean content' (monetisation allowed) versus 'miscellaneous' (not monetisable). Evidently, this division penalised those who deal with 'adult' content (for instance, politics, war, etc.). Many YouTubers have suffered a vast earning loss. The consequent reactions were different, yet the main two were the opening of a Patreon²⁹ or the migration on Twitch³⁰.

Nonetheless, this solution was not a definitive one. In fact, in November 2017, there was 'Adpocalypse 2.0' (Breaking Italy 2017) due to controversial content in the 'safe' category of YouTube Kids³¹; and in 2019, there was the 'Voxpocalypse' (Breaking

²⁸ The controversial content was a video demonstrating the ineffectiveness of policemen's bulletproof vests. We should consider this a 'security investigation' or, instead, an incitement to kill policemen?

²⁹ BreakinItaly, which had a 70% drop in earnings, started a Patreon to save the project. Pateron is a platform in which the creator offers the followers benefits – such as exclusive content, community chat, etc. – in exchange for a monthly subscription.

³⁰ PewDiePie, the biggest YouTuber in the world, moved on Twitch.

³¹ The controversial video was a fake 'Peppa Pig' cartoon, showing adults with costumes of ambiguous and violent behaviour.

Italy 2019), which led to the issue of new – stricter – rules on online bullying and, consequently the lost monetisation of dozens of channels³².

In conclusion, YouTube is trying to build a policy system able to balance between not displeasing creators and not displeasing advertisers, with an inevitable prioritisation of the latter due to the economic interest of the firm. The consequence of this uncertainty is that the biggest creators started to rely on ‘branded content’ – with a specific third party sponsoring the videos³³ – while the smaller ones find it difficult to make ends meet³⁴.

On the individual level, the ambiguity of the policies leaves room for discretionary interpretation and, thus, discrimination between the YouTubers. As always, countless examples can be made about most of the rules taken individually. However, for the sake of this research, we are going to see just one example.

As discussed in the interview with the YouTuber ‘Flip’, it relates to the guidelines on ‘reused content’.

From 2018 to 2022, his main format consisted of compilations of the best clips of the week taken from multiple Twitch channels that collaborated with him. On 25 January 2022, YouTube took away Flip’s channel monetisation for ‘reused content’, explained by the platform as “channels that repurpose someone else’s content without adding significant original commentary or educational value”. Moreover, within the examples provided by the platform, there is the “promotion of other people’s content”, even if you have permission (YouTube Help - YouTube Channel Monetization Policies).

There is a clear basis for contesting the association of his product with the notion of reused content. Firstly, he explained to me that

it used to take me 3-4 days to create the videos, download all the clips, group together the funny parts, edit them with various zooms, transitions and more and then upload the final product to YouTube. So this is already wrong because it doesn’t fit my violation since there is editing work behind it.

Moreover, he questioned the above-mentioned example

so any kind of channel that is created by a company and receives consent from the original creator to upload and promote its content does not have the right to monetise? This rule is also very strange because there are a lot of YouTube channels that do this and still monetise without problems; YouTube should specify a minimum (De Giorgio 2022).

³² For a recap of all the Adpocalypse’s waves see Wikitubia - YouTube Adpocalypse.

³³ ‘Gianpiert’ explained to me that nowadays it is almost impossible to make a living on YouTube with monetisation. YouTube has become just a ‘window’ useful to make yourself visible from the outside world and, thus, to find sponsors (Santoro 2022).

³⁴ Piotr Urbanczyk, one of the administrators of the polish YouTube channel ‘Copernicus’, confirmed that the situation is similar in Poland. The smaller YouTubers, with less history of content in the channel, try to do their best to understand and go along the YouTube’s AI system and guidelines, but they hardly survive. In his words, the views of the content and, in general, the visibility of a channel is led by the ‘fortune-tell lady’. No predictability, no safety (Urbanczyk 2022).

'Flip' tried to contact the support via chat (*i.e.* direct confrontation) and via email, asking for explanations, but the replies just referred to the official policies without any further explanation. In the end, he deleted all the compilations, sent back the partner request after one month (the minimum amount of time to wait imposed by the platform) and was accepted to return to monetising content.

2.2.2 Procedural Rights and Obligations

2.2.2.1 Reporting System

Differently from Twitch, YouTube relies on an automatic Google algorithm to detect forbidden words within the content – title, tags, script, etc. – which lead to demonetisation without checking what actually is the message conveyed by the YouTubers. This is a 'preventive policy'. Therefore, the creator has no chance of defence prior to the demonetisation. Only after the YouTuber can request a human review

which, due to the amount of material to be inspected, always arrives too late with respect to the viewing peaks, completely eliminating all the potential gains that would have been made with the advertisements in the period preceding the approval of the human operator (the Wise Magazine 2020).

YouTubers try to circumvent this problem with two strategies.

Firstly, by relying on pre-uploaded content, thus hoping that the period of time between the upload and the actual publication will be enough to have a human checks in case of algorithm flag of the content. However, this is not a solution feasible for everyone, especially for the channels that have a daily format. These YouTubers risk seeing their work nullified since the loss of monetisation for – in the best-case scenario – two or three days means losing the peak of the audience due to the daily nature of the content.

Secondly, by tricking the algorithm by changing some letters within the keywords to avoid flagging. For example, in the first period of the Covid-19 pandemic, all the content having the word 'Covid' in the title were automatically demonetised. Thus, one of the solutions found was to write 'C*ovid' or 'C😊vid' instead. However, all these trial-and-error solutions are far away from being definitive. Every time the platform changes the algorithm slightly, YouTubers have to start from zero in their testing of the AI.

As well for YouTube, there is widespread criticism for the insufficiency of the moderation team. In reality, the interaction with the platforms' moderation team depends on multiple factors: (1) the size of the channel, with the biggest ones having the advantage of being more assisted than the smaller ones³⁵; (2) the nature of the channel, with some content favoured by the platform for policy reasons; (3) the personal contact with the high-level staff of the platforms³⁶.

³⁵ 'Gianpiert' – thanks to his work for big YouTube channels such as 'Croix89' and 'FaviJ' – explained to me that the biggest channels have a faster communication channel with the platform. This does not automatically mean that they enjoy a special treatment for the content of the decisions (Santoro 2022).

³⁶ For instance, Matteo Flora, due to his past work interaction with Google and Meta, had the opportunity to interact directly with the heads of the moderation process. Consequently, the revision process was faster than the normal procedure (Flora 2022).

Julien Potié – chief of staff and producer for HugoDécrypte – describes their relationship with the various platforms' channel managers as very good (Potié 2022)³⁷. For instance, most of their problems with flagged content have been solved with the help of the moderation staff³⁸. Nevertheless, he himself recognises how their channel is 'lucky' in this regard, having a more favourable treatment compared with other ones. The reasons are multiple.

Firstly, taking the example of YouTube, even if their numbers do not place them within the stars of the platform, the type of their content³⁹ is considered 'highly valuable' by the platform, thus moving them to the same level of assistance as the one given to the top 10 French channels⁴⁰.

Secondly, France is an important market for Google (and thus, for YouTube). This is due to the size and the engagement of the French audience with YouTube, the situation of almost monopoly of Google in the usage by the French population, and the institutional framework which makes France the most effective State in which to lobby for the platform's interest at EU level. An example of this connection is the construction of one of the first 'YouTube Space'⁴¹, within EU member states, in Paris in 2015, next to the headquarters of YouTube France. The consequence of this bond between YouTube and France is that the YouTube team has a significant number of resources that help in relieving the pressure.

2.2.2.2 Disciplinary Procedure

As we already mentioned, demonetisation is the standard measure adopted by the platform. The above-mentioned example of *Flip* showed both the discretionary – and discriminatory – interpretation of the guidelines and the length and inconclusiveness of the process of assistance. However, YouTube can also issue other sanctions.

In fact, the platform relies on a 'Strike' system. This means that when your content violates the Community Guidelines, the channel will lose some privileges. The most important is the deprivation of the possibility of uploading videos, live streams, or stories.

With the first strike, the channel will restore full privileges automatically after one week, but the strike remains on the channel for 90 days. If within the 90-day period you get a second strike, the sanctions will last for two weeks. If within 90 days from the second strike, you get a third strike, the channel will be permanently removed from YouTube (YouTube Help - Community Guidelines Strike Basics).

³⁷ In this regard, the project HugoDécrypte works through most of the main platforms: YouTube, Twitch, Instagram, and TikTok. Thus, Mr Potié is making reference to the staff of all those platforms.

³⁸ The procedure is usually the following: the uploaded content is flagged; they apply for an appeal; since there is no fast answer, they contact the channel manager to push for speeding up the process. This procedure is even slower in summer, due to the holidays of the moderation team.

³⁹ This is not a universal truth. In fact, content favoured in one country can be penalised in another one. An example can be seen drawing a comparison between HugoDécrypte (France) and BreakingItaly (Italy), differently affected by the apocalypse and monetisation.

⁴⁰ In fact, the channel manager who follows their channel is the same as for the top 10 channels.

⁴¹ 'YouTube spaces' are physical locations built by Google and left at the service of YouTube content creators in order to foster creativity and collaboration. The first one was built in London in 2012, while the second and the third ones were built in Paris and Berlin in 2015.

Thirdly, YouTube largely uses the measures affecting visibility mentioned in the previous section on Twitch. Differently from the previous example, on YouTube the effect is even more disruptive due to the higher number of content uploaded. Thus, if the subscribers to the channel do not receive a notification when the video is uploaded, if the general audience does not see the video in the referral or on the home page, the organic view of the video diminishes drastically, and so the earnings of the creator.

The lack, or the length, of the interaction with the moderation team is still a significant problem for creators, as reported by 'The Pruld'. During the interview, he told me that some of his content was flagged by From Software⁴² for alleged copyright infringement. This allegation was manifestly not founded since the software used to make the video, 'Source Film Maker', had the rights to use the model from the From Software's game in question. Eventually, the appeal to review the flagged content received no answer (Cardinali 2022). In the following sub-section, we are going to develop further this problem by focusing on the policy which causes most of the flags: copyright.

2.2.2.3 Copyright: YouTube's crucial policy

Now, we will go through three examples – coming from the interview I conducted – regarding the reporting system and the disciplinary procedure, which relates to the most common problem for YouTubers: copyright.

The first and the most straightforward case, almost a 'no problem', is the testimony made by Piotr Urbanczyk (on behalf of the channel 'Copernicus'). In short, they randomly experience problems with the music copyright; the system flags their video even if the music used is of 'stock type' (this means that it is free to use). Nonetheless, the process to contest the flag and rehabilitate the video is quite fast, with the need just to fill in a form with information about the stock music (Urbanczyk 2022).

On the other hand, the following two cases are very complex.

The working story of Paride Cardinali – in art 'The Pruld' – can be defined as an ongoing and exhausting fight with the music copyright of the platform (Cardinali 2022).

One of his most famous videos, named 'We are the souls', was first made with a song by Christina Perri. Consequently, the content was flagged and removed by the platform. Then, Paride made a cover of the song and re-uploaded the content. The platform's answer this time was different: it gave all the monetisation to Christina Perri. Now, a question arises naturally: why do all the fruits of his creative work – especially for the visual part – have to be neglected and transferred to a music author just because of the use of a cover of her song? Should not it will be better a division of the earnings coming from that video? Moreover, Christina Perri's song in question has seen its views on YouTube multiplying exponentially after Paride's video. For this positive externality, Paride had no recognition.

⁴² From Software is a Japanese video game company who produced 'Dark Souls', the game whose images are in question in this example.

Moreover, between 2015 and 2016 there was a significant change in the platform: a switch towards a more aggressive copyright system, which retroactively flagged or demonetised most videos on Paride's channel. This gave multiplied the above-mentioned problems – often with big music houses like the Warner Music Group – thus giving him no chance to survive on the platform. He had to find working solutions elsewhere.

This is not everything yet. In fact, Paride also experiences the other side of the copyright dilemma: his original content are constantly freebooted⁴³. The platform does not help the creator in this regard. When freebooted content is identified – often thanks to the work of the community – YouTube gives the owner only the possibility to (a) delete the freebooted content or (b) leave it. Evidently, comparing the two above-mentioned situations experienced by Paride, the platform differently treats the content creators and the big music houses and artists. Why does Paride have no possibility (c) to monetise on the freebooted content from him? His disappointment is natural

YouTube protects only the giants [...] it gives creators a window of opportunity to make money, but in the end, it takes away everything [...] if you are a small creator, you have no power to fight with the platform.

After having seen the impact of demonetisation, the working story of Paolo Pirruccio – in the art 'Nocoldiz' – presents the extreme consequences of the strike system (Pirruccio 2022).

After the opening of his channel in 2010, he got a minor series of bothersome strikes related to visual copyright due to the nature of his channel⁴⁴, but none went over the 90 days period without reaching the third strike and the termination of the channel.

In 2016 he got the partnership – thanks to a third-party intermediary – and the strikes were dealt with by the management of this intermediary with no worries for him as a creator.

Between 2018 and 2019 YouTube stretched the limits of its demonetisation and banning policies. Then, Paolo lost his channel (310k subscribers, 20k fixed views plus 20k variable) via direct ban – probably due to his strike history, but still not following the three-strike procedure – for 'spam, scams, misleading videos'. There was no possibility of having further explanation since his attempt led only to an automatic answer by the system. Even his channel manager had no answer for him, due to the secret imposed by the platform.

After that, Paolo re-opened a new channel and went through several other strikes due to the nature of his content. He knows about the volatility of his channel's life, which means he cannot build a job on his passion for satirical video editing.

⁴³ The phenomenon of 'freebooting' consists of the unauthorized usage and sharing of someone's else digital content presenting it as original work.

⁴⁴ 'Nocoldiz' main format is the so-called 'YouTube Poop': a mashup created by remixing/editing pre-existing video, which conveys a subcultural meaning for humorous and satirical purposes.

3. The EU Legal Framework

The EU legal framework on content creators is scarce and fragmented. There is no provision addressing directly and comprehensively the figure of content creators. Thus, the first part of this section will be devoted to the reconstruction of all the provisions which indirectly affect the content creators working life. Subsequently, the second sub-section will assess the possible impact of the proposals in discussion at the present moment within the EU legislative process.

3.1 The present legal framework

This section relates to the current legal framework.

We are going to analyse: (1) Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services (hereinafter, 'Platform-to-Business' or 'P2B'); (2) Regulation 679/2016 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 (hereinafter, 'General Data Protection Regulation' or 'GDPR'); (3) Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter, 'Copyright Directive').

However, before diving into the analysis of the secondary legislation, it is essential to make a minor premise on the European Charter of Fundamental Rights (hereinafter, CFR).

The relevant CFR's provisions for content creators are article 16, which grants freedom to conduct a business; article 17(2), which protects intellectual property; article 27, which gives workers the right to information and consultation within the undertaking; article 31 that guarantee fair and just working conditions⁴⁵; and, lastly, article 47 that establish the right to an effective remedy and to a fair trial⁴⁶.

3.1.1 Platform-to-Business Regulation

This Regulation provides a series of safeguards – with regards to transparency of terms and conditions, procedural guarantees following disciplinary measures and effective redress in the event of disputes – to the business users to compensate for the disproportionate platforms' power in comparison to self-employed business users who operate on them. However, the Regulation does not cover other vital aspects, such as transparency and human monitoring of automated decision-making systems (other than ranking).

⁴⁵ Article 31 CFR: "1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

⁴⁶ Article 47 CFR: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

First of all, for what concerns the scope of application of the Regulation, article 2 sets out the notions of 'online intermediation services' and of 'business user'.

On the one hand, the notion of 'online intermediation services' is constituted by three requirements: (a) to be an information society services within the meaning of Article 1(1b) of Directive 2015/1535⁴⁷; (b) to allow "business users to offer goods or services to consumers [...]"; (c) to be provided to business users on the basis of contractual relationships. YouTube and Twitch are online content-sharing services, a specific form of information society services within the meaning of Directive 2015/1535. Moreover, both platforms satisfy the requirement of P2B directive by allowing creators to offer content to consumers on the basis of a specific partnership program. Thus, YouTube and Twitch fall within the scope of application of this Regulation.

On the other hand, the concept of 'business users' refers to

any private individual acting in a commercial or professional capacity who, or any legal person who, through online intermediation services, offers goods or services to consumers for purposes relating to its trade, business, craft or profession.

In consideration of the analysis of the working status in the first section, I firmly believe content creators – as genuine self-employed – fall within the scope of the notion of 'business users' and, thus, the Regulation is applicable to them.

The last element with regard to the scope of application is article 1. This article establishes that what matters for the application of this Regulation is the country of destination (business users and consumers located in the EU) and not the country of origin (place of establishment or residence of the providers).

For what concern terms and conditions, article 3 obliges platforms to provide easy access to information – clear and intelligible – that covers: (a) "grounds for decisions to suspend or terminate or impose any other kind of restriction", (b) "additional distribution channels and potential affiliate programmes", (c) "ownership and control of intellectual property rights". Nonetheless, the most critical part of this article is the obligation on platforms to "notify, on a durable medium, to the business users concerned any proposed changes of their terms and conditions" and wait at least 15 days before implementing those changes.

Moreover, ex article 8, the eventual changes to terms and conditions cannot be retroactive unless they are "required to respect a legal or regulatory obligation or [...] are beneficial for the business users".

In conclusion, the Regulation addresses the disciplinary procedures via three articles.

Article 4 is the critical provision which tries to respond to the need for guarantees in regard to the restriction, suspension, and deletion of the accounts of professional

⁴⁷ Article 1(1b) of Directive 2015/1535: "service' means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purpose of this definition: 'at a distance' means that the service is provided without the parties being simultaneously present; (ii) 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; (iii) 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request."

users. For all these measures, the platform has the duty to provide the user with “a statement of reasons for that decision on a durable medium”. The content, evidently, must refer to “the specific facts or circumstances [...] as well as a reference to the applicable grounds”. The timing of the notice period changes according to the nature of the measure. In fact, the statement of reasons for restriction and suspension has to be delivered “prior to or at the time taking effect”, whereas, for termination, it has to be delivered “at least 30 days prior to the termination taking effect”. There are cases in which this notice period does not apply, in particular when the business user concerned “has repeatedly infringed the applicable terms and conditions, resulting in the termination”.

Secondly, the platforms must establish an internal complaint-handling process (ex article 11), within which the business user has the opportunity to clarify the facts and circumstances. This process has to be based on principles of transparency, proportionality and equal treatment. Moreover, it has to be easily accessible, free of charge and work within a reasonable time frame. If at the end of the internal procedure the measure is deemed unjustified and thus is revoked by the platform, the business user must be reinstated without undue delay.

In conclusion, considering that the complaints cannot always be resolved by the internal complaint-handling process, article 12 sets out the platforms’ obligation to identify “two or more mediators” to try to reach an out-of-court agreement. If the mediators do not operate within the EU, platforms must ensure that

business users concerned are not effectively deprived of the benefit of any legal safeguards laid down in Union law or the law of the Member States.

3.1.2 General Data Protection Regulation

The GDPR grants rights to people performing platform work regardless of their employment status.

Within section 2, Article 13 obliges the collector of the personal data to provide certain information to the data subject. Paragraph 2 prescribes information necessary to ensure fair and transparent processing. In particular, it requires information on

(f) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

Within section 4, article 22(1) establishes the right of the “data subject” to not be subject to a decision “based solely on automated processing [...] which produces legal effects concerning him or her or similarly significantly affects him or her.” Even if the second paragraph provides three grounds for exemption from this right⁴⁸, the provision continues requiring the data controller to

⁴⁸ Article 22(2) “Paragraph 1 shall not apply if the decision: (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; [...] or (c) is based on the data subject’s explicit consent.”

implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

However, it is worth pointing out two limits of this provision.

Firstly, the rights *ex* article 22(1) are based on unstable ground. In fact, any kind of human interaction with automated processing will interfere with the notion of a decision “based solely on automated processing”, thus exempting the platform from the application of this article (Hacker *et al.*, 2020).

Secondly, the difficulty in drawing a line “between algorithmic decisions that do or do not affect workers in a sufficiently ‘significant’ way” makes it hard for persons performing platform work to assert their data protection rights in the context of algorithmic management (Platform Working Directive 2021).

Recital 71, other than re-stating the rights expressed in article 22(1), also speaks about the “right to obtain an explanation”. However, the Recital is not binding. For this reason, some scholars have tried to give this right binding force through article 15. In fact, this article – paragraph 1h – establishes the right of the data subject to obtain from the controller in

the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

For some authors, the scope of the mandatory information is only about the general structure and architecture of the system. For others, that information

can only be meaningful if it helps the data subject to exercise her rights under Art. 22(1) and (3) GDPR, [...] Therefore, if specific explanations of the decision, including the weights and factors used to reach it, are necessary to check the accuracy of the protection and to potentially challenge its correctness, such information needs to be provided.

In any case, the discussion on the interpretation must be settled by the CJEU (Hacker *et al.*, 2020).

In conclusion, the GDPR does establish rights for the individual. Nonetheless, this Regulation has certain limits, especially for what concerns labour law's collective aspects. In fact, article 88 calls for “more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context”.

3.1.3 Copyright Directive

Lastly, the Copyright Directive – via article 17 – establishes two guarantees for creators.

On the one hand, paragraph 7 protects the creative process of creators by covering them with copyright exceptions or limitations related to “quotations, criticism or

reviews” or the use of works for “caricature, parody or pastiche” purposes. On the other hand, paragraph 9 obliges the Member States to assure that the

online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

3.2. The proposals under discussion

Within the legislative process, there are some instruments under discussion that can change the playing field.

From 2020, there is the (1) Proposal for a Regulation on a Single Market for Digital Services (hereinafter, 'Digital Services Act' or 'DSA'). This Act, together with the Digital Markets Act (hereinafter, 'Digital Market Act' or 'DMA'), constitute the pillars of an EU digital regulation unique in the world. They aim to face the new digital world challenges posed by digital giants, also for what concerns their business users.

Whereas, in 2021, there are the (3) 'Proposal for a directive on improving working conditions in platform work' (hereinafter, 'Platform Working Directive' or 'PWD') and the (4) proposal for a regulation laying down harmonised rules on artificial intelligence (hereinafter, 'AI Act').

Lastly, the new 2022 (5) Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (hereinafter, 'Corporate Sustainability Due Diligence' or 'CSDD').

The aim of this sub-section is to assess how these instruments – if they pass the legislative process successfully – will affect the labour condition of content creators. In order to do so, let us highlight, respectively, the key provisions.

3.2.1 Digital Services Act

Expected to come into force in the first quarter of 2024, the DSA will apply to all online intermediaries providing intermediary services in the EU, “irrespective of the place of establishment of the providers of those services”.

The aim of the Regulation is to enhance both consumer protection and privacy. For what concerns content creators, Article 1 points out the aim to “set out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected.”. The core issues – related to the working conditions of content creators – concern content moderation⁴⁹, transparency on algorithms and dispute resolution mechanisms. This constitutes a big revolution, with more power for the individual, hopefully leading to better usage of data and artificial intelligence.

⁴⁹ Defined by Article 2 as: “the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account”.

Article 2 is fundamental to understanding which obligation applies.

The article divides 'intermediary service' into three categories: 'mere conduit', 'Caching', and 'Hosting'. The latter category consists of "the storage of information provided by, and at the request of, a recipient of the service".

Subsequently, the article provides also the definition of "online platform", meant as a "provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information". Moreover, article 25 defines "very large online platforms" (hereinafter, VLOPs) as those platforms that "provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million".

Lastly, the notion of "recipient of the service" refers to "any natural or legal person who uses the relevant intermediary service". Thus, content creators fall within its scope.

Taking into consideration these provisions, Twitch and YouTube are subject – cumulatively – to the obligations set out for (a) very large online platforms, (b) online platforms, and (c) hosting services. So, let us have a look at the most relevant duties – imposed on these two actors – in regard to content creators.

Section 1 refers to the "provisions applicable to all providers of intermediary services".

Article 12 obliges the providers of intermediary services to set out, clearly and without ambiguities, in their terms and conditions all the information regarding "any restrictions that they impose in relation to the use of their service", including information on "any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review". Moreover, the second paragraph requires them to act in a "diligent, objective and proportionate manner" in the application and enforcement of the above-mentioned restrictions.

Article 13 enhances the transparency of the providers by establishing a duty to, at least once a year, publish clear and detailed reports on their content moderation. Within its content, there must be information regarding

the number and type of measures taken that affect the availability, visibility and accessibility of information provided by the recipients of the service and the recipients' ability to provide information, categorised by the type of reason and basis for taking those measures.

Section 2 establishes additional obligations for hosting services, including online platforms.

Article 15 obliges the provider of hosting services – when it "removes or disables access to specific items of information provided by the recipients" – to inform the recipient about the decision and to "provide a clear and specific statement of reasons for that decision". The content of this statement has to include: the measures taken by the provider, the relevant facts and circumstances, the use of automated means (when applicable), the ground for incompatibility with the terms of the contract, and the redress possibilities available to the recipient.

Section 3 establishes additional obligations to online platforms.

Article 17 requires the platforms to provide the recipient with access to an “internal complaint-handling system” after decisions on the recipient’s information (remove or disable access), account (suspension or termination), and the possibility to use the service (suspension or termination). The access must be granted for a period of at least six months following the abomination decisions and must allow the recipient to submit “sufficiently precise and adequately substantiated” complaints. The platforms shall handle the complaints in a “timely, diligent and objective manner”, eventually reversing the decision – without undue delay – if the complaint is successful. Moreover, the platform shall inform the recipient about the possibility of “out-of-court dispute settlement [...] and other available redress possibilities”. Lastly, and most importantly, the platforms shall ensure that the decisions “are not solely taken on the basis of automated means”.

Article 18 sets out the “out-of-court dispute settlement mechanism” – available to the recipients – with a certified body with whom online platforms shall engage in good faith and respect its decision.

Article 23 adds some other transparency requirements connected to the obligations ex article 13 by requiring the providers of online platforms to include in the report: (a) the number, the outcomes and the average time needed for completing the disputes submitted to the out-of-court dispute settlement bodies; [...];

(c) any use made of automatic means for the purpose of content moderation, including a specification of the precise purposes, indicators of the accuracy of the automated means in fulfilling those purposes and any safeguards applied.

Section 4 establishes additional obligations for “very large online platforms to manage systemic risks”, identified by the above-mentioned criteria ex article 25.

Article 26 obliges VLOPs to conduct – at least once a year – an assessment of the “significant systemic risks stemming from the functioning and use made of their services in the Union”, with a specific focus on “any negative effects for the exercise of the fundamental rights to respect for [...] the prohibition of discrimination” and taking into account how their “content moderation systems [...]” influence those risks. Consequently, article 27 imposes on them the obligation to mitigate those risks by adopting tailored, reasoned, proportionate and effective measures.

3.2.2 Platform Working Directive

The main purpose of the Platform Working Directive is to set common definitions (Article 2) and to grant the correct determination of employment status on the basis of the principle of primacy of facts (Article 3). For the sake of this Master’s Thesis, we will only address the provisions which could apply to content creators.

First of all, it is fundamental to point out the division between “platform worker” – which refers to “any person performing platform work who has an employment contract or employment relationship” – and “person performing platform work” – which means “any individual performing platform work, irrespective of the contrac-

tual designation of the relationship between that individual and the digital labour platform by the parties involved”.

Article 4 is the core of the Directive. It establishes a rebuttable legal presumption of an employment relationship if two of the following criteria – related to the concept of 'controlling the performance' – are fulfilled

- a) effectively determining or setting upper limits for the level of remuneration;
- b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
- c) supervising the performance of work or verifying the quality of the results of the work, including by electronic means;
- d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular, the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
- e) effectively restricting the possibility of building a client base or performing work for any third party.

In consideration of the previous section, it is clear how criterion (a) is met: Twitch and YouTube are effectively determining the level of remuneration of content creators. However, all the others are less likely to be considered fulfilled. Thus, content creators fall within the latter category as 'genuinely self-employed'.

In my view, the only debatable criterion is the second one due to the role of the platforms' guidelines in limiting the output of content creators' creativity. Nonetheless, I believe that considering content creators as an employee of Twitch and YouTube does not mirror the reality of their work.

Having established that creators do not fall within the concept of 'platform workers', let us have a look at the provisions of Chapter III on Algorithmic Management which apply to them.

Article 10 states that articles 6, 7(1), 7(3), 8 “shall also apply to persons performing platform work who do not have an employment contract or employment relationship” without prejudice of P2B regulation if applicable.

Article 6 relates to the transparency of and use of automated decision-making systems. Firstly, it imposes an obligation on platforms to provide information to digital platform workers on

automated decision-making systems which are used to take or support decisions that significantly affect those platform workers' working conditions, in particular their access to work assignments, their earnings, their occupational safety and health, their working time, their promotion and their contractual status, including the restriction, suspension or termination of their account.

Then it specifies the information needed: the use of such systems, the categories of decisions, the parameters taken into account with their relative importance, and lastly

the grounds for decisions to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work performed by the platform worker, on the platform worker's contractual status or any decision with similar effects.

That information has to be provided in a written form (may be electronic)

at the latest on the first working day, as well as in the event of substantial changes and at any time upon the platform workers' request

Moreover, the information "shall be presented in a concise, transparent, intelligible and easily accessible form, using clear and plain language".

Article 7 imposes on the digital labour platforms the obligation to "regularly monitor and evaluate the impact of individual decisions taken or supported by automated [...] decision-making systems, on working conditions.". In order to do so, the platforms must "ensure sufficient human resources" which "shall have the necessary competence, training and authority to exercise that function" and "shall enjoy protection from dismissal, disciplinary measures or other adverse treatment for overriding automated decisions or suggestions for decisions".

Article 8 establishes the right for platform workers to "obtain an explanation" from the platform for "any decision taken or supported by an automated decision-making system that significantly affects the platform worker's working conditions". More specifically, the platforms are obliged to provide workers with access to a

contact person [...] to discuss and to clarify the facts, circumstances, and reasons having led to the decision [...] with the necessary competence, training and authority to exercise that function.

Additionally, the platforms are obliged to provide the worker with a

written statement of the reasons for any decision taken or supported by an automated decision-making system to restrict, suspend or terminate the platform worker's account, any decision to refuse the remuneration for work performed by the platform worker, any decision on the platform worker's contractual status or any decision with similar effects.

Moreover, if the workers are "not satisfied with the explanation or the written statement of reasons obtained or consider that the decision referred to in paragraph 1 infringes their rights", the Directive grants them the right to

request the digital labour platform to review that decision [...] with a substantiated reply without undue delay and in any event within one week of receipt of the request.

Chapter IV – "Transparency on platform work" – prescribe a set of relevant information that the platforms are obliged to share with "the competent labour and social protection authorities of the Member State" and to update regularly. The main information regards the number and the status of persons performing platform work on the platform, together with the general terms and conditions of those contractual relationships.

Chapter V – “Remedies and enforcement” – grants to persons performing platform work the right to

have access to effective and impartial dispute resolution and a right to redress, including adequate compensation, in the case of infringements of their rights arising from this Directive.

Moreover, the Directive imposes on platforms the duty to create communication channels for persons performing platform work, refraining from accessing and monitoring those communications.

3.2.3 AI Act

This EP proposal aims to create an EU AI market that respects fundamental rights, especially in the context of algorithmic management. Equal treatment, accountability, transparency, traceability and explainability are the pillars of the obligations set for AI providers, all in place to facilitate the implementation of fundamental rights.

First of all, article 6 defines the so-called “High-risk AI systems”. Paragraph 2 refers to Annex III, whose paragraph 4 includes systems that relate to

Employment, workers management and access to self-employment [...] AI intended to be used for making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behaviour of persons in such relationships.

Subsequently, the AI Act provides specific requirements on “transparency and information to users”, which allows persons performing platform work to have access to the information they need to operate within the platform’s AI system. In fact, article 13 requires the High-risk AI systems to be designed and developed in a manner that users are able to understand its implication and the way to use them in the proper way for working.

Moreover, this provision refers as well to the “human oversight” mechanism of article 14. This mechanism is aimed at “preventing or minimising the risks to health, safety or fundamental rights” by establishing the control of a natural person. These persons shall be able to “fully understand the capacities and limitations of the high-risk AI system and be able to duly monitor its operation” and to “correctly interpret the high-risk AI system’s output, taking into account, in particular, the characteristics of the system and the interpretation tools and methods available”.

In conclusion, the protective extent of this AI Act is limited since it does not “provide safeguards in relation to the respect of working conditions for the people directly affected by the use of the AI systems, such as workers” (PWD 2021).

3.2.4 Corporate Sustainability Due Diligence

The purpose of this proposal is to lay down rules on “obligations for companies regarding actual and potential human rights adverse impacts and [...] on liability for

violations of the obligations mentioned above". The Annex specifies that "violation of the right to enjoy just and favourable conditions of work" constitutes "adverse human rights impact" within the meaning of the Directive.

Article 2 points out that this Directive applies to extra-EU companies which have a "net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year". Thus, YouTube and Twitch fall within their scope of application.

The Directive requires the Member States to ensure that companies conduct human rights "due diligence" through different actions: integrating due diligence into their policies, monitoring the effectiveness of those policies and publicly communicating its strategy; identifying, preventing potential adverse impacts, or mitigating and bringing actual adverse impacts to an end. Lastly, and most importantly, article 9 sets out an obligation to establish and maintain a complaints procedure accessible to

persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact [...] trade unions and other workers' representatives representing individuals working in the value chain concerned.

3.2.5 Summary

To conclude, I would like to highlight the key changes these proposals can bring if they pass the legislative process successfully.

In the first place, they are likely to enhance the protection of creators within the context of automated decision-making systems.

The PWD – in the case of the use of such an instrument – establishes the creators' right to obtain an explanation and to interact with a human to discuss and clarify the situation. Moreover, it also establishes the need to devote sufficient human resources to monitor those automated means.

The AI Act requires platforms to explain their AI system in a way that creators can use them in the proper way for working.

Finally, the DSA obliges platforms to report on the use, purpose and accuracy of this automated means for content moderation, together with the safeguards related to it.

In the second place, these provisions provide for several fundamental guarantees throughout the whole disciplinary process.

The DSA impose an obligation to notify the creators of any limitations related to their content. Then, it establishes the right to access an internal complaint-handling system with specific requirements of precision and speediness of the process. Moreover, it grants the creators the right to have an out-of-court dispute settlement with a certified body.

Lastly, PWD's chapter V establishes the creators' right to request adequate compensation if the internal claim is successful.

In conclusion, on a more general basis, the DSA requires platforms to assess yearly the systemic risk with regard to the use of their services. Moreover, it imposes the obligation to mitigate the risk discovered. This encompasses all the aspects seen above.

4. Problems and Solutions: Present and Future

The last part of this dissertation aims to put in relation to the findings of the previous two sections.

Therefore, we will address one by one the problems that emerged in the second section by dividing them into subsections. Considering the significant similarities between the difficulties experienced by YouTubers and Streamers, we are going to begin considering them as a whole. However, some specific solutions will be pointed out.

After having identified the problem, we will assess if there already are EU legal instruments capable of addressing it. Then, we will check if and how the proposal in discussion within the EU legislative process – highlighted in yellow – can address the issue. Lastly, if there is a lack of protection both in the present and future EU Legal Framework, we will suggest how to intervene at the EU level.

4.1 Earnings

4.1.1 Metrics

In the first place, the platforms have the monopoly not only in setting the shares of the earnings but also on the counts of the metrics, which will lead to the calculation of the remuneration. Thus, the creators have no possibility to verify and compare what has been communicated to them by the platform.

In the lack of present or future legislative safeguards, I would highlight the need for a third party who is able to check and certify this fundamental process.

4.1.2 Visibility

In the second place, the creators' earnings are inherently dependent on visibility to the viewers, which in turn is unilaterally determined by the platforms via policies and AI systems. Thus, a significant part of the earnings is subjected to variations independent of the streamers' actions.

The lack of transparency and clarity on both main visibility rules and best practices is very detrimental to the streamers' work⁵⁰. On the same point, there is a lack of explainability on the algorithmic process, which rules the indexation on the platform.

On the very last point, articles 13(2f) and 15 GDPR may grant some safeguards. These articles oblige the platform – in case of usage of automated decision-making systems – to provide the creators "meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.". Moreover, Recital 71 also speaks about the "right to obtain an explanation". However, considering that it is not binding, there is a heated scholars' debate on whether the Recital – read jointly with article 15 – imposes mandatory information only about the general structure and architecture of the system or more specific explanations of the decision "including the weights

⁵⁰ For instance, it is unclear how to get to the Twitch's 'Front Page' or YouTube's 'Trending'.

and factors used to reach it, are necessary to check the accuracy of the protection and to potentially challenge its correctness”.

A solution in this regard might be provided by Article 8 PWD, which establishes the right of the person performing platform work to “obtain an explanation” from the platform for “any decision taken or supported by an automated decision-making system that significantly affects the platform worker’s working conditions”. More specifically, the platforms are obliged to provide workers with access to a contact person “to discuss and to clarify the facts, circumstances, and reasons having led to the decision” with “the necessary competence, training and authority to exercise that function”.

This led creators to a “trial and error” approach to testing the algorithm response. However, sudden changes in the algorithms operated by the platforms nullify the previous effort of the creators and put at risk all their investments.

On the topic of changing terms and conditions, article 3 P2B obliges platforms to “notify, on a durable medium, to the business users concerned any proposed changes of their terms and conditions” and wait at least 15 days before implementing those changes.

In the last place, talking specifically about Twitch, the “live exclusivity clause” is an aspect that affects remuneration and termination of the working relationship. Thus, it should be subject to negotiation, which will lead to the adequation of the streamers’ earnings.

At the moment, there are no legislative protections – neither present nor future – in this regard.

4.2 Community Guidelines

As we have discussed above, considering that it is unrealistic to regulate every possible human behaviour, the Guidelines need to be as comprehensive as possible. However, their significant presence of ambiguities is the cause of two types of issues.

4.2.1 Unequal Treatment

Both on YouTube and Twitch, the platforms’ discretionary interpretation of their policy guidelines leads to unjustified discrimination between creators. Some can be punished by the platform for behaviour that others conduct with no consequences. For Twitch, we have seen the example of ‘Amouranth’; for YouTube, the ‘Adpocalypse gate’ and the case of ‘Flip’. Moreover, the history of suspension is full of easily avoidable suspensions, as mentioned in the NOSTreamDay’s Manifesto.

On the latter point, Article 17(7) GDPR protects the creative process of creators by covering them with copyright exceptions or limitations related to “quotations, criticism or reviews” or the use of works for “caricature, parody or pastiche” purposes. Especially for what concerns YouTube’s AI-based reporting system, the situation might be improved by AI Act. Article 13 requires the High-risk AI systems to be de-

signed and developed in a manner that users are able to understand its implication and the way to use them in the proper way for working.

Moreover, a big change can be brought by the DSA. Article 26 obliges the platform to conduct – at least once a year – an assessment of the “significant systemic risks stemming from the functioning and use made of their services in the Union”, with a specific focus on “any negative effects for the exercise of the fundamental rights to respect for [...] the prohibition of discrimination” and taking into account how their “content moderation systems [...]” influence those risks. Consequently, article 27 imposes on them the obligation to mitigate those risks by adopting tailored, reasoned, proportionate and effective measures.

4.2.2 Exploitation by the Platforms

The issue of discrimination – flowing from the ambiguity of the policies – is not only due to the type of reporting system (on Twitch) or to the inner limits of the platforms’ moderation teams but also to the hidden entrepreneurial decisions made by the platforms, whose have the whole control on what can be done and whatnot. The ambiguities are purposely exploited by the platforms within the disciplinary process.

On this point, Article 11 P2B requires an internal complaint-handling process based on principles of transparency, proportionality, and equal treatment.

Moreover, for what regards YouTube’s AI-based reporting system, Article 23 DSA requires platforms to report on “any use made of automatic means for the purpose of content moderation” including “a specification of the precise purposes, indicators of the accuracy of the automated means in fulfilling those purposes and any safeguards applied”.

Lastly, it is worth mentioning again YouTube’s copyright rules and the case of ‘The Pruld’. Creators using copyright protected music – even if it is a remake – see their video demonetised in favour of the owner of the song without any recognition of the visual and editing work done. Whereas, when the creators’ content is free-booted, the platforms offer them no possibility to monetise, just to ban the free-booted content.

4.3 Reporting System

For what concerns the reporting system, we have seen different problems within YouTube and Twitch due to their different starting points.

On Twitch, the problem is threefold.

Firstly, there is discrimination between the smaller channels and the bigger ones. Considering that the system is based on viewers’ reports, the bigger channels are more likely to be reported, while for the same behaviours, smaller channels are more likely not to be noticed.

Secondly, there are as well groups of organised flaggers who exploit the user-based reporting system to impair the work of creators whom they do not like.

Thirdly, the other side of the coin is the moderation of the community. The platforms usually give creators some tools to auto-moderate their channel, yet there is a lot more to do.

On the other hand, YouTube heavily relies on the algorithmic flag of content.

This is a preventive policy which leaves the creators with no defence prior to the demonetisation. Only after the flag creators can request a human review. However, the human checks usually arrive too late with respect to the viewing peaks, thus completely eliminating all the creators' potential earnings. Creators try to circumvent this system in two ways.

Firstly, pre-uploading the content days in advance. However, there are formats that rely on daily (or else, frequent) publication and thus cannot be pre-uploaded in advance.

Secondly by "trial and error solutions". However, those solutions are far away from being definitive, considering that every time the platform changes the algorithm slightly, creators need to start from zero in their testing of the AI.

A crucial provision in this regard is Article 7 PWD, which imposes on the platforms to "ensure sufficient human resources" for "regularly monitor and evaluate the impact of individual decisions taken or supported by automated [...] decision-making systems, on working conditions".

4.4 Disciplinary Procedure

Last but not least is the disciplinary procedure. The process of appealing a platform's decision is very problematic for creators. Let us address the common issues between YouTube and Twitch.

Firstly, this is an ex-post measure which does not interrupt the negative consequences of the disciplinary measure.

Furthermore, the length and inconclusiveness of the process of assistance frustrate even more the earnings of the creators. In some cases, especially with the Twitch permaban measure, the length and unpredictability of this process are devastating for the working life of the creator, as we have seen in the case of 'Sdrumox'.

Article 11 P2B requires that the internal complaint-handling process has to work within a reasonable time frame.

Art.17(9) Copyright Directive requires an effective and expeditious complaint and redress mechanism.

The new proposals are likely to strengthen creators' rights significantly in this regard.

On the one hand, article 17 DSA obliges platforms to grant creators access – for a period of at least six months following the disciplinary decision – to an internal complaint-handling system which must allow the recipient to submit "sufficiently precise and adequately substantiated" complaints. Moreover, it requires the platforms to handle the complaints in a "timely, diligent and objective manner", eventually reversing the decision – without undue delay – if the complaint is successful.

On the other hand, article 6 PWD imposes an obligation on platforms to provide information to digital platform workers on the use of automated decision-making systems, the categories of decisions, the parameters taken into account with their relative importance, and lastly, the grounds for decisions. Moreover, the information “shall be presented in a concise, transparent, intelligible and easily accessible form, using clear and plain language”. Moreover, article 8 grants creators the right to “request the digital labour platform to review that decision” with a “substantiated reply without undue delay and in any event within one week of receipt of the request”.

As it was not enough, even in the case of a successful claim, creators have no right to compensation for the economic losses and the damage to their image.

At the present moment, Article 4 P2B just establishes the platforms’ duty to reinstate the business user without undue delay.

The PWD can make a huge difference. In fact, Chapter V grants the creators “have access to effective and impartial dispute resolution and a right to redress, including adequate compensation, in the case of infringements of their rights [...]”.

Secondly, there is a clear lack in terms of human checks.

On one side, the interaction with automatic assistance – often useless to understand the issue at stake, with just referral to a general policy guideline without further explanation – substitutes most of the time the possibility of speaking with a human moderator.

On the other side, there should be a human checks on the previous content, the streamer's history, and an in-depth evaluation of the case before proceeding with the suspension.

Article 22(1) GDPR grants creators the right to not be subject to a decision SOLELY (however, any kind of human interaction interferes with the application of this provision) based on automated processing which produces legal effects SIGNIFICANTLY (yet, it is hard for the creators to actually demonstrate this blurred requirement) affects them. Consequently, the provision requires the data controller to “implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests”, at least “the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision”.

A small change can be brought by article 17 DSA, which obliges platforms to ensure that disciplinary decisions “are not solely taken on the basis of automated means”.

Thirdly, both platforms manipulate creators’ visibility without any notification. This practice is more disruptive for YouTubers than for Streamers because the former sees their organic view diminishing drastically, and so do their earnings.

Article 4 P2B requires the platforms – that impose restriction or suspension of the service provided to the creators – to notify the creators of the measure with a statement of reasons which refers to the specific facts, circumstances and grounds.

The DSA goes in the same direction. Article 12 specifies that the platforms shall act

in a “diligent, objective and proportionate manner” in the application and enforcement of the above-mentioned restrictions. Article 15 obliges the provider of hosting services – when it “removes or disables access to specific items of information provided by the recipients” – to inform the recipient about the decision and to “provide a clear and specific statement of reasons for that decision”.

Lastly, at the moment, creators have no possibility to refer to third-party entities to appeal platform decisions.

Article 12 P2B obliges platforms to identify two or more mediators to deal with creators’ complaints. Moreover, it states that, in any case, creators must always be able to enjoy effective legal safeguards.

The DSA can bring significant changes on this point. Article 17 obliges the platforms to inform the recipient about the possibility of “out-of-court dispute settlement” – which has to be established ex article 18 – and “other available redress possibilities”.

Conclusion

The objective of this dissertation was to assess the labour conditions of YouTubers and Streamers within the EU.

Evidently, this work could not provide a detailed analysis of the numerous legal issues that arise in this new kind of work. Such analysis would go far beyond the scope of this work and must necessarily be left to later studies⁵¹. Rather, the focus is on providing an initial overview of the law issues related to the relationship with VLOPs – such as YouTube and Twitch – in particular concerning content moderation and disciplinary measures.

Nonetheless, this narrow analysis has revealed several gaps in the current EU legal framework, even in light of the upcoming legislation. The legal answer to fill these gaps has to come at the EU level rather than a national one. This is because of the intrinsic cross-border nature of the platform services in question: “regulatory fragmentation will seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large” (DMA 2020).

We need EU harmonisation; we need a comprehensive instrument which addresses the figure of content creators and of all people performing platform work that cannot be classified as an employee but still are economically dependent on the choices of the platforms on which they operate.

Even if, in the end, content creators are going to be categorised as self-employed, they perform a new kind of self-employment, which call for protection from the unilateral and unfair decision of the platforms that host them. The tailored protection

⁵¹ There are numerous topics – that I have discussed with creators during my interviews – left aside from this Dissertation. Just to briefly mention them: the psychological pressure which derives from the need to be present on platform to not lose the position (e.g., giving no effective holiday break to Streamers) and updated with rules, and trends to not lose the competitive advantage and the organic view; the lack of a clear VAT number, which leave creators in a risky position to be a tax evader; the struggle of trade union / syndicates movements; the national institute lack of data about the creator economy phenomenon; and so on.

needed can be achieved by switching the focus on the latter actor: considering platforms as responsible entities for compliance with a basket of rights and obligations – with the legislative presumption that creators qualify for these rights – is a feasible solution.

List of abbreviations

ADS - Advertisement

AI - Artificial Intelligence

CFR - European Charter of Fundamental Rights

CJEU - Court of Justice of the European Union

CSDD - Corporate Sustainability Due Diligence

DMA - Digital Market Act

DSA - Digital Services Act

EU - European Union

GDPR - General Data Protection Regulation

PWD - Platform Working Directive

VLOPs - Very Large Online Platforms

References

Antonucci Alberta, Tatiana Biagioni, Notarianni Aurora (2012). *Indagine conoscitiva sui lavoratori che svolgono attività di creazione di contenuti digitali*. XI Commissione (Lavoro pubblico e privato) della Camera dei deputati (n.d.). https://www.camera.it/leg18/1079?idLegislatura=18-&tipologia=indag&sottotipologia=c11_contenuti_digitali&anno=2021&mese=07-&giorno=13&idCommissione=11&numero=0009&file=indice_stenografico.

Cardinali Paride (2022). Interview with The Pruld. Google Meet, 25 April 2022.

Charter of Fundamental Rights of the European Union (2000). Pub. L. No. 2000/C.

De Giorgio Cristian (2022). Interview with Flip. Email, 14 March 2022.

Directive (EU) (2019). *On copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*. Pub. L. No. Directive 2019/790, 34.

European Commission (2022). *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071>

European Commission (2021). *Proposal for a Directive on Improving Working Conditions in Platform Work*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:762:FIN>

European Commission (2021). *Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206>.

European Commission (2020). *Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN>.

European Commission (2020). *Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN>.

European Union (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). <https://eur-lex.europa.eu/eli/reg/2016/679/oj>
- European Union (2019). *On promoting fairness and transparency for business users of online intermediation services*. <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX:32019R1150>
- Flora Matteo. Interview with Matteo Flora. Phone call, 15 April 2022.
- f10nki. Interview with f10nki. Skype, 9 May 2022.
- Hacker Philipp, Krestel Ralf, Grundmann Stefan, Naumann Felix (2020). "Explainable AI under Contract and Tort Law: Legal Incentives and Technical Challenges". *SSRN Electronic Journal*, 2020. <https://doi.org/10.2139/ssrn.3513433>.
- Pirruccio Paolo (2022). Interview with Nocoldiz. Google Meet, 27 April 2022.
- Potié Julien (2022). Interview with Potié Julien (Chief of staff and producer of HugoDécripte). Google Meet, 12 April 2022.
- Santoro Gianpiero (2022). Interview with Gianpiert. Google Meet, 22 April 2022.
- Scialdone Marco, Greco Angelo, Bennato Davide (2021). *Indagine conoscitiva sui lavoratori che svolgono attività di creazione di contenuti digitali*. XI Commissione (Lavoro pubblico e privato) della Camera dei deputati. https://www.camera.it/leg18/1079?idLegislatura=18&tipologia=indag&sottotipologia=c11_contenuti_digitali&anno=2021&mese=04&giorno=28&id-Commissione=11&numero=0001&file=indice_stenografico.
- Uber BV and others v Aslam and others (2021), No. UK Supreme Court (19 February 2021).
- Urbanczyk Piotr (2022). Interview with Copernicus. Google Meet, 25 April 2022.

Sitography

- 'About Account Enforcements and Chat Bans'. Accessed 10 April 2022. https://help.twitch.tv/s/article/about-account-suspensions-dmca-suspensions-and-chat-bans?language=en_US.
- 'Become a Channel Member on YouTube - Android - YouTube Help'. Accessed 11 April 2022. <https://support.google.com/youtube/answer/6304294?hl=en&co=GENIE.Platform%3DAndroid#zippy=%2Cbecome-a-channel-member>.
- Breaking Italy. *ADPOCALYPSE 2 e FAKE NEWS in ITALIA: Cosa Sta Succedendo?*, 2017. <https://www.youtube.com/watch?v=L0vE7cUyKVU>.
- Breaking Italy. *Cosa è VOXPOCALYPSE, La Nuova "Tragedia" Abbattutasi Su YouTube*, 2019. <https://www.youtube.com/watch?v=ZNZTa2kUm5M>.
- 'Channel Analytics'. Accessed 10 April 2022. https://help.twitch.tv/s/article/channel-analytics?language=en_US#RevenueBreakdown.
- 'Community Guidelines'. Accessed 10 April 2022. https://safety.twitch.tv/s/article/Community-Guidelines?language=en_US.
- 'Community Guidelines Strike Basics - YouTube Help'. Accessed 13 April 2022. <https://support.google.com/youtube/answer/2802032?hl=en>.
- Geyser, Werner. 'Creator Earnings: Benchmark Report 2021'. Influencer Marketing Hub, Accessed 07 April 2022. <https://influencermarketinghub.com/creator-earnings-benchmark-report/>.
- McLaughlin. 'Twitch, in Response to Action against Hot Tub Streamers, Promises Not to Discriminate against "sexy" People'. 21 May 2021. Accessed 12 May 2022. <https://sports.yahoo.com/twitch-response-action-against-hot-193457499.html>

'Joining the Affiliate Program'. Accessed 10 April 2022. https://help.twitch.tv/s/article/joining-the-affiliate-program?language=en_US

Open. 'La rivolta degli streamer di Twitch: inizia il #nostreamday. Mr. Marra: «È un lavoro, vogliamo più diritti»', 9 December 2020. <https://www.open.online/2020/12/09/la-rivolta-degli-streamer-di-twitch/>.

'Manage YouTube Super Chat & Super Stickers for Live Chat - YouTube Help'. Accessed 11 April 2022. <https://support.google.com/youtube/answer/7288782?hl=en>.

'#NoStreamDay — Il Manifesto Degli Streamer Di Twitch'. Accessed 10 April 2022. <https://www.nostreamday.com/>.

Twitch.tv. 'Twitch.Tv - Affiliate Agreement'. Accessed 10 April 2022. <https://www.twitch.tv/p/en/legal/affiliate-agreement/>.

Twitch.tv. 'Twitch.Tv - Partners'. Accessed 10 April 2022. <https://www.twitch.tv/p/en/partners/>.

'Video On Demand'. Accessed 10 April 2022. https://help.twitch.tv/s/article/video-on-demand?language=en_US.

Powned.it. 'xQc si scaglia contro Amouranth, IndieFoxx e la politica troppo leggera di Twitch! (CLIP)', 24 June 2021. <https://www.powned.it/generale-news/xqc-si-scaglia-contro-amouranth-indiefoxx-e-la-politica-troppo-leggera-di-twitch/#:~:text=Uno%20dei%20protagonisti%20principali%20della,caso%20come%20%E2%80%9Dtroppo%20leggera%E2%80%9D>.

Wikitubia. 'YouTube Adpocalypse'. Accessed 11 April 2022. https://youtube.fandom.com/wiki/YouTube_Adpocalypse.

theWise Magazine. 'Youtube Adpocalypse, la fine dell'Internet come lo conoscevamo', 11 January 2020. <https://www.thewisemagazine.it/2020/01/11/adpocalypse/>.

'YouTube Channel Monetization Policies - YouTube Help'. Accessed 11 April 2022. <https://support.google.com/youtube/answer/1311392?hl=en>.

'YouTube Partner Earnings Overview - YouTube Help'. Accessed 11 April 2022. <https://support.google.com/youtube/answer/72902?hl=en#zippy=%2Cwhats-my-revenue-share>.

'YouTube Partner Program Overview & Eligibility - YouTube Help'. Accessed 11 April 2022. https://support.google.com/youtube/answer/72851?hl=en&ref_topic=9153642.

Yuan, Yuanling, and Josh Constine. 'SignalFire's Creator Economy Market Map'. Accessed 7 April 2022. <https://signalfire.com/blog/creator-economy/>.

The EU use of social media in crisis management: from Afghanistan to Ukraine

Álvaro Garrote Fuentes

Introduction

The formulation of the Lisbon Treaty in 2007 reshaped the political-institutional framework of the European Union. The transfer of competences to supranational bodies was granted with the endorsement of the national sovereignty of the different member states, reinforcing the idea of a sovereign Europe. This institutional reform granted clear competences in terms of who has the decision-making capacity in the event of a possible crisis.

A volatile society such as today's needs to be clear about how to act at any given moment, although forecasting is difficult to establish, even more so when there is such interdependence between global actors. In this context, the objective of this research is to gain an insight into the functioning of the European Union in the field of crisis management. To do so, it will start with the institutional framework and the procedure that has been progressively established in this field.

The focus of this research goes beyond looking at questions of competences assigned by the treaties, but will present an empirical approach, in order to find out how the different EU institutions actually act. For this reason, the study of crisis management from the perspective of communication is proposed. Is there a joint social communication strategy launched by the EU in times of crisis, and what are the hallmarks of the messages issued by EU crisis management actors? These are some of the questions that motivate this research and to which the reader will find answers.

The great lack of confidence that European citizens have in the EU project is due to a lack of knowledge about the activities of its institutions and the benefits it carries. Based on this premise, the aim is to analyse the communication management carried out by the major European political actors. To do so, we will use the social media channel Twitter, a consolidated medium in political communication, since it

provides a platform for all these actors to communicate and, at the same time, provide content for their communication, as it enables information to be simultaneous, differentiated, retransmitted and received by all parties (Campos Rodríguez 2017: 786).

Strong institutions require legitimacy on the part of citizens, and for this to happen, communication must be at the centre of action. In times of crisis, citizens are

particularly vulnerable and want to be informed at all times. If institutions fail at such times, trust will fall and institutional fatigue will spread among the public, threatening the very existence of the European project.

What number do I call when I want to speak to Europe? This idea of Henry Kissinger's would serve to explain what is happening in politics today. Moreover, there are discussions within academia on this issue, analysing the shift in politics at the national level from party affiliation to candidate politics, where political leaders are everything, in line with the so-called personalisation of politics¹. A good leader is a guaranteed victory, while a bad leader will not win support. At the European level it is the same, who is the decision-maker at the European level, who has the final say. Citizens have not a clear idea; communication is flawed.

From a communication point of view, the strategy used to disseminate one message or another has to be planned, since a large part of the success and the possible connection with citizens can come through this channel. In unstable times and the rise of populist-nationalist forces, the European Union must act firmly and reach out to citizens through all available channels.

Information and communication technologies have acquired a fundamental role in post-modern society, multiplying the possibilities for institutions to practice communication and public diplomacy. At the same time, this evolution can be a deterrent, as other actors may develop the same strategy to ensure that their message has an impact on society.

The empirical character of the present research is produced through the analysis of two case studies, allowing comparisons to be made between the two and a series of conclusions to be drawn. On the one hand, the focus will be on events in Afghanistan in August 2021. Since 1979, with the Soviet invasion of the territory, the country has been marked by conflict and war. Today, we find a country on the brink of collapse, both economically and socially.

The international community's response to humanitarian demands has alleviated the catastrophe in the territory, with peace and ceasefire appearing to be a necessity in the area. The focus on this conflict is to measure the role the EU played in mediating what was provoked by the Taliban takeover of Kabul, thus ending the country's pseudo-democratic regime².

For its part, Russia's invasion of Ukrainian territory challenged the international security paradigm. The EU as a global actor has mobilised, unanimously condemning the actions of Russian forces. Similarly, up to five sanctions packages have been imposed on the Kremlin by the EU. There has been no shortage of solidarity in terms of humanitarian aid from the 27 member states, as well as mechanisms for action by European institutions. Analysing the communication strategy in this scenario will be

¹ Van Aelst, Peter, Tamir Sheafer, and James Stanyer. "The Personalization of Mediated Political Communication: A Review of Concepts, Operationalizations and Key Findings." *Journalism* 13, no. 2 (February 2012): 203–220, <https://doi.org/10.1177/1464884911427802>; Mcallister Ian. "The Personalization of Politics" *The Oxford Handbook of Political Behaviour* (2007).

² Daniel Rajmil, Lucía Morales, Toni Aira, Mariona Cardona Valles, "Afghanistan: A multidimensional crisis," *Peace Review* (2022):1-10 doi: 10.1080/10402659.2022.2023428

crucial to understand whether proximity is an element to take into account when designing the communication strategy.

In general terms, a comparison of the two case studies will allow us to identify whether there really is a strategy in terms of social communication. In this way, it will be possible to identify whether there is a multiplicity of messages from the European institutions or whether, on the contrary, there is real communication coordination. Furthermore, it will be interesting to compare the two cases, as elements such as geographical proximity to the conflict can play an important role in defining crisis communication. The presentation of the framework provided by the treaties and the case studies will show whether there is real cooperation and coordination between EU institutions and bodies.

At this point, and given the importance of crisis management by the EU, it is obvious that citizens want to know what is happening and what actions are being taken to solve the problems. This is because a globalised world means that the consequences of conflicts can have a direct impact on citizens. The EU's legitimacy is at risk, as is its integrity. Using a content analysis methodology, the EU's communicative strategy in the face of the aforementioned international crises will be observed. Communication must be efficient and effective so that public opinion is not filled with negative perceptions, and the EU's external communication policy has a crucial role to play in this.

1. Literature review

1.1 EU as a crisis manager

How the European Union has tried to work and act from its institutions with crisis management leads us to make this theoretical presentation of what the different authors have said and investigated on this issue. In this context we have to understand that we are approaching the topic from two perspectives, either on the side of the institutions or on the side of the citizens.

The European institutions, like any other organisation, seek to achieve confidence on the part of citizens and they should be perceived by them as legitimate and efficient. Trust in institutions is everything, as they need it to carry out their actions on a day-to-day basis. Gray and Balmer explore how important reputation can be for an organization. They define reputation as "the aggregate evaluation constituents make about how well an organisation is meeting constituent expectations based on its past behaviours" (Gray and Balmer 1998:696). In this sense, the researchers conclude that the maintenance of the reputation allows the institution not to spend time repairing the possible damage (Gray and Balmer 1998:696).

However, it will not be easy to achieve this, as many factors come into play. The way in which the European Union acts to alleviate crisis situations will be presented in the following paragraphs.

The actions taken by the EU policies tend to consolidate, accelerate or even to initiate when threats assail the Union (Sperling and Webber 2019: 228). Thomas Persson, Charles F. Parker and Sten Widmalm present the idea that

Transboundary events of this kind or national events that exceed the capabilities of a single country to handle alone are some of the principal reasons why the EU has assumed an increasingly central role in the management of crises (2017: 102).

In this context it has to be presented that the Treaty on the Functioning of the EU includes in its Article 222 the solidarity clause in which the European Union and all its Member States have the obligation to assist each other in case a MS may potentially be affected by external treat³. The EU seeks to coordinate global action due to effective crisis management “depends on the capacity of managers, decision-makers, involved organisations, and stakeholders to contribute to the various specific phases and activities that make up crisis management” (Persson, Parker, and Widmalm 2017: 99).

The solidarity attitude is not an easy one to follow by the MS. The conceptualisation of sovereignty is crucial in this aspect. In order to activate the solidarity clause, who should be the one in charge of declaring the state of emergency? Among the reflections presented by the academic Nikolay Pavlov, we can find the idea that was pointed out by Carl Schmitt, the German constitutional jurist. Smith defined the sovereign “as the one who can proclaim a state of emergency” (Pavlov 2015: 25). Overall, in order to shape EU crisis management policy it should be taken into account the relation between crisis management and national sovereignty, mostly because the MS are reluctant to relinquish powers (Pavlov 2015: 25).

The European Union is identified as the main player in these operations. It is since 1999 that the EU has incorporated “new procedures and structures for the deployment of military and civilian crisis management in the framework of ESDP” (Gourlay 2004: 405). According to Pavlov, this occurs because the international agenda was interrupted by the end of the Soviet bloc and the Kosovo Crisis, generating a signal in the EU institutional framework (Pavlov 2015: 24). In this sense, Pavlov follows the discussion pointing out that

unlike the North Atlantic Treaty Organization (NATO) which has crisis management as a core task from the outset, the European Union was not designed to play the role of a crisis manager (Pavlov 2015: 23).

It is also for this reason why the EU works in cooperation and in partnership with other organizations like the UN, NATO and the OSCE (Stewart 2008: 229).

When it comes to crisis management we find that Comfort *et al.* explain that on this subject, we can differentiate several activities such as “threat assessment; prevention and mitigation activities; preparedness/early warning; response; and recovery” (Demchak, Boin, Comfort 2010). All in all, the goal is to reduce risk and present resilience as an institution. In the context concerning the current research we need to point out that the EU crisis management policy has been fed, on the one hand, by the EU security and defence policy, and, on the other hand, by EU emergency and disaster policy (Pavlov 2015: 25).

Following the same line, the increased importance of the topic can be noticed in the acquisition of a legal status and recognition by the TFEU. Pavlov discuss that

³ Article 222, " Consolidated Version of Treaty on the Functioning of the European Union." October 26, 2012. OJ C326/47

within the discourse of the Common Security and Defence Policy (CSDP) the term 'crisis management' includes the Petersberg Tasks – humanitarian and rescue tasks, peacekeeping tasks, tasks of combat forces including peace-making (Pavlov 2015: 25).

An important remark that has to be made at this stage is the treatment that is made by the legal framework of EU of the concept "crisis". What we have point out so far is the relation of the concept with the military environment, but in the TFEU it is referred to monetary policy, indeed, economic aspects⁴. Pavlov reflects on the idea that

[the term] is not directly referred to in the part on EU External Action (where CSDP is situated) or in the special provisions on the Common Foreign and Security Policy (CFSP) which technically remain part of the Treaty on the European Union (TEU)" (Pavlov 2015: 27).

The Lisbon Treaty generates a huge advance in terms of outlining the EU crisis management system. Some of the components of this new system are the establishment of the Standing Committee on Operational Cooperation on Internal Security and the function of the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission (HR/VP)-giving a coherent shape to the EU external action- and set up the European External Action Service (EEAS) (Pavlov 2015: 27).

Another important idea developed by the Lisbon Treaty was the attribution of competences in the field of crisis to the different institutions. In this sense we can see the tasks of each institution.

Firstly, we should pay attention to the role of the Council of the European Union. Since the Lisbon Treaty, this institution has been seen as the key decision-making organ in times of crisis, mostly because it acts as a Foreign Affairs Council. It still must be mentioned that in the year 2000 within the Council was founded the Political and Security Committee, in charge of "exercising political control and strategic direction of EU crisis management operations" (Pavlov 2015: 33). The European Council remains "as the major political peace-setter acting on a consensual basis and governments cannot be outvoted there" (Falkner 2016: 955). It should be marked that as evolution of the political body the formal consensus requirements have been relaxed over time (Falkner 2016: 955).

Secondly, we bring the newly (in comparison with the others) established EEAS. From this position, the HR/VP tries to help the European Union become more visible and effective at the international level through foreign police. In other words, the EU tries to develop via the EEAS a coherent foreign policy and be in terms of security policies presence in the world (Csernatonni 2021:87). In spite of that, one of the critics arrives at the stage related to the policy-making by EEAS, presenting lots of limitations.

Thomas E. Henökl presents the EEAS as "an organisational hybrid with inbuilt ambiguities, stemming from the pre-Lisbon pillar structure, with competence areas di-

⁴"Consolidated Version of Treaty on the Functioning of the European Union." October 26, 2012. OJ C326/47

vided between community institutions and the members” (Henökl 2015: 680). Bátorá agrees with Henökl in the “hybrid” character of this institutional body. He remarks that the EEAS holds a “character, combining political, diplomatic and administrative structures and tasks” (Bátorá 2013: 603). Some concrete actions and responsibilities we can allude to are co-responsibility for foreign aid and development, civilian and military crisis management or defence cooperation (Bátorá 2013: 607). We can conclude that dealing with crisis and providing a potential response is a task attributed to the EEAS, due in the organisation chart itself can be distinguish how Charles Fries was appointed as Deputy Secretary-General for Common Security and Defence Policy (CSDP) and crisis response, being the last responsible for the Directorate of Integrated Approach for Security and Peace and Security and Defence Policy Directorate (Csernatoní 2021:93).

Among all the academics that have been working about the EEAS should also mentioned Powell and Colyvas. For them the hybrid character that was pointed out represents a lack of clarity regarding responsibilities. This generates opacity in terms of goals and vision. The authors also see how the overlapping of the jurisdictions can generate dysfunctional control and oversight mechanisms (Powell, Colyvas 2008: 283).

At this stage it should be mentioned that the position of the HR/VP was determined and corseted by the own Lisbon Treaty, so the room to act is not really big. The missions attributed to that portfolio were mostly based on two lines of action. On the one side, he/she should act as a bridge between the EU and the member states foreign ministers. On the other side, the HR/VP shares external policy competences with some Commission’s Directorate Generals.

Lastly, and coming back to the question about legitimacy, the HR/VP is invoke to the European Parliament, having to account and justify his/her policies choices (Powell, and Colyvas 2008: 283). In addition, “the HR has the right to put forward foreign policy proposals with the member states” (Vanhoonacker, Pomorska 2013: 1316) based on the Article 30.1 of the TEU. Sophie Vanhoonacker and Karolina Pomorska manifest that “having the right of initiative like in the case of the Commission is an important asset but not a guarantee of successful policy initiation” (Vanhoonacker, Pomorska 2013: 1320).

On the last division we present the European Commission. Within the Commission, the General Directorate for Civil Protection and European Humanitarian Aid Operations (DG ECHO) plays the most important role concerning crisis management. The DG, founded in 1992, holds the Civil Protection Community Mechanism and the Emergency Response Coordination Centre (ERCC), being one of the most valuable instruments for EU crisis response (Pavlov 2015: 34). In relation with the actions taken by the European Commission, there is a huge change with the implementation of the Lisbon Treaty. At the pre-Lisbon stage they were the member states those who were acting as motor of cooperation and integration. At the after-Lisbon setting the European Commission gained power with the Common Foreign and Security Policy (Vanhoonacker, Pomorska 2013: 1318).

All in all, we can notice how difficult it is to achieve policies in the field of security and defence can be. Emma J. Stewart supports that idea mostly because she thinks that within this institutional framework creating a coordinated conflict prevention policy is not an easy task due the policy-making actions being split among different pillars and institutions (Stewart 2008: 230). She adds “conflict prevention is in danger of becoming a token objective claimed by both institutions-referring to the Council and the Commission-, but practised by neither” (Stewart 2008: 246).

1.2 Communication in time of crisis

In the previous paragraphs, the idea of trust in the EU's institutions was presented, and by the same token, the idea of perception plays an important position. The perception that the citizens have about the European Union as a whole or about a specific institution can be changed and can migrate from a positive one to a negative one and vice versa.

At this level, it is worthy to mention the research conducted by Kim and Cameron, which shows that when it comes to evaluating a company (the same apply to institutions) citizens are guided by emotions induced by news frames (Kim and Glen T. Cameron 2011: 830). We can appreciate the link between organisations and citizens, and it is in this scenario that we want to highlight the importance of communication in general.

It is in this line where the majority of critics that the European Union sphere receives come. Mazzoleni presented in 2010 the idea that due to the European Union being a political system it should develop a political communication. He understood political communication as “the public exchange between the political system, the mass media and the citizens” (Mazzoleni cited in Rivas de Roca, García Gordillo 2021: 2). In the same line, Habermas theorised about the idea of public sphere, reflecting about it like “a common space, [where] citizens act as a holders of democratic legitimacy thanks to the mediated role of media” (Habermas cited in Rivas de Roca, García Gordillo 2021: 2).

When it comes to communication and actions taken by the EU's Institutions we need to mention the 2001 Leaken Declaration and the 2006 White Paper on the European Communication Policy. After his research, Andrino San Cristobal found that the EU has shown great concern about how to communicate and how to develop external communication (Andrino San Cristobal 2014). On the other hand, academics like Moravcsik follow the idea that the EU is distant to the public (Moravcsik 2002: 603-624).

This communication gap between the European Union and citizens may generate the disconnection and illegitimacy given by the citizens to the EU sphere. This described scenario tends to be avoided during crisis management situations.

The European Union to secure the public support, resources and legitimacy needed to build well-functioning crisis management and disaster response institutions” and the best way is through communication (Persson, Parker, Widmalm 2017: 100).

From the theoretical perspective Timothy Coombs launched the Situational Crisis Communication Theory (SCCT) in order to assess receivers of information and their perceptions and the attribution of responsibility to the organizations that they may generate (Coombs 2004: 270). The importance of this theory and why it is presented is due to it helping crisis managers to

Identify the best outlets to relay crisis responses and develop strategies to target key sources that might help or hinder attempts to maintain organizational reputation or manage publics' emotions toward the organization experiencing a crisis (Coombs 2004: 270).

Indeed, the focus should be done in the communication strategy that is done by the institutions.

In terms of strategy, Christian Kreuder-Sonnen launched that the main goals to achieve through the established strategy are the control of the public perception towards threat, in order to avoid the panic, and to avoid a deterioration of the crisis situation (Kreuder-Sonnen 2018: 966). In this regard, Kirk Hallahan defines strategic communication as "the purposeful use of communication by an organization to fulfil its mission" (Hallahan *et al.* 2007: 3). The idea that comes within the organisation is that every action in times of crisis can be seen as a form of communication, in this sense, everybody inside the institutional framework should see themselves as potentially strategic communicators (Hallahan *et al.* 2007: 11).

When it comes to crisis communications, if you always focus on building a relationship with your customers, fans, and followers, you will always find yourself communicating in the right direction (Buama 2018: 63).

With this statement, Melissa Agnes, international crisis management speaker, tries to approach the idea of how important the receptor, the person that is receiving the message, is for the sender-message part. In his handbook about crisis communication and crisis management, Chester C. Buama recognises that should be the ability of the communicator to identify the groups that need to communicate to and be good in order to adapt the message to all of them, in order to create an effective communication process (Buama 2018: 64).

The key aspect of crisis communication is to communicate. The target audience may be affected by the crisis, or maybe not, but the institution has to share all the information they have in order to combat all types of rumours that may appear. The main goal is to influence and inform the audience, an audience that have great expectations to the authorities. It is at this stage is where we find again that "if authorities fail to meet these expectations, the public tends to lose confidence in the management" (Buama 2018: 66) in charge of the institution.

Consequently, Buama identifies that an institution dealing with crisis should maintain its credibility, be transparent, be accessible and have and show expertise through its actions (Buama 2018: 67-68). In the same line, the mentioned Coombs suggests that institutions can anticipate to crisis thanks to the potential crisis communication plan (Coombs 2015: 143). According to Buama, the crisis communication

could be divided in three stages: crisis planning, crisis response and crisis recovery (Buama 2018: 76).

In relation with the first stage, crisis planning, the main goal is to assess the organisation itself. It means identifying vulnerabilities, allocating responsibilities and developing an interface for media interaction. Communication is a key component while assessing and creating a functional crisis plan. The second stage concerns the crisis response. All the actions taken are undermined by the own crisis. The interaction created with the media in the first stage is exploited here, due the skilled media spokesperson that would be the connection of the institution with the external world through this channel. The elements mentioned before (transparency, accessibility...) are required and should be exhibited at this phase (Buama 2018: 76).

When the crisis is over, the institution should start the recovery path. It will allow getting back to the normal operations, beside it will be difficult to achieve a full recovery. As Burma explains "the crisis provides an opportunity for the organizations to introspect own processes and system" or in other words "a period of renewal and a recommitment to the core principles under which the organization was founded" (Buama 2018: 77).

All in all, during this process it was highlighted how important it is to practice an active communication during crisis, in both an internal and external way. The impact of the message is a key aspect crisis manager need to deal with. Among features that a good message should have we find: simplicity, consequence, clear tone, key point presence and credibility on the behalf of the person presenting it (Buama 2018: 105).

In this context, and as a part of an evolving society, technologies are gaining an important position to help organisations and politicians to be connected with citizens. Nicholas Michelsen and Thomas Colley identify that "the emergence of digitised, networked media ecology has made communication appear increasingly important to achieving outcomes in international politics" (Michelsen and Colley 2019: 61). It is important to highlight that most of the conducted academic research has been focused in analysing the usage of social media during political election. Moreover, this is an important argument to support how important social media can be in the political arena.

Buama, the previous mentioned academic, includes among its steps in crisis communications a list of key actors, like the "social media manager". According to him this person would be "responsible for managing the social media content and communication for the organization during the crisis" (Buama 2018: 81). The online presence through social media channels can help as a powerful tool to reduce the possible panic and rumors situations. As the American researchers LaShonda, L. Eaddy and Yan Jin refer in their article, "Crisis history tells matter", "the crisis communication literature suggests that organisations can benefit from telling their crisis information before other sources such as media outlets" (LaShonda, Eaddy, Jin 2018: 230). To fulfil this purpose, social media channels are the best tools.

Certainly, social media brings lots of benefits when it comes to crisis response and resolution, but at the same time, the same social media is a form of crisis threat.

Everything depends on the usage that social media managers carry out. Coombs reflects that “just because you communicate during crisis does not mean you necessarily make the situation better” (Coombs 2015: 141). At the same time the mentioned crisis response strategy should avoid this scenario and protect the organisation by eliminating or reducing reputational damage (Allen and Caillouet 1994: 50).

If we pay attention to the receptor position, Lucinda Austin *et al.* expose that in times of crisis audience trend to use social media to check the latest news and events (Austin, Liu, Jin: 2012: 191). Institutions dealing with a crisis situation need to consider that “during crises, audiences turn to social media to find a wide variety of information and support, especially emotional” (Hilyard *et al.* 2010: 2294-2301).

Overall we can conclude this chapter with the reasoning that communication in general and social communication in particular, thanks to digitalisation, are an integral part of crisis communication. The most important element is that we can find how communication adapts to the new paradigms of society.

1.3 About crisis

In the previous paragraphs, different concepts and ideas have been presented. Through the literature compilation we could identify what researchers and academics have studied in terms of how the European Union institutions deal with crisis situation. Furthermore, the usage of communication and social media to connect these institutions with the citizenry has been also pointed out.

Despite all this, there is one idea missing in this literature review. The main concept we are dealing with is crisis, and for this reason the presentation of this concept should be done. Above all, the term is lack of a widely accepted definition. The researcher E. Stern considers crisis as

a situation, deriving from a change in the external or internal environment, characterized by three necessary perceptions in responsible decision-makers: threat to basic values, urgency and uncertainty (Stern 2003: 7-8).

The last element is addressed by Christian Kreuder-Sonnen in his article “Political secrecy in Europe: crisis management and crisis exploitation”. Kreuder-Sonnen agrees that “crisis are typically characterised by a high degree of uncertainty” (Kreuder-Sonnen 2018: 958-980). This uncertainty mostly arrives due there is a lack of knowledge possessed by crisis managers in terms of nature, causes and consequences of the potential crisis.

A basic idea that should be included in the conceptualisation of crisis is that it is a social construct, based on individuals’ perceptions. That means that a crisis situation is not determined by an objective reality, in other words, “it is a specific multidimensional political perception of a certain reality” (Pavlov 2015: 24). At this stage is where the idea of “agenda-setting” appears. There are issues and situations that often arise much more quickly than others. If there is a global perception and identification that an event is considered as a crisis the focus will be automatically around the conflict. The same idea is shared by Kleinnijenhuis *et al.* those who assert that “it can even be

said that, although crises have a real origin, in the end they are constructed from the interaction between various actors, whose perceptions produce real consequences" (Kleinnijenhuis, Schultz, Oegema 2015: 19).

In this last idea presented is where we can find the link between the importance of communication and the crisis solution. As crisis is an aspect subject to interpretation, crisis managers should act to avoid the possible downgrading of the institution. Connected with this idea we can find the neoinstitutionalisation theory presented by Allen and Caillouet that shows that "an organization is granted legitimacy if stakeholders believe an organization is good and/or has the right to continue operations" (Allen, Caillouet 1994: 47). This theory can be summarised with one of the ideas presented in the very beginning and that we have been defending "a crisis is a threat or challenge to an organization's legitimacy" (Allen, Caillouet 1994: 48).

In the same line, it is worthy to present the role played by public diplomacy. This conceptualisation is fundamental in crisis scenarios between international actors, and it can be considered as a fundamental tool to manage the situations that emerge from the different crisis. In this regard, communication still plays an important role because "diplomacy has fallen under the scrutiny of the media and public opinion" (Gilboa 2008: 55). About the idea of public diplomacy theory, there is important work done in order to develop a further theorisation. In this respect, Eytan Gilboa confirms that

despite the significant growth of public diplomacy in the study of contemporary international relations, scholars have not yet sufficiently caught up with or promoted theoretical research in this field (Gilboa 2008: 73).

Nevertheless, in the field of IR the interest about public diplomacy is not new. For example, social constructivism's scholars showed an interest in the study of public diplomacy consequences in crisis management. For the academic Nicholas Cull, public diplomacy is considered as an "international actor's attempt to manage the international environment through engagement with foreign publics" (Cull 2009:12). The same idea is collected by neo-liberal practitioners such as Joseph Nye, who considers public diplomacy as a tool to gain influence in the international arena thanks to offering attraction to certain actors. Following the same idea, for Nye public diplomacy is a concrete mechanism to deploy soft power (Nye 2008: 97).

After the discussion about crisis implications, we can conclude by presenting the crisis definition made by Timothy Coombs, previously mentioned academic, that fully synthesises all that has been pointed out: crisis as "the perception of an unpredictable event that threatens important stakeholder expectations and can seriously affect an organization's performance and generate negative results" (Coombs 2015: 146).

2. Methodology

2.1 Content analysis on twitter

Once the contextual-theoretical contents have been presented, we can proceed to explain the method used to carry out this master thesis. The methodology has become the cornerstone of the scientific work, as it is the most appropriate for achiev-

ing the specific motivation for this research. In this scenario it is necessary to present the objectives to be achieved at the end of the study. These can be seen below, split into a general objective and two specific objectives:

- General objective: To study the response mechanism to war crises that the Fundamental Treaties of the European Union grant to the different European institutions and supranational bodies.
- Specific objective I: To analyse the communication strategies promoted by the different European institutions that have been assigned competences in the field of crisis and conflict resolution.
- Specific objective II: To quantify the digital impact on the Twitter social media of the institutional discourse on the conflict in Ukraine and Afghanistan according to the resources and strategies applied.

The fulfilment of the designed objectives will allow the following hypotheses to be verified at the end of the research:

- Hypothesis I: The European Union shows a greater degree of commitment to events determined by proximity criteria. An approach that can be observed in the dissemination of messages on Twitter about the conflicts in Ukraine and Afghanistan.
- Hypothesis II: The degree of the European Union involvement in international conflicts will be greater in the early stages of conflicts. This trend can be seen in the case of Ukraine, to the detriment of Afghanistan, as the first conflict is a new cycle in international relations.
- Hypothesis III: The multiplication of voices in the European Union fails to unify the message and to achieve a common position and a common voice in times of crisis. This approach is observed during the conflicts in Ukraine and Afghanistan.

Bearing these premises in mind, the methodology applied to complete the research responds to the application of a study technique based on a comparative content analysis. For K. Krippendorff, content analysis "may become one of the most important research techniques in the social sciences" (Krippendorff 2004: 11) and furthermore details that "[content analysis] seeks to understand data not as a set of physical events but as symbolic phenomena, and in this way approaches their direct analysis" (Krippendorff 2004: 11). To Krippendorff, considered the father of content analysis, Raymond Colle reflects that content analysis can be conceived as

a set of research methods and techniques designed to facilitate the systematic description of the semantic and formal components of all types of messages, and the formulation of valid inferences about the data collected" (Colle 2011: 93).

In this way, the application of the comparative content analysis methodology, both quantitative and qualitative-discursive, is demonstrated. The analysis focuses on reviewing the activity and behaviour of political leaders at the inter-state level, in the context of the European Union, through social media, specifically through Twitter. To the justification of the choice of the method we must add the justification

of the techniques used. Andréu Abela, sociologist, determines that the use of content analysis in research with broad time frames is the most suitable tool (Andréu Abela 2002).

The time frame of the research is fifty-seven days, divided into two time periods. Each period corresponds to a case study, as the conflicts analysed take place at different times. The first period corresponds to the conflict in Afghanistan and twenty-eight dates are studied, from 15th August 2021 to 11th September 2021. The date of 15 August 2021 was chosen because that is when the Taliban took Kabul. 11th September 2021 is chosen as the closing date as the US orders the withdrawal of its troops from the field.

On the other hand, the second case study focuses on the conflict in Ukraine, which comprises 29 days of analysis. The timeframe of this part of the study runs from 24th February 2022 to 24th March 2022. The proposed one-month period is the most intense period of news after the Russian Federation's invasion of Ukraine on the 24th February 2022. The decision to choose the 24th March 2022 as the closing date corresponds to the fact that after a month of war the conflict is entering a stalemate phase. In fact, at this point Russia suggests focusing on the Donbass region. In addition, there is the practical justification that this is when the sample collation begins.

Before describing the procedure followed in the content analysis, it is particularly important to define the sample chosen to conduct the research.

2.2 Sample

It has already been briefly stated above that the sample is made up of social messages posted by political leaders at the inter-state level in the context of the European Union. The choice of Twitter as the social media where the entire sample is located is justified by the impact that this social platform has in terms of the reproduction and virilisation these messages can achieve (Pérez Curiel and García Gordillo 2020: 1142).

The tweets are authored by three key players at the European level:

- Ursula von der Leyen (@vonderleyen) ⇒ President of the European Commission
- Josep Borrell Fontelles (@JosepBorrellF) ⇒ High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission
- Charles Michel (@eucopresident) ⇒ President of the European Council

The choice of these actors is reflected in the theoretical framework of this research. These actors are the most decisive in terms of crisis management and security at the inter-state level, as the treaties have granted them competencies in terms of decision-making.

Therefore, the sample is composed of the tweets that these actors have published. Twitonomy software provides access to the tweets published by the actors under analysis. The general sample of tweets (n=661) is subjected to a thematic categorisation to obtain the specific sample (n=479). This sample includes only messages related to the thematic "conflict".

On the basis of these constants, and in order to fulfil the research objectives, as indicated by the content analysis technique, an analysis template-sheet is designed. The sheet includes 10 variables, corresponding to a triangulation of quantitative, qualitative and discursive elements. The variables can be seen below:

QUANTITATIVE VARIABLES	
No. of Tweets	Tweet Metrics - Likes - Retweets
QUALITATIVE-DISCURSIVE VARIABLES	
Thematic	Tweet Format
Use of Hashtags	Mentions
Audiovisual Content	Tweet Tone
Language	

Table 1: Content analysis applied to Twitter
Source: Own elaboration

The next phase to conduct the analysis of the different variables, as well as of the values that they may present, is to design a coding manual, allowing the data processing work to be speeded up.

The coding does not distinguish between quantitative or qualitative-discursive variables; the same pattern is applied in both scenarios. For every option within each variable is assigned a value from 01 to as many options exist. At the same time, a distinction is made between ordinal and nominal variables. In the research conducted we can find in the “number of MG” or “number of RT” a clear example of an ordinal variable. However, the variable “Use of Hashtags” is a nominal variable, as it has dichotomous values, YES or NO.

The last methodological step is data processing. The use of the statistical software IBM SPSS Statistics version 25 has been employed. The reliability of the inter-coders is calculated through Scott's Pi formula, presenting an error level of 0.98. From the exploitation of the data, it was possible to draw up contingency and frequency tables.

3. Results analysis

3.1 Twitter results analysis

After explaining the methodology followed for this master thesis, we proceed to the presentation and commentary of the data exploited in the analysis. In spite of having two different case studies, we have opted for a joint presentation of the results, i.e. handling the research data jointly. Thanks to the joint treatment of the information, it will be possible to draw a series of conclusions and thus fulfil the objectives and hypothesis that were set at the beginning of the research.

As indicated above, the analysis of results is the outcome of monitoring the activity of the different EU actors on which the focus has been placed: Ursula von der Leyen, Josep Borrell Fontelles and Charles Michel. Quantitative and qualitative-discursive elements will be identified in this assessment.

First of all, it is necessary to identify the specific sample universe. The quantitative analysis is the one that provides the information about the sample, identifying the metrics of each of the actors.

Of the total of 479 tweets that were submitted, there is a fairly even distribution in terms of the number of social messages posted by the different actors. It is worth noting that in the periods analysed, Josep Borrell is the one who uses Twitter the most to post social messages, while the President of the European Council, Charles Michel, has had the least social presence. There is a difference of 41 tweets between these two actors, while the European Commission Presidency is in an intermediate position, with a tweet difference of 29 tweets, with a total of 154 social messages.

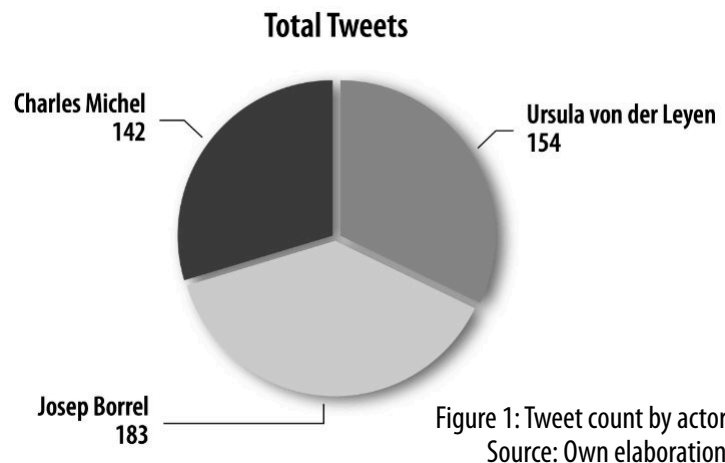


Figure 1: Tweet count by actor
Source: Own elaboration

In order to approach the hypotheses put forward, the next element presented relates social messages to both Afghanistan and Ukraine conflicts. Through a quantitative analysis it has been possible to identify how many tweets each political actor has published in each conflict scenario.

Looking at the different cells in the table 2, it is possible to identify the trend of each actor in both conflicts, Afghanistan and Ukraine. 81.8% of the tweets issued focus on the conflict that broke out in Ukraine, while only 82 of the 479 tweets refer to the situation in Afghanistan in August 2021.

Military Conflict Referenced by Actor					
EU Actor		Military Conflict Referenced			Total
		Afghanistan	Ukraine	None	
Ursula von der Leyen	Count	17	137	0	154
	% of Total	3,5%	28,6%	0,0%	32,2%
Josep Borrell	Count	34	144	5	183
	% of Total	7,1%	30,1%	1,0%	38,2%
Charles Michel	Count	31	111	0	142
	% of Total	6,5%	23,2%	0,0%	29,6%
Total	Count	82	392	5	479
	% of Total	17,1%	81,8%	1,0%	100,0%

Table 2: Tweets count by actor and conflict, source: Own elaboration

If we identify the trend that each actor has pursued we find no surprise. They all have the Ukrainian conflict in mind on a greater number of occasions. Josep Borrell was the actor who tweeted the most in both cases, posting 34 of the 82 tweets about the events in Afghanistan. It is striking that Ursula von der Leyen is the one who tweets the least in reference to the conflict in Afghanistan. However, it is Charles Michel who has the least social presence in the Ukrainian conflict.

Having presented the most relevant data from a quantitative point of view, it is necessary to focus on the evaluation of the most significant qualitative elements. Taking the specific sample of tweets (479) as a reference, we first analyse the thematic branding in the different social messages.

A total of nine thematics were identified to conduct the analysis:

- Attacks and Condemn
- Energy, Environment and Climate Change
- Disinformation
- Economy, Industry and Crisis
- Judicial Action, Sanctions
- Immigration, Security, Evacuations
- Equality and Social Rights
- Diplomacy
- Others

One of the issues of most interest in this research is the relationship between the actors and the thematic, in order to identify which issues have monopolised the agenda of the different profiles.

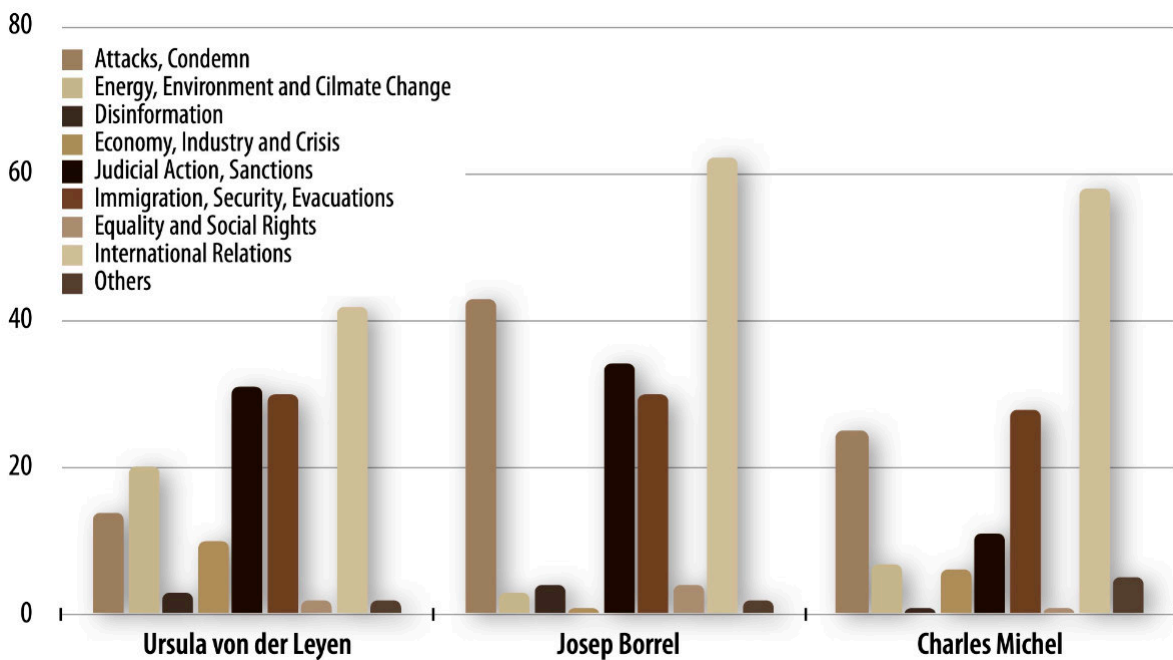


Figure 2: Thematic and EU actor, source: Own elaboration

The thematic focus of each of the actors can be visually identified. It is unanimous that “diplomacy” is the most frequently used theme. Under this thematic, the tweets that were categorised were the ones that showed a bilateral and multilateral relations between the actors and third parties.

With respect to other themes used, it can be identified that a large part of the tweets published by von der Leyen focus on “judicial actions and sanctions”. This topic presents a great contrast in the profile of Charles Michel, being the fourth theme most

used by him. By the use of the thematic “judicial actions and sanctions”, it is possible to see the weight that the different institutions have when it comes to adopting sanctions, with the European Commission being the benchmark in this respect.

It is Josep Borrell who in his Tweets most condemns the attacks and who focuses on posting tweets about the conflicts themselves, thus following up on the latest developments. Another theme that stands out symmetrically in the profiles analysed is “immigration, security and evacuations”, with most of the tweets under this classification being dedicated to reporting on the evacuations of civilians that were taking place.

Finally, another topic that has a great weight in the total number of tweets published is “energy, environment and climate change”. An example can be found in Ursula von der Leyen’s profile, 20 of her tweets focused on this topic. The presence of the energy issue on the political agenda of the different actors is justified by the conflict in Ukraine, as it points out the EU-Russia dependence on energy supplies.

After the evaluation of the data, it was observed that another interesting element in the content analysis is to see the relationship between the thematic identified and the conflicts analysed as case studies.

The table shows the issues frames that were present in each conflict, thus generating the political agenda of the actors analysed.

In order to facilitate the interpretation of the data, the relevant figures are highlighted. The most frequently used topics in social messages are “diplomacy” and “immigration, security and evacuations”, accounting for 33.8% and 18.4% of tweets.

The major impact that the issue frame “diplomacy” has in the previous paragraphs is that it represents the spirit of the EU as a global actor in conflict resolution.

Tweets’ Tematic					
Tweet’s Specific Topic		Military Conflict Referenced			Total
		Afghanistan	Ukraine	None	
Attacks, Condemn	Count	7	71	4	82
	% of Total	1,5%	14,8%	0,8%	17,1%
Energy, Environment and Climate Change	Count	0	30	0	30
	% of Total	0,0%	6,3%	0,0%	6,3%
Disinformation	Count	0	8	0	8
	% of Total	0,0%	1,7%	0,0%	1,7%
Economy, Industry and Crisis	Count	0	17	0	17
	% of Total	0,0%	3,5%	0,0%	3,5%
Judicial Action, Sanctions	Count	2	74	0	76
	% of Total	0,4%	15,4%	0,0%	15,9%
Immigration, Security, Evacuations	Count	30	58	0	88
	% of Total	6,3%	12,1%	0,0%	18,4%
Equality and Social Rights	Count	2	5	0	7
	% of Total	0,4%	1,0%	0,0%	1,5%
Diplomacy	Count	38	124	0	162
	% of Total	7,9%	25,9%	0,0%	33,8%
Others	Count	3	5	1	9
	% of Total	0,6%	1,0%	0,2%	1,9%
Total	Count	82	392	5	479
	% of Total	17,1%	81,8%	1,0%	100,0%

Table 3: Tweet’s tematic, source: Own elaboration

On the other hand, “immigration, security and evacuations” issues are a consequence of both case studies. The consequences of the conflict on the civilian population force them to leave the country. Here again, the EU's position is crucial in terms of evacuations.

The table highlights the theme “judicial action and sanctions” in the Ukraine conflict. More specifically, 15.4% of the tweets referring to the conflict in Ukraine focus on this topic. Looking back at the political news during the period under review, we found that the European Commission launched up to five sanctions packages against Russia in response to the invasion of Ukraine. These actions have had a great social impact, generating up to 74 tweets on the subject of sanctions and legal action.

Although already identified in the previous graph, this table provides more detail on the issue frame “Energy, Environment and Climate Change”. It can be seen that this topic is only present in the Ukraine conflict, since, as explained above, Russia's energy supply to European countries has placed this question at the top of the political agenda. In the Afghanistan conflict, this theme is not present, nor is “disinformation”. The latter is present in the case of Ukraine, mainly by identifying the threat posed by Russia in terms of propaganda through the television channels Sputnik and Russia Today among others.

In order to get a complete picture of the relationship between actor, theme and conflict, a triple cross tabulation was chosen to show the frequency of use per actor of each theme in both conflicts. To present the results, a graphical representation was chosen:

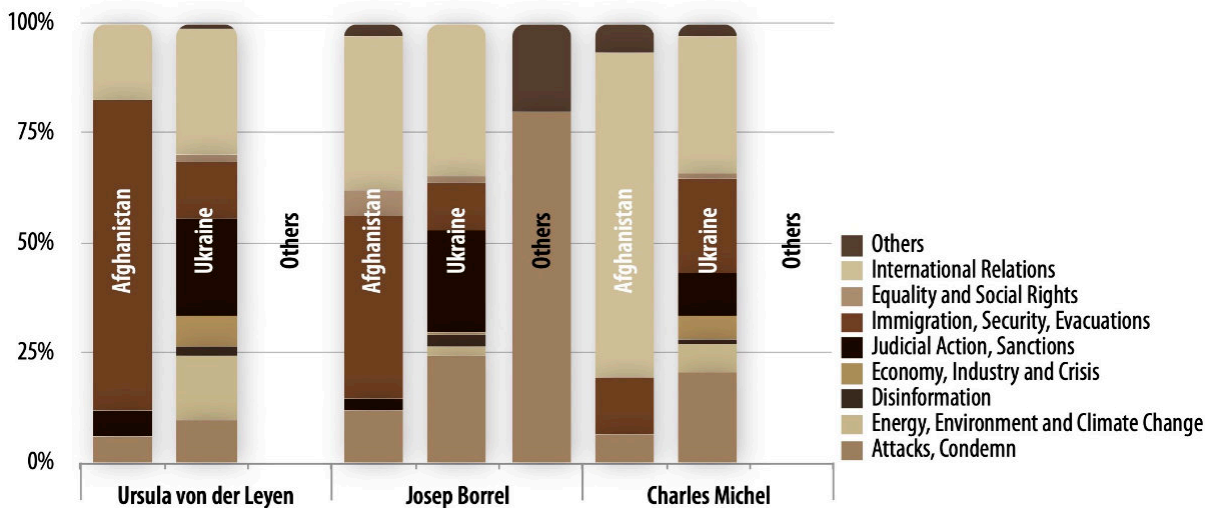


Figure 3: Thematic-Actor-Conflict, source: Own elaboration

The bar chart shows the thematic trends in the political agenda of the actors under study. Firstly, the President of the European Commission shows a fairly uniform behaviour with regard to the Afghanistan conflict. Most of their social messages revolved around concerns about immigration, security and evacuations situations that were taking place. However, as can be seen, the social message's issue frame in the Ukraine conflict is more varied, highlighting the role of the EU as a global actor and as a sanctioning agent.

HR/VP Borrell political agenda on the Afghanistan conflict is similar to von der Leyen’s, although it is true that the thematic “diplomacy” is more prominent, highlighting meetings with worldwide political representatives. This *modus operandi* is followed by Charles Michel, with most of his tweets during the period analysed on the Afghanistan conflict being a representation of his agenda and calls/video calls (due to COVID situation and lockdowns) with worldwide political leaders too. Both Borrell and Michel condemn in equal parts Russia's invasion of Ukraine and the ensuing attacks.

Another variable to which the social messages of the different political actors have been subjected is the tone of the message. Through this variable, the communication strategy can be analysed, as it allows the potential receptor to know what the intention of the message received is.

It is clear from the aside graph presented that there is no trend in terms of tone in the tweets, as the discursive marks are different for each actor. Three tweets’ tones were considered in the analysis: positive, critical and neutral. Under the positive tone classification, messages that consider improvements and positive actions towards the European Union have been included. In other words, in the tweets included the profiles analysed spoke about benefits in terms of well-being for the European population. Critical tone refers to messages based on harsh criticism of the actions of a third actor, i.e. Russia. Finally, the neutral tone refers to those messages with an informative slant on current affairs, as well as personal agenda information, such as, for example, agreements reached or meetings conducted by the actors.

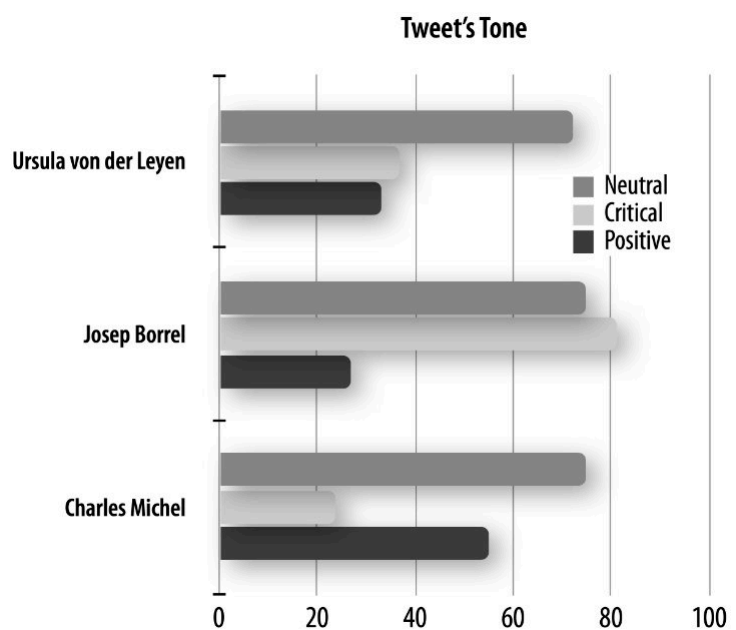


Figure 4: Political tone, source: Own elaboration

Having established the criteria that have been followed, we can now comment on the results of the analysis of the social message of the profiles analysed. In the case of Michel and von der Leyen, the neutral tone stands out, being present in more than 50% of their publications. In the case of Josep Borrell the critical tone highlights, with more than 80 of his 183 tweets having a critical bias.

The critical trend is also present in more than 20 tweets in the case of the President of the Council, while Ursula von der Leyen has the fewest tweets of a critical nature. It is the President of the Commission who has the greatest presence of messages with a positive tone. These data, which we will later explore in the conclusion,

help us to advance the profile of each of the politicians, highlighting Borrell's critical tone and von der Leyen's neutral and positive tone.

Another important variable to analyse when studying the political message is the message code, i.e. the language used. The identification of the language used is crucial, as it is the basis of the communication process. The emitter intends to send a message with the aim of it being intercepted by the receiver, and to do so it must be sent with a code that the receiver must know. The following table shows the use of language in the conflicts studied.

Use of Language					
Language		Military Conflict Referenced			Total
		Afghanistan	Ukraine	Other Conflict	
English	Count	77	341	2	420
	% of Total	16,1%	71,2%	0,4%	87,7%
French	Count	1	13	2	16
	% of Total	0,2%	2,7%	0,4%	3,3%
German	Count	0	2	0	2
	% of Total	0,0%	0,4%	0,0%	0,4%
Ukrainian	Count	0	21	0	21
	% of Total	0,0%	4,4%	0,0%	4,4%
Other	Count	4	15	1	20
	% of Total	0,8%	3,1%	0,2%	4,2%
Total	Count	82	392	5	479
	% of Total	17,1%	81,8%	1,0%	100,0%

Table 4: Use of language in each conflict, source: Own elaboration

The most frequently used language is English. 87.7% of the messages issued by the actors analysed are written in English, 420 tweets out of a total of 479. The low use of French and German, both of which are recognised as official languages and used in the day-to-day work of the European institutions, is striking. Only 16 tweets are published in French, and two in German.

One element that has attracted attention, and was therefore identified as an individual variable, is the use of Ukrainian for tweeting. Despite the fact that 21 messages, representing 4.4% of the total, is not a large enough sample, it serves to justify the fact set out above, namely the adaptation of the code according to the recipient of the message. The messages in Ukrainian mostly show support for the Ukrainian people, condemning Russia's actions under Ukraine's sovereign soil.

Finally, tweets in Spanish, Italian and Russian have been identified under the "others" variable. The first two correspond to interviews that Josep Borrell has given in those countries and on which he has reported information, while the messages in Russian are a direct appeal to the Kremlin, in which the a critical tone stands out.

In the following, we will focus on analysing social messages from the point of view of their formal production. To do so, we will first pay attention to the formal production itself, analysing the format of the tweet. On the other hand, we will see how actors use mentions and hashtags. Finally, we will look at the use of audio visual resources.

All these elements are fundamental to draw conclusions based on the communication strategy that is carried out by EU actors. Specialists in social political communication indicate that the elaboration of the message that is disseminated on the web is elaborated by the politician or by a team specialised in social media that applies communication and marketing techniques (Fernández Gómez, Hernández-Santaolalla, Sanz-Marcos 2018: 20).

The tweet format variable included five possible options:

- Own production
- Retweet
- Thread
- Quoted tweet
- Reply to another user

In the graph below it can be seen the form that each of the actors gave to the different tweets.

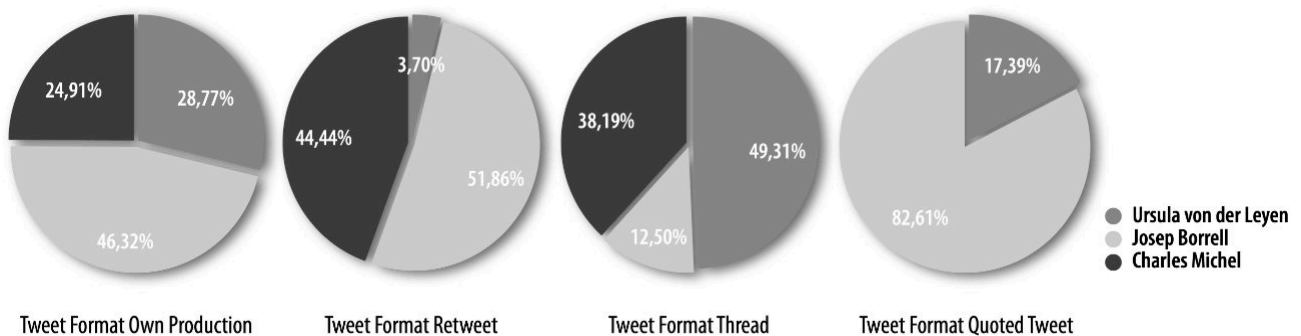


Figure 5: Tweets' format, source: Own elaboration

Firstly, it is striking that one of the formats that was contemplated in the initial analysis framework is not present, the one consisting in replying to another user. The nature of social media channels is that they are dynamic and bidirectional, allowing the political actor to be close to the citizenry. The fact that none of the 479 tweets received a response is quite significant.

On the other hand, the graphs show a great variety in terms of social message production, supporting the presented theory of the elaboration involved in tweeting. While the own production format is not interesting, the threading and retweeting format are. The use of these formats has followed a common pattern: explanation by the actors of concrete political measures that, due to the 280 character limit in every tweet, were difficult to explain in a simple tweet. The trend observed is to explain concrete actions in the areas of security, migration and political-economic sanctions.

Ursula von der Leyen is the one who makes the most use of threads, 49.31% of times, corresponding to a total of 71 threads. Charles Michel follows with a total of 55 threads. It is striking that Josep Borrell is the actor with the highest production of his own tweets. While it is true that Borrell appears with 51.85% of the retweets, in net figures we are talking about 14 RT, identifying a total of 27 retweets.

The formal analysis of the tweets continues by identifying the use of mentions and hashtags made by the different profiles. The decision to include these variables is motivated and justified by the fact that they are further evidence of the elaboration of the social message and the potential interaction on the network atmosphere.

Use of Hashtags				Mentions			
EU Actor	Use of Hashtags		Total	EU Actor	Mentions		Total
	Yes	No			Yes	No	
Ursula von der Leyen	14	140	154	Ursula von der Leyen	50	104	154
Josep Borrell	129	54	183	Josep Borrell	88	95	183
Charles Michel	113	29	142	Charles Michel	87	55	142
Total	256	223	479	Total	225	254	479

Table 5: Use of Hashtags and mentions, source: Own elaboration

In general terms, a balance can be observed in the use of both resources, with more hashtags being used than mentions in general. However, if we look at the figures for each actor, we can see what characterises their social message.

Commission President von der Leyen hardly uses hashtags in her tweets, only 14 times. This is quite significant, especially if we take into account that the rest of the profiles do and if we take into account the launch by EU institutions of the *#EUstandwithUkraine* hashtag.

Charles Michel is the only one with a positive balance in terms of mentions. In 87 of his 142 tweets he made a mention, i.e. he either directly appealed to an interlocutor or simply inform of a meeting or conversation he had held. The same trend can be observed in the messages issued by Josep Borrell. The fact that the mentions in both profiles follow the thematic trend discussed above, the social message of both actors was framed under “diplomacy” issue frame.

Finally, we will focus on the analysis of the variable audio visual elements that von der Leyen, Borrell or Michel may have incorporated in their messages published on Twitter. Up to six options were considered when sampling and analysing the data:

- Picture
- Video
- Video live
- Link
- Other
- None

First of all, we want to present the relationship between the different actors and the use of audio visual elements. At first glance, major differences between actors can be observed. Ursula von der Leyen is the one who most often uses images when posting on Twitter, i.e. she tends to use images to present the content. At the other extreme,

both Borrell and Michel tend to publish tweets without any audio visual content.

The use of videos is high in the case of Borrell and Michel; for the latter being the most commonly used audio visual resource. Through content analysis, it has been identified that all of them tend to upload their speeches and political speeches and even recorded interviews with the media. Finally, VP/HR Borrell use of links is striking, with 28 times such links being used.

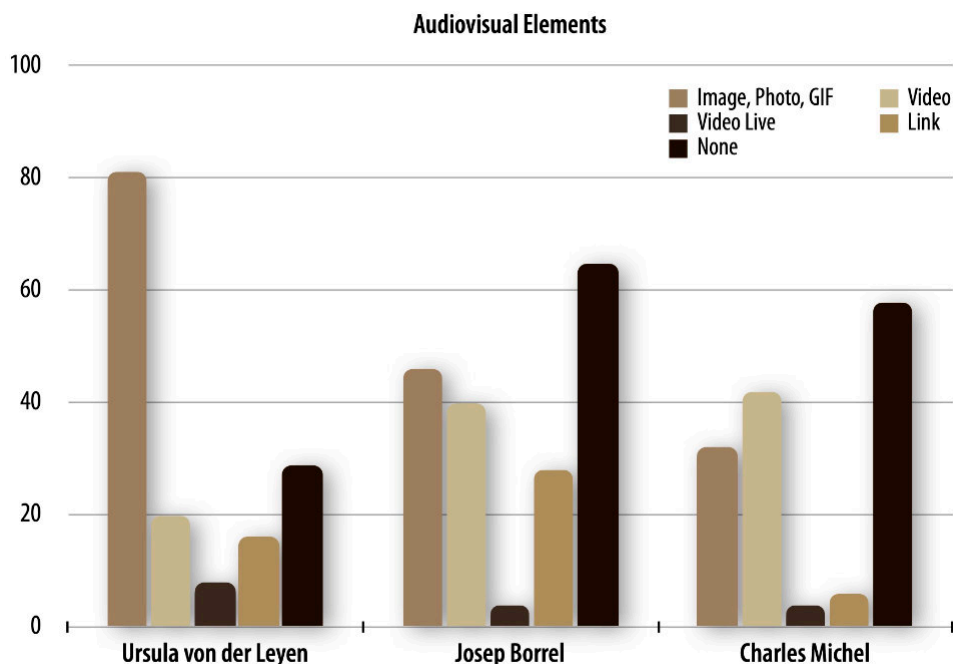


Figure 6: Audio visual elements per actor, source: Own elaboration

In a second phase, the aim is to look more closely at the use of audio visual elements in the construction of the social message. The following table shows the relationship between the subject matter of the tweets and the audio visual elements.

Tweet's Specific Topic		Audiovisual Element					Total
		Image, Photo, GIF	Video	Video Live	Link	None	
Attacks, Condemn	Count	13	18	3	11	37	82
Energy, Environment and Climate Change	Count	16	5	0	3	6	30
Disinformation	Count	3	1	0	1	3	8
Economy, Industry and Crisis	Count	9	2	0	1	5	17
Judicial Action, Sanctions	Count	15	18	3	10	30	76
Immigration, Security, Evacuations	Count	30	18	1	10	29	88
Equality and Social Rights	Count	3	2	0	2	0	7
Diplomacy	Count	70	35	6	10	41	162
Others	Count	0	3	3	2	1	9
Total	Count	159	102	16	50	152	479
	% of Total	33,2%	21,3%	3,3%	10,4%	31,7%	100,0%

Table 6: Tweet's topic and Use of audio visual elements, source: Own elaboration

The table shows in greater detail the elements we mentioned in the previous pie charts. In the last row are located the percentages of use, showing that more tweets appear with some audio visual element than without any, the latter 31.7%. Photography is the most used element, appearing in a total of 159 tweets, remembering that the sample is 479 tweets.

Paying specific attention to the tweets thematic matter, due we can comment on several things. Firstly, the tweets that refer to “diplomacy” in most cases appear with a photograph or video. This communication strategy serves to illustrate the occurrence of a political reception, for example, if Borrell has met someone, he uploads a photo of the meeting and a short explanatory text to his profile. The same applies to von der Leyen and Michel.

With regard to “immigration, security and evacuations” issue frame, it is worth noting that 30 of the 88 tweets on the subject used images. In this way, the tweet focuses on the tweet’s major topic, which serves to generate a greater impact on the receptor. Finally, the theme of “attacks and condemnation” is the thematic that uses links the most. In this scenario, actors usually attach links that redirect to an official statement or join declaration, thus representing solemnity.

To conclude with the content analysis based on a sample of tweets (479) published by Ursula von der Leyen, Josep Borrell and Charles Michel, we want to apply and identify who has been the most influential and viral with their discourse. In other words, quantitative and qualitative-discursive analysis will help us to draw conclusions empirically based on the construction of the social message in times of crisis.

To this end, academics such as Carrasco Polaino, Villar Cirujano and Tejedor Fuentes applied a formula to measure the viralisation capacity of tweets. A weighting is carried out in which

RTs received will have twice the value of favourites. The final formula to determine the diffusion capacity [...] results from adding the retweets received multiplied by 2 and the favourites received, divided by the number of original tweets published (Carrasco Polaino, Villar Cirujano, Tejedor Fuentes 2018: 73).

$$\text{Viralisation impact} = (\text{SUM retweets} * 2 + \text{SUM likes}) / \text{SUM tweets posted}$$

Statistics				
EU Actor			RT	Likes
Ursula von der Leyen	N	Valid	154	154
	Mean		1560,03	7229,31
	Sum		240244	1113313
Josep Borrel	N	Valid	183	183
	Mean		260,20	780,08
	Sum		47616	142754
Charles Michel	N	Valid	142	142
	Mean		198,10	834,11
	Sum		28130	118444

Table 7: Metrics per EU Actor, source: Own elaboration

According to the researchers, the reason why RT is twice as valuable as Likes is because of "when a retweet is received, the content of the original tweet appears on the timeline of the person who RTs, increasing the dissemination of the message, while when Likes is given, the content of the original tweet does not appear on the timeline of the person who assigns the favourite, so the original message does not increase in terms of dissemination".

The table 7 shows the raw data for the number of RTs and Likes received by each observed actor:

After applying the proposed formula, the following virality indexes result: Ursula von der Leyen (10349.36), Josep Borrell (1300.47) and Charles Michel (1230.31). In this way, we highlight that Ursula von der Leyen, through her 154 tweets, achieves greater virality among public opinion.

In the same way, the virality of each of the conflicts analysed can be obtained. The following table shows the ratio of RTs and Likes that the tweets have received:

The same viralisation impact formula is applied to this table and the following results are obtained: the Afghanistan conflict has a viralisation of 863,415 while the Ukraine conflict achieves a viralisation of 4929,814. The figures illustrate that the Ukraine case studied generated more impact through Twitter.

Statistics				
Military Conflict Referenced			RT	Likes
Afghanistan	N	Valid	82	82
	Mean		168,09	527,24
	Sum		13783	43234
Ukraine	N	Valid	392	392
	Mean		768,88	3392,05
	Sum		301402	1329683

Table 8: Study Cases Conflict's metrics, source: Own elaboration

4. Findings

After closing the chapter dedicated to the presentation of the case studies, as well as the results of the content analysis, the findings drawn from this research will be presented in the following lines.

The general objective of this Master Thesis was to study the crisis response mechanisms of the European Union institutions. Throughout the development of the research, this objective has been achieved from a twofold approach. First of all, the topic was approached from a theoretical point of view, using the foundations and provisions of the 2007 Lisbon Treaty. The other prism of the approach was complemented by the presentation of the case studies. The empirical approach provides and enables you to notice the contrast with the provisions of the treaties.

Furthermore, it should be added that the presentation of the case studies allows the rest of the objectives to be met. On the one hand, along the previous chapters, the different communication strategies that the different actors studied have developed have been presented. More specific findings will be presented at a later stage, but for the moment it can be noted that the presence and impact of the different social messages could be assessed through the social message. This last idea is linked to the last specific objective presented at the beginning of the research. All in all, in this scenario, the motivation and objectives that were set out can be considered fulfilled.

At the same time, when designing the research, a series of hypotheses were devised on the basis of the objectives. After the presentation of all the empirical elements, this chapter can be closed by confirming that the research that has been con-

ducted allows the hypotheses that were established at the beginning of the study to be ratified:

- Hypothesis I: The European Union shows a greater degree of commitment to events determined by proximity criteria. An approach that can be observed in the dissemination of messages on Twitter about the conflicts in Ukraine and Afghanistan.
- Hypothesis II: The degree of the European Union involvement in international conflicts will be greater in the early stages of conflicts. This trend can be seen in the case of Ukraine, to the detriment of Afghanistan, as the first conflict is a new cycle in international relations.

The results shown in the previous chapters serve to support Hypothesis I and Hypothesis II.

According to a quantitative and qualitative-discursive content analysis, a series of elements and figures have been shown that are decisive for analysing the social behaviour of the leading actors in the different institutions. In this case, if we pay special attention to the quantitative analysis, we can draw some very significant conclusions.

One only needs to look at the metrics of the different political actors to see how one conflict has trended against the other. The social trace that the Ukraine conflict (392) has had is three times the media importance of the Afghanistan conflict (82). The Ukraine conflict, provoked by Russian Federation invasion is in an early stage, a new cycle of the conflict that involved international community. On the other hand, the scenario developed in Afghanistan represents the end of a cycle.

Similarly, not all actors have had the same involvement in both conflicts, finding that for the President of the European Commission the conflict in Afghanistan was not as relevant in terms of the social messages generated. In this case, the proximity factor is explained by the EU's involvement in the resolution of the conflict. In this scenario we are identifying the EU as a global actor, in which the geopolitical factor of the conflict may also play an important role. The question of commitment can be measured by the consequences that conflicts can have for the EU and its citizens. The thematic focus of the political agenda of the different actors is the best example regarding this question.

The different social agendas have revealed that the concerns in both theatres of war have been totally different. While in the case of Ukraine the relevant issue has been the judicial issue and the application of sanctions, in the case of Afghanistan the relevant factor has been immigration, security and the evacuation of civilians. By the application of sanctions the EU is playing a primary role as an international actor, by the same token, the risks it takes with the application of these measures can be high. Indeed, the publication of messages directly appealing to sanctions and specific actors can further aggravate the situation.

All these elements show how there has been a disproportionate commitment to the conflict in Afghanistan that there has not been to the conflict in Ukraine.

- Hypothesis III: The multiplication of voices in the European Union fails to unify the message and a common position in times of crisis. This approach is observed during the conflicts in Ukraine and Afghanistan.

Similarly, by conducting both case studies, the third hypothesis of the research can be confirmed.

Through this hypothesis, it is possible to find out the communication strategy that the different profiles studied have applied through Twitter, and this hypothesis is linked to one of the objectives presented above.

The fact that there is no unification of the message or a common position among the three public representatives is clear from the presentation of the results. As mentioned above, thanks to the quantitative and qualitative-discursive analysis, it has been possible to understand the way in which each actor has addressed messages to the audience, finding major differences in them.

One possible explanatory element is the fact that there is a quantitative difference in the number of messages broadcast, but this is not relevant and is not part of the strategy that can be implemented. It is clear that paying similar attention to one conflict to the detriment of the other is significant, but this may respond to the proximity factor discussed above.

Elements such as the difference in the language used or the tone of the discourse are more significant in this scenario. As can be seen, there is no unanimity in the tone used by the actors, and this is a key factor when it comes to establishing a joint position on a conflict. Although it is true the fact that each actor focuses on one issue more than another is not necessarily the most relevant factor, as each actor has different priorities that have been defined by the responsibilities that the treaties attribute to their institution. An important remark that should be made is the fact that in the Ukrainian conflict the confrontation actor was defined, whilst in Afghanistan, due the long-process time conflict, the adversary is extended.

Finally, we did a presentation on the use of audiovisual and hypertextual elements. The impact they have is exponential, as these elements can make the difference in terms of the strategy that each actor (or their team) has carried out on Twitter. For example, it has been observed that Ursula von der Leyen hardly used Hashtags or mentions, while the rest of the actors did. Another example that can be given is the lesser use of audio visual elements by Michel and Borrell compared to von der Leyen.

5. Conclusion

At this point, following the presentation of the findings of the research conducted, the present study can be concluded. As indicated above, the objectives and hypotheses set out at the beginning of the study have been met, and after this it is possible to draw some general conclusions on the subject that has been discussed within the previous pages.

It became clear that there is no coordination in terms of communication strategy planning between the different actors and their teams. Through the study of the so-

cial messages they have posted on Twitter, it has been possible to see the lack of cohesion, thus identifying that each actor develops its own communication strategy. In other circumstances, such as, for example, at the national political level, this differentiation that we have identified would be perceived as normal, as it is expected that there is a struggle between political actors to achieve greater impact on society.

At the EU level, however, this differentiation may come to be perceived by the public spotlight as an internal struggle between different actors. The final consequence this scenario may lead to is the weakening of institutions. This scenario can also have an effect on the message, as it can affect the strength of the message, especially when we see that the actors do not even share the tone used in the political discourse.

If we follow this inductive sequence, it can be identified as a final consequence that the lack of cohesion between the different actors can provoke: the increase of a negative perception towards the EU institutions. The importance of communicative actions in crisis mediation is evident, as the perception that citizens can develop towards the EU at this time can be crucial, and the legitimacy and trust in the European Union can be jeopardised.

This chapter is an opportune space for a brief reflection on concrete actions that the different actors can take to jointly generate greater social impact.

Firstly, it is clear that in order to achieve the unification of the European message, they need to coordinate the execution of the message itself. If one looks at the organisational structure of each institution, and within it the team of each actor, one identifies in each institution that each actor has a communication team. Coordination and cooperation between these teams would be indispensable, as any further efforts would be meaningless without such initial coordination.

Secondly, on the basis of the social message, further elaboration and dedication is needed on the social media Twitter. After presenting the communication strategy that each actor has carried out, it has been possible to identify the features and elements used by each actor. Twitter as a social media has numerous features with which the social message can be designed in detail. All this translates into a possible social media communication strategy, with the realisation of a series of social media behavioural patterns. It is evident that the actors lack them, as the results have shown that even each actor makes unequal use of Twitter.

A final element that actors could improve is the interaction with the audience through Twitter. As presented in this research, one of the utilities of social media is the ability to connect with audiences quickly, directly and at reduced cost. Despite all these facilities, no interaction with the audience has been observed. If interaction could be achieved, perhaps the impact in terms of virality could be increased, which could be transformed into potential legitimacy and trust in EU institutions.

It is clear that this research has a number of limitations, although this master thesis was intended to be the starting point of future research. The study of strategic communication in times of crisis is premature at the European level, so there is much work to be done in the field. The same methodology applied to this research can be

applied to other social media, such as Facebook, LinkedIn or Instagram. In this way, the impact of the European Union's message on other audiences could be measured.

Another possible line of research is the impact that the political social message has on public opinion, measured through traditional media. One of the limitations of this research has been the time available to carry it out. Preliminary research ideas included measuring the impact of the same social message analysed in this research on the traditional press. In fact, the analysis of the front pages of newspapers from the Spanish daily *El País* and the Polish daily *Gazeta Wyborcza* was started. The analysis of the latter was made possible thanks to the help of Mr. Wiktor T. Poźniak, Director of Library Services at the College of Europe in Natolin. These words of thanks are in order.

This master thesis closes by stressing that it is clear that there is a great deal of academic work that can be done in the field of communication, especially due to the fundamental role that communication plays in crisis management through public diplomacy.

References

- Allen Myria Watkins, Rachel H. Caillouet (1994). "Legitimation Endeavors: Impression Management Strategies Used by an Organization in Crisis". *Communication Monographs* 61, no. 1, 44–62.
- Andréu Abela Jaime (2002). "Las técnicas de análisis de contenido: una revisión actualizada". *Fundación Centro de Estudios Andaluces*, 1-34.
- Andrino San Cristóbal Sonia (2014). *Comunicar sobre Europa, desde Europa y para Europa. La política de comunicación europea entre 1990 y 2010: Euranet, la primera red de radios europeas*. Valladolid: Universidad de Valladolid.
- Austin Lucinda, Brooke Fisher Liu, Yan Jin (2012). "How Audiences Seek Out Crisis Information: Exploring the Social-Mediated Crisis Communication Model". *Journal of Applied Communication Research* 40, no. 2, 188–207.
- Bátora Jozef (2013). "The "Mittrailleuse Effect": The EEAS as an Interstitial Organization and the Dynamics of Innovation in Diplomacy: The "Mittrailleuse Effect"". *JCMS: Journal of Common Market Studies* 51, no. 4, 598–613.
- Burma Chester Alexis C (2018). *Crisis Communication and Crisis Management*. Oakville: Society Publishing.
- Campos-Domínguez Eva (2017). "Twitter y la comunicación política". *El profesional de la información* 26, no. 5, 785-93.
- Carrasco Polaino Rafael, Villar Cirujano Ernesto, Tejedor Fuentes Laura (2018). "Twitter como herramienta de comunicación política en el contexto del referéndum independentista catalán: asociaciones ciudadanas frente a instituciones públicas". *Icono* 14 16 no.1, 64-85.
- Colle Raymond (2011). "El análisis de contenido de las comunicaciones". *Sociedad Latina de Comunicación Social*, 1-112.
- Consolidated Version of Treaty on the Functioning of the European Union. October 26, 2012. OJ C326/47.
- Coombs W. Timothy (2004). "Impact of Past Crises on Current Crisis Communication: Insights from Situational Crisis Communication Theory." *The Journal of Business Communication* 41, no. 3, 265-89.
- Coombs W. Timothy (2015). "The Value of Communication during a Crisis: Insights from Strategic Communication Research". *Business Horizons* 58, no. 2, 141–48.
- Csernaton Raluca (2021). "The Evolving Role of the European External Action Service in Security and Defence". *European Foreign Affairs Review* 26, 87–100.
- Cull Nicholas J. (2009). *Public Diplomacy: Lessons from the Past*. Los Angeles: Figueroa Press.
- Demchak Chris C., Arjen Boin and Louise K. Comfort (2010). *Designing Resilience: Preparing for Extreme Events*. Pittsburgh: University of Pittsburgh Press
- Eaddy LaShonda Luallen, Yan Jin (2018). "Crisis History Tellers Matter: The Effects of Crisis History and Crisis Information Source on Publics' Cognitive and Affective Responses to Organizational Crisis". *Corporate Communications: An International Journal* 23, no. 2, 226–41.
- Falkner Gerda (2016). "The EU's Problem-Solving Capacity and Legitimacy in a Crisis Context: A Virtuous or Vicious Circle?". *West European Politics* 39, no. 5, 953–70.

Fernández Gómez, Jorge David, Víctor Hernández-Santaolalla and Paloma Sanz-Marcos (2018). "Influencers, Marca Personal e ideología política en Twitter". *Cuadernos.Info*, no. 42, 19-37.

Gilboa Eytan (2008). "Searching for a Theory of Public Diplomacy." *The ANNALS of the American Academy of Political and Social Science* 616, no. 1, 55–77.

Gourlay Catriona (2004). "European Union Procedures and Resources for Crisis Management". *International Peacekeeping* 11, no. 3, 404–21.

Gray Edmund R., John M.T. Balmer (1998). "Managing Corporate Image and Corporate Reputation". *Long Range Planning* 31, no. 5, 695–702.

Hallahan Kirk, Holtzhausen Derina, van Ruler Betteke, Verčič Dejan, Sriramesh Krishnamurthy (2007). "Defining Strategic Communication". *International Journal of Strategic Communication* 1, no. 1, 3–35.

Henökl Thomas E (2015). "How Do EU Foreign Policy-Makers Decide? Institutional Orientations within the European External Action Service". *West European Politics* 38, no. 3, 679–708.

Hilyard Karen M., Freimuth Vicki S., Musa Donald, Kumar Supriya, Crouse Quinn Sandra (2010). "The Vagaries Of Public Support For Government Actions In Case Of A Pandemic". *Health Affairs* 29, no. 12, 2294–2301.

Kim Hyo J., Cameron Glen T. (2011). "Emotions Matter in Crisis: The Role of Anger and Sadness in the Publics' Response to Crisis News Framing and Corporate Crisis Response". *Communication Research* 38, no. 6, 826–55.

Kleinnijenhuis Jan, Schultz Friederike, Oegema Dirk (2015). "Frame Complexity and the Financial Crisis: A Comparison of the United States, the United Kingdom, and Germany in the Period 2007–2012: Frame Complexity and the Financial Crisis". *Journal of Communication* 65, no. 1, 1–23.

Kreuder-Sonnen Christian (2018). "Political Secrecy in Europe: Crisis Management and Crisis Exploitation". *West European Politics* 41, no. 4, 958–80.

Krippendorff Klaus (2004). *Content Analysis: An Introduction to Its Methodology*. Thousand Oaks: Sage.

Mcallister Ian (2007). "The personalization of politics". In: Russell J. Dalton and Hans-Dieter Klingemann (eds). *The Oxford Handbook of Political Behaviour*. The Oxford Handbook of Political Science, 572-88.

Michelsen Nicholas, Colley Thomas (2019). "The Field of Strategic Communications Professionals: A New Research Agenda for International Security". *European Journal of International Security* 4, no. 1, 61–78.

Moravcsik Andrew (2002). "Reassessing Legitimacy in the European Union". *JCMS: Journal of Common Market Studies* 40, no. 4, 603–24.

Nye Joseph S (2008). "Public Diplomacy and Soft Power." *The ANNALS of the American Academy of Political and Social Science* 616, no. 1, 94–109.

Pavlov Nikolay (2015). "Conceptualizing EU Crisis Management". *European Foreign Affairs Review*, 23–42.

Pérez Curiel, García-Gordillo Concha and Mar (2020). "Indicadores de influencia de los políticos españoles en Twitter. Un análisis en el marco de las elecciones en Cataluña", *Estudios*

sobre el Mensaje Periodístico 26, no. 3, 1133-44.

Persson Thomas, Parker Charles F., Widmalm Sten (2015). "Social Trust, Impartial Administration and Public Confidence in EU Crisis Management Institutions: Confidence in EU Crisis Management". *Public Administration* 95, no. 1, 97–114.

Rajmil Daniel, Morales Lucía, Aira Toni, Cardona Valles Mariona (2022), "Afghanistan: A multidimensional crisis". *Peace Review*, 1-10 .

Rivas-de-Roca Rubén, García-Gordillo Mar (2021). "Understanding the European Public Sphere: a review of pending challenges in research". *European Politics and Society*, 1-15.

Sperling James, Webber Mark (2019). "The European Union: Security Governance and Collective Securitisation". *West European Politics* 42, no. 2, 228–60.

Stern Erik (2003). *Crisis Decision making: A Cognitive Institutional Approach*. Swedish National Defence College.

Stewart Emma J (2008). "Capabilities and Coherence? The Evolution of European Union Conflict Prevention". *European Foreign Affairs Review* 2, 229–53.

Van Aelst Peter, Sheafer Tamir, Stanyer James (2012). "The Personalization of Mediated Political Communication: A Review of Concepts, Operationalizations and Key Findings". *Journalism* 13, no. 2, 203–20.

Vanhoonacker Sophie, Pomorska Karolina (2013). "The European External Action Service and Agenda-Setting in European Foreign Policy". *Journal of European Public Policy* 20, no. 9, 1316–31.

Water W. Powell, Colyvas J.A. (2008). "Microfoundations of Institutional Theory". In: Greenwood Royston, Oliver Christine, Sahlin Kerstin, Suddaby Roy (eds). *Handbook of Organizational Institutionalism*, London: Sage, 276-98.

The biased deficit bias: exploring heterogeneities in discretionary fiscal policy choices in the EU and the assumption of a deficit bias

Christina Stuart

1. Introduction

The importance of budgetary discipline is specified in the primary law of the European Union (EU). This highlights the paradigmatic importance placed on the assumption of a fiscal deficit bias in the design of the EU fiscal framework for the European Economic and Monetary Union (EMU). Namely that governments tend to run budget deficits irrespective of cyclical conditions and need to be 'disciplined' with rules to prevent this behaviour. Therefore, it is important to thoroughly interrogate this foundational assumption, especially in the context of the ongoing debate on fiscal framework reform in the EU, triggered by the temporary suspension of the rules during the Coronavirus Pandemic. If there are alternative key drivers behind fiscal policy choices, these should be considered alongside the deficit bias in the redesign of the European fiscal framework to ensure long term sustainability and prosperity.

These alternative explanatory factors may vary across countries and would result in heterogeneous fiscal choices in similar cyclical conditions, in contrast to the all-encompassing theory of deficit bias that is assumed to be applicable to all governments - resulting from opportunism, conflicts of interests, partisan preferences, strategic behaviour and domestic and international common pool problems. Therefore, this thesis focuses on the individual country-level fiscal choices, to explore areas of heterogeneity, nuances, and idiosyncrasies that can contribute towards explaining fiscal policy choices. This is the key added value of this analysis, by focusing on individual member state (MS) level fiscal stances over time, to determine if there are groups of countries with different patterns of fiscal behaviour; and then attempt to explain this heterogeneity based on alternative political economic factors that vary across countries and influence fiscal stances.

This paper focuses on variations across political systems, fiscal framework strength and budgetary institutions, and varieties of capitalism and the interlinked growth models. Further areas of heterogeneity should also be explored to further understand the nuances driving fiscal behaviour in Europe. These other factors will persist and create their own biases and recurring patterns of divergent fiscal stances. Therefore, in redesign of the fiscal framework, structural heterogeneities should be considered to enable a flexible framework that is responsive to the political economic country context. This will be more effective than a one-size-fits-all fiscal frame-

work based on assumptions that are assumed to be 'law-like', such as the deficit bias. The overarching conclusion of this analysis is that there is not a 'law-like' deficit bias across all countries' fiscal behaviour, and therefore complementary and alternative explanations for fiscal policy choices need to be integrated into the European fiscal framework. The key research questions of the analysis are the following.

1.1. Research Questions

Do all EU countries exhibit a persistent deficit bias over time, based on pro-cyclical expansionary fiscal policy during periods of positive output gap? Why do we observe a persistent deficit bias in certain countries in the EU and not in others? What other explanatory factors contribute towards discretionary fiscal policy patterns?

1.2. Methodology

This thesis will empirically investigate the fiscal stances of individual EU Member States over the last decade, to determine whether they exhibit deficit bias behaviour when examined individually as well as on aggregate. The methodology rests on the assumption, supported by the literature, that an expansionary fiscal policy during periods of positive output gap is an indication of a deficit bias. Based on deficit bias theory and empirical studies in the literature, which are outlined in Chapter 2, the hypothesis of the empirical analysis in Chapter 3 is that when cyclical conditions are favourable countries will exhibit a pro-cyclical expansionary fiscal stance. This hypothesis is not supported by the empirical analysis of graphing the change in the cyclically adjusted primary balance (CAPB) against the output gap. Not all countries exhibit the behaviour predicted by the hypothesis, enabling MSs to be placed into two groups based on fiscal patterns.

Chapter 4 then explores whether alternative explanatory factors that vary across countries can explain this heterogeneity, using a two-sample t-test to test whether the null hypothesis that the means between the two groups are different can be rejected or not. Proxy variables are used to test differences in political systems, fiscal framework, and variety of capitalism. This methodology enables an indication of the relative explanatory power of the factor to explain the difference between the two groups. While noting the causality and endogeneity concerns regarding the methodology in the analysis, the results are used to draw conclusions for fiscal policy reform in the EU.

1.3. Structure of the Thesis

The structure of the thesis is as follows. Firstly, the overarching political economy theoretical lens is set out, and within this framework the literature on deficit bias theories and varieties of capitalism are critically assessed in the context of the EU. The fiscal framework in the EU as well as key concepts of the public budget are also set

out to lay the groundwork for the analysis. Secondly, the empirical analysis attempts to answer the first research question by graphing the change in CAPB against the output gap for individual MSs to assess the tendency to exhibit deficit bias behaviour. The causality and endogeneity concerns of this analysis are also outlined. Thirdly, the second research question is analysed by exploring whether other political economic factors can explain the heterogeneity in fiscal behaviour found in the main analysis. Finally, the implications of the results for fiscal framework reform in the EU are explored and the key policy options are outlined.

2. Political Economy Theoretical Framework and Literature Review of Deficit Bias and Varieties of European Capitalism

The purpose of this chapter is to firstly outline the theoretical framework of political economy and analyse why this is the most appropriate framework to approach the analysis of the deficit bias. Secondly, discuss the literature on the deficit bias, focusing on theories of the deficit bias from a political, economic, agent, institutional and other political economy perspectives. These theories of deficit bias underpin the arguments in favour of fiscal discipline and the institutional design of the Stability and Growth Pact in the EU, hence the importance of studying the deficit bias and its impact in the EU. These political economy theories of the deficit bias underpin the hypothesis in the empirical analysis of a persistent deficit bias, identified by procyclical expansionary fiscal stance during economic upturns. The empirical results do not support an all-encompassing theory of the deficit bias, indicating that alternative explanatory theories are necessary to explain persistent non-adherence to deficit bias for some countries. Therefore, the final part of this chapter will outline the literature on varieties of capitalism and growth models in the EU, as an alternative theory able to better explain variation in fiscal policy choices during similar cyclical conditions across EU MSs over time.

2.1. Political Economy Theoretical Framework

Political economy is a theoretical lens that views economic decisions within a political world, questioning how political forces shape economic policy outcomes and decisions. The political economy approach questions the assumption in normative economics that there is a benevolent, well-informed government serving the objective of maximising the general interest (Bénassy-Quéré *et al.* 2018: 88). An assumption which can be traced back to Rousseau's "vision of the government as a "frictionless device" and a mere "implementation instrument of the people's will" without a proper existence" (Bénassy-Quéré *et al.* 2018: 88). The political economy approach treats the government's behaviour as endogenous, following objectives and facing constraints. For example, behaviour is impacted by partisan preferences, special interest groups, electoral pledges, corruption, or bribery. This framework also considers the behaviour of technocrats within government as actors with their own objectives, incentives, and constraints. The institutional set up is also essential to the political

economy theoretical approach, as the mandate as well as internal and external governance of the institution influences economic policy decisions and the arena in which agents interact, as well as the policy regime. Crucially, political economics does not consider the policymaker as omniscient, omnipotent, or benevolent. Governments have objectives, which are generally constrained by their instruments, therefore face trade-offs conditional on their preferences and on the institutional set-up. Essentially, there are limits to knowledge, representation, confidence, information, and benevolence.

One of the key responsibilities of economic policymakers is to make budgetary decisions on taxation and spending, these policy decisions fulfil core economic functions of allocation, stabilisation, and redistribution. These decisions effect all households and firms at a microeconomic level in terms of their income, behaviour, productivity, and growth; as well as at a macroeconomic level due to the impact of budgetary decisions on aggregate demand in the economy. The core aim of fiscal policy is to influence aggregate demand to have a stabilising effect of moving the economy towards equilibrium. This can be done in a non-discretionary manner, through the natural evolution of government spending and revenue due to growth, inflation, and unemployment levels in the economy, known as automatic stabilisers. In parallel, stabilisation may be pursued through budgetary decisions to adjust public revenue (taxation levels) and spending, namely discretionary fiscal policy. These decisions result from a political process within political institutions. Therefore, political processes shape the economic outcomes, and a political economy approach is the most appropriate theoretical framework for the study of budgetary processes and the so-called 'deficit bias'.

At the core of political economy in macroeconomics are conflicts of interest or heterogeneity of interests (Allan 2018:4). Political economy theories of budget deficits have heterogeneity of preferences at their core. The literature on the types of heterogeneity of preferences leading to theories of deficit bias will be analysed below. Firstly, it's important to define the concepts of the budget balance, deficit bias, surplus bias and pro-cyclicality in order to analyse the dynamics of public deficits in Europe.

2.2. Flow and stock variables of the public budget

The public budget specified the income as well as intended spending across a period for a government. Government income is mainly from direct and indirect tax receipts or public assets, while government spending is mainly from provision of public services, social transfers, support to the economy through infrastructure or research spending and interest payments on public debt. The preparation, discussion and adoption of the budget is a key stage in the economic policy decision-making process. The EU has established a harmonised public accounting system, making it possible to compare across member states. The fiscal balance, or budget balance, is the difference between government income and government expenditure. If the bal-

ance is negative, there is a fiscal budget deficit, and conversely a fiscal budget surplus when the balance is positive. These are flow variables generated each period and contributing to stock variables of government assets and liabilities. A deficit in one period will increase the stock of public or government debt, namely total government financial liabilities, resulting in public debt accumulation over time. A budget surplus will reduce the stock of public debt. Debt and deficit dynamics crucially must be assessed in comparison to the country's Gross Domestic Product (GDP) and growth levels.

Several concepts and calculations are made to the budget balance to better understand the dynamics of public debt over time. Firstly, the primary balance concept, is the budget balance net of government debt interest payments. Secondly, the structural budget balance is the budget balance adjusted for the impact of the economic cycle and any one-off exceptional expenditures or receipts, such as bank recapitalisations or asset sales. Thirdly, the structural primary budget balance is the budget balance adjusted for interest payments on debt, the cyclical component of fiscal policy, and one-off measures (European Commission 2000). The structural primary balance is also referred to as the cyclically adjusted primary balance (CAPB), and is a measure of the fiscal effort, although imprecisely. This is the main dependent variable of interest in this analysis, as it is the main indicator used by international organisations including the IMF, OECD, and in particular the European Commission to monitor budget developments and develop policy prescriptions (Bénassy-Quéré *et al.* 2018: 156). European Commission's definition of CAPB is as follows.

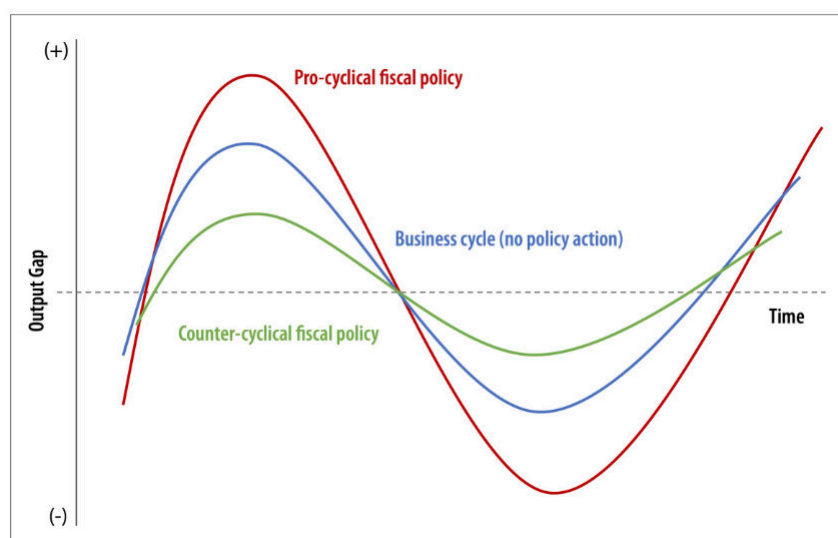
The cyclically adjusted primary balance removes from the cyclically adjusted balance the impact of interest payments. Hence, a change in this variable indicates a movement in the structural or underlying budgetary position mainly due to discretionary policy actions but not due to fluctuations in economic activity or change in interest payments which are essentially outside the control of fiscal authorities (European Commission 2000: 14).

The relative reliability and shortcomings of this variable will be set out in the next chapter. The fiscal stance indicates the direction of discretionary fiscal policy, which is either expansionary, restrictive, or neutral. The change in the CAPB is the main fiscal stance indicator used by the Commission, a positive change signals policy tightening or consolidation, and negative change indicates relaxation of fiscal policy or expansion. Discretionary and non-discretionary fiscal policy impact the economy through the effect on aggregate demand, though the exact transmission and multiplier effects are debated and model dependent.

Deficit bias is defined in the literature as the tendency for policymakers to run budget deficits irrespective of the economy's prevailing cyclical conditions (Larch *et al.* 2021:4). Several political economy theories underpin this expectation of a deficit bias for policymakers. The cyclical conditions are determined by the output gap. In 'good times', there is a positive output gap, in 'bad times' there is a negative output gap and likely a recession, depending on the quarters of negative growth. If regardless of the cyclical conditions in the economy the government is running a budget

deficit, it indicates a deficit bias. Conversely, there is a surplus bias if there is a tendency for policymakers to run a budget surplus regardless of the cyclical conditions. Although the objective of fiscal policy is stabilisation to reduce fluctuations of the cycle, a deficit or surplus bias will result in pro-cyclicality in fiscal policy. Pro-cyclicality results when there are expansionary policies during good times and restrictive policies in bad times, namely the variables are positively correlated with the fluctuation in output resulting in amplification and propagation of the cyclical conditions. Figure 1 illustrates the effect of pro-cyclical and counter-cyclical fiscal policy on the natural business cycle fluctuation over time (positive and negative output gaps).

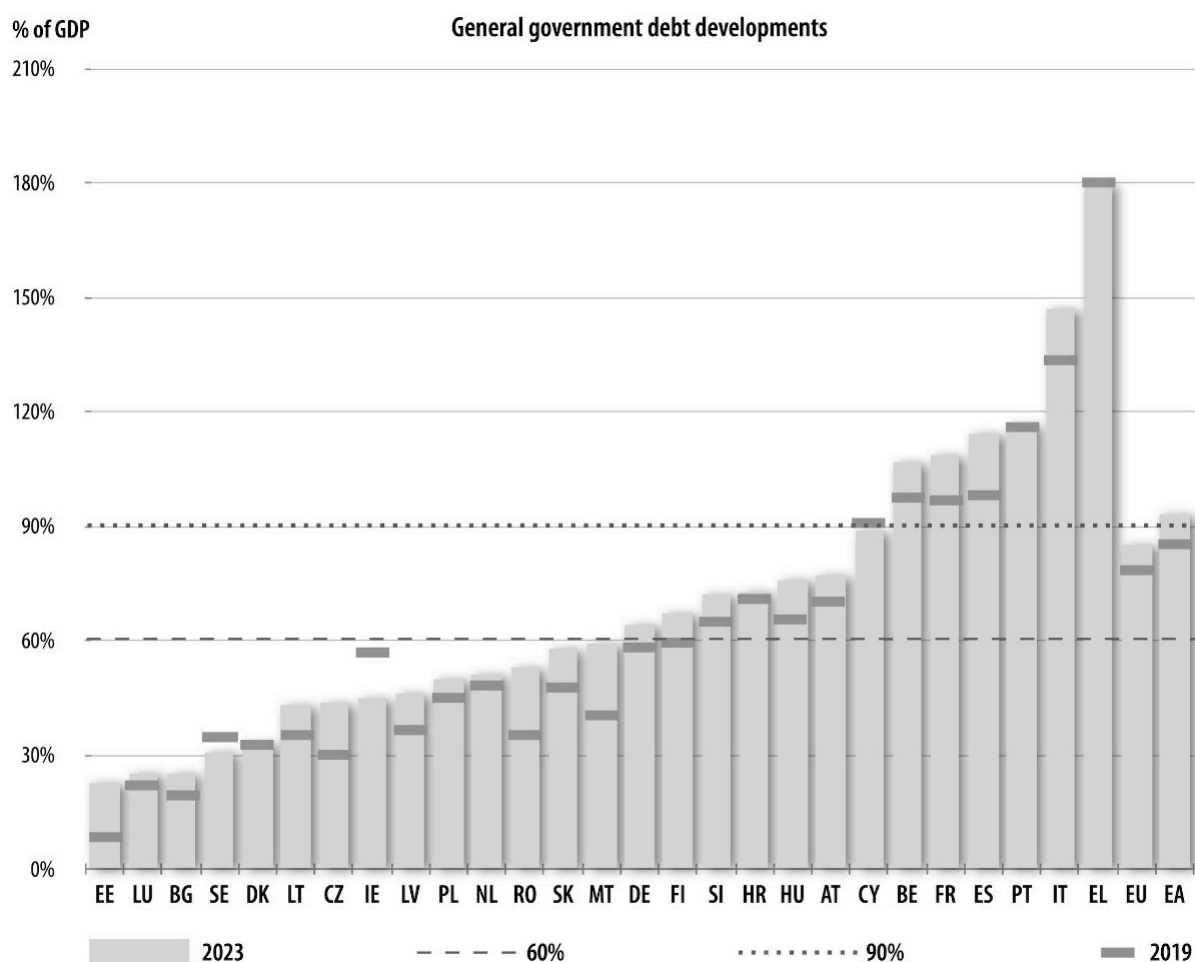
Figure 1: Impact of Fiscal Policy Stance on the Business Cycle



Therefore, this analysis will explore whether there is any pro-cyclicality in fiscal policy, which is likely to stem from a deficit bias in good times, when the constraining effect of fiscal rules is more muted. During recessions, pro-cyclicality is likely to be a function of fiscal rules,

as is shown in the literature (Larch *et al.* 2021: 4). There are numerous empirical studies on the pro-cyclicality of fiscal policy, in advanced economies the pro-cyclicality is found to be more pronounced in good times (Barro 1979). Although pro-cyclicality in upturns may also be a conscious decision by governments aiming to provide an expansionary boost to the economy that will create growth effects in future downturns, rather than merely a result of deficit bias. However, the assumption that procyclicality in upturns is a result of a deficit bias will be maintained throughout the empirical analysis, but it will be re-evaluated in Chapter 4 when considering alternative explanatory factors, in particular the importance of the strength of fiscal frameworks to determine fiscal behaviour.

Figure 2 is taken from the Commission's Spring 2022 Forecast and illustrates the high government debt accumulation in the EU. The standard normative economics explanation of consumption smoothing by the government (Barro, 1979) is unable to effectively, or plausibly, explain these extremely high debt levels that have been reached, nor pro-cyclical patterns. Alesina and Perotti (1995) emphasise that, "politico-institutional factors are crucial to understanding budget deficits in particular, and fiscal policy in general".

Figure 2: General Government Debt Developments in the EU (European Commission, 2022)

2.3. Political Economic Theories of the Deficit Bias and relevance in the EMU

There is a rich literature on political economy explanations of the deficit bias in fiscal policy makers. This literature can be broadly grouped based on the source of heterogeneity of preference, such as between voters and the government, between political parties, as well as between social groups or regions. Separate to heterogeneity of preferences, there is a growing literature on the important role of budgetary institutions themselves setting the constraints that govern budgetary decisions, this is also found to be significant in Chapter 4. The key authors within these explanatory categories will be reviewed and analysed.

2.3.1. Opportunistic policymakers and 'fiscal illusion' of voters

The early literature on deficit bias is focused on fiscal policy as a tool for electoral manipulation by opportunistic policymakers. Buchanan and Wagner (1977) set out the concept of fiscal illusion of voters, who misunderstand the intertemporal government budget constraint and therefore overestimate the benefits of expansionary fiscal policy and underestimate the costs of future taxes and inflation. This is taken

advantage of by policymakers aiming to be re-elected with high deficit-financed expenditure, aiming to maximise votes rather than maximise social welfare. Nordhaus' (1975) theory of opportunistic political business cycles is a key work underpinning this explanation of deficit bias.

These theories are criticised, however, because of underlying assumption of 'fiscal illusion' that voters will persistently make mistakes and fail to understand the budget (Alesina and Perotti 1995: 9). It implies a systematic error which rational voters are unlikely to make, even if they are imperfectly informed. Although more recent literature, notably Rogoff (1990) and Shi and Svenssen (2006), found theoretical explanations to rationalise voting for policymakers enacting opportunistic deficits, but these are dependent on lack of transparency over the budget. These theories also are limited given their ability to explain short-term spending fluctuations, rather than long-term trends in debt accumulation that is seen in several EU member states.

Moreover, most of the empirical literature on the topic does not support the theory of pre-election increases in expenditure or voter preferences for high-spending governments, except for in some 'new democracies' and developing countries where fiscal policy is less transparent (Eslava 2011). With the notable exception of Von Hagen (2006) that finds evidence of pre-election expansions in the EU, as measured by fiscal aggregates, but concentrated in countries with less informed voters. Eslava (2011) notes the need for more investigations to reconcile the evidence for the EU with the rest of the literature, a gap which this thesis works towards filling. Generally, pre-election opportunistic deficits depend on the transparency of the budget process and ability to monitor fiscal outcomes for voters. Evidence in the literature also suggests that high-spending governments are not preferred by voters, who are aware of the costs of spending.

EU MSs generally have well-established democracies, with high transparency over the budgetary process and available fiscal information, so there are less constraints to increase heterogeneity of information and create fiscal illusion. Especially following the eurozone crisis, it can be argued that European citizens are likely to be well-informed about consequences of expansionary fiscal policy, reducing the incentive for opportunistic policymakers to exhibit a deficit bias.

2.3.2. Partisan preferences of policymakers

Several authors posit that a deficit bias may emerge from the assumption of heterogeneity of fiscal preferences across political parties and politicians. Alesina and Tabellini (1990) present such a model of strategic deficits of incumbents spending on their preference of public goods in order to tie the hands of successors and ensure spending on the incumbent's preferred goods. The implication is a greater incentive for the incumbent to generate strategic deficits, the larger the polarisation in spending preferences and probability of regime change. Related theories, such as Persson and Svensson (1989) model heterogeneity across politicians' preferences over the optimum size of government. Namely, conservative incumbents are assumed to have

low-spending and small government preferences, and if there's a large probability of losing the election, they will cut taxes (run deficits) to force the high-spending successor to have lower expenditure than their actual preference. Conversely, left-wing incumbents are assumed to have preferences for higher spending levels and larger government size, when they expect to lose the election, the model predicts they raise taxes and run surpluses to force the successor into spending more. Therefore, deficits arise with polarisation of preferences, but only under conservative governments. The implication of this theory is the opposite of the traditional 'unconditional partisan cycle' hypothesis literature that right-wing governments run surpluses and left-wing governments run deficits (Eslava 2011).

Several empirical studies using large data panels attempt to test these theoretical arguments but generally findings do not support the hypotheses. There is especially weak evidence for unconditional partisan cycles between right- and left-wing governments. Though there are generally difficulties adequately controlling for large cross-country differences in political and economic environments. Therefore, Pettersson-Lidbom (2001) focus on one institution and examine Swedish local government debt accumulation, finding evidence to support the Persson and Svensson (1989) strategic debt hypothesis. Though the external validity is a challenge to this approach of studying a single institution over time. There also may be reverse causality involved in these theories, as fiscal outcomes may affect the probability of re-election, rather than the probability of re-election affecting spending choices. This methodological challenge of the direction of causality runs through theories and empirical studies of deficit bias.

2.3.3. Common pool problem and distributional conflicts of interest

Another reason for pervasive deficit bias put forward in the literature is heterogeneous interests across groups of voters, this results in a common pool problem that generates a deficit bias. The government is modelled to represent groups interested in different government expenditures on certain projects. The benefits of the publicly funded project are concentrated and internalised by the interest group, while the costs are shared across all groups. Therefore, there is an externality and market failure of the 'common pool' type, and consequently over-provision of the good – namely government debt funded projects. The greater the fragmentation of districts participating in the budget, the greater the size of the budget, given a certain revenue level. Von Hagen and Harden (1995) and Krogstrup and Wypolozz (2010) model deficit bias arising from this common pool problem of the budget. This distributional conflict between interest groups is modelled as a 'war of attrition' by Alesina and Drazen (1991), resulting in fiscal adjustments not being adopted when they are necessary as groups are unwilling to accept paying the costs. Common pool problems are used to explain fiscal policy procyclicality by Gavin and Perotti (1997) among others. During booms there are additional fiscal resources available, which is modelled to generate a more intense fight among different interest groups, through

a 'voracity effect'. Consequently, public deficits grow in good times, based on common pool problem dynamics. Another explanation for procyclicality in good times comes from Alesina *et al.* (2008). The boom generates extra revenues and voters aim to avoid these extra revenues being given to other interest groups or the government appropriating the additional revenue. It's based on an assumption of voters' limited ability to monitor the amount of fiscal resources the boom generates or the amount of 'rents' captured by the government or interest groups. Based on this lack of perfect information, voters demand increased productive public spending during a boom to restrain appropriation of the extra resources. So, during good times voter-demand for increased public spending generates a deficit bias. These models imply a greater deficit bias the greater the fragmentation and polarisation, as there are greater distributional conflicts among interest groups.

Empirical evidence to test the implications of these theories seems to generally confirm that political cohesion is positively related to fiscal discipline, namely reduced deficit bias. Such as a positive relation between the number of spending ministers or legislating parties in a coalition and government spending. Specifically, Bawn and Rosenbluth (2006) find that for European countries the number of legislative parties participating in the governing coalition is key, rather than the number of parties generally. There is also empirical evidence that parliamentary systems and proportional systems lead to more spending than presidential systems and majoritarian electoral systems, respectively (Alesina *et al.* 2006). Eslava (2011) highlights the various areas to be further explored in this part of the deficit bias literature include causality concerns, the potential different impact of fragmentation on spending rather than deficits (as spending and deficits are generally treated as equivalent variables in the common pool literature), and the link between the initial debt levels and probability of government undertaking corrective fiscal adjustment measures when debt grows excessively.

2.3.4. Budgetary institutions

Although motivations are important in shaping fiscal choices in political economy models of the deficit bias, these motivations depend on the constraints governments face during the budget-making process. The budgetary institutions are the general rules, procedures and practices that shape the budgetary process which includes the drafting, approval, and implementation of the budget (Alesina *et al.* 1999).

Firstly, numerical targets are the most severe type of constraint, and there is extensive discussion in the literature on the optimality of fiscal rules. These rules aim to resolve the common pool problem, as the rule-setting authority internalises the costs to diverging interest groups, resulting in more fiscal discipline. Conversely, however, fiscal rules are hard to enforce, and may even create incentives for creative accounting practices by governments as shown by Milesi-Ferretti (2003) theoretically, and Bohn and Inman (1996) empirically. Fiscal rules may also impede counter cyclical fiscal policy and tax smoothing.

In the EMU, the Maastricht Treaty set the supranational numerical budget targets, the institutional framework will be further outlined in the next section. The EMU fiscal rules address the domestic common pool problem as well as the international common pool problem, of international negative externalities, as rationalised by Krogstru and Wyplosz (2010). There are numerous studies analysing the effectiveness of EU fiscal rules. Von Hagen (2006) found greater effectiveness of the rules to reduce deficits and spending for smaller member states and those with better budgeting institutions. Von Hagen and Wolff (2006) found the EMU rules generated incentives for creative accounting to comply with the 3% limit of the SGP by using stock-flow adjustments to substitute for deficits. Linked to this adjustment, the rules are found to be more effective initially after adoption, indicating governments may circumvent the rules after a certain period (Von Hagen 2006). The general evidence points to limited effectiveness of numerical fiscal rules, with spending channelled to funds not constrained and large differential patterns of response across countries, due to political context and other budgetary institutions shaping the environment. Eslava (2011) questions the suitability of rules and suggests the need for a revision. Member States themselves have recently also called for revision of the strict rules and reform of the fiscal framework.

Secondly, procedural rules concerning the design, voting and implementation of the budget are a key constraint on policymakers' motivations and potential deficit bias. These rules can be classified as more or less hierarchical or centralised, based on representation of different interests in the budget process. More representation is theorised to result in overspending due to common pool problems. Institutions that centralise drafting power on the finance minister rather than across spending ministers or limit the legislature's ability to change the budget size or impose amendments, are likely to increase fiscal discipline and ameliorate common pool problems.

Transparency of the budget institutions is also key to fiscal discipline. Most empirical studies create indices of budget institutions and findings are in line with the theory that greater transparency results in lower deficits, Alt and Lassen (2006) find this for the OECD countries. Von Hagen (2006) also finds that in the EU, the strength of procedural rules impact the effectiveness of numerical targets.

The characteristics of the political systems are also important in shaping the budget institutions. Hallerberg and Von Hagen (1999) find that in Europe majoritarian systems generally delegate budget processes to a treasury minister and are more hierarchical. However, separating between political system and budget processes is a challenge in the literature, as well as endogeneity of budget institutions. For example, sources of endogeneity could be that some budget institutions may only be effective with a certain political environment or budget rules may emerge from previous fiscal outcomes. Furthermore, there may be third forces at play which fiscal outcomes or budgetary institutions are responding to, including culture, voter preferences and the political environment. De Haan and Sturm (1994) find that when controlling for voter preferences, budget institutions do matter. However, generally few studies look at these third explanatory factors.

A critical review of the literature on motivations behind persistent deficits highlights the common theme of conflicts of interest across theoretical and empirical explanations. Such as the importance of opportunistic motivations, partisan preferences, and conflicts between groups fighting for the common pool of deficit 'resource'. The literature indicates that political and institutional forces are key in determining the budget balance, shaping the motivations and constraints of policy-makers.

Eslava (2011) highlights that across this literature there are causality concerns that require further exploration. The literature largely takes for granted that correlations reflect causality, but reverse causality, omission biases and simultaneity are possible. This is important if authorities hope to generate effective solutions for persistent deficits. As, although it is straightforward to formulate the deficit bias in theory, in practice if the government is not exhibiting consistent deficit bias, or there are differential patterns across countries as is the case in Europe, there may be other explanatory factors underpinning the intertemporal budget constraint.

The institutional framework determines whether the deficit bias channels presented in theory result in an actual deterioration in the fiscal balance. Therefore, it's important to outline the institutional framework in the EU ahead of analysing the trends in deficits over time.

2.4. Deficit bias theory applied to European fiscal framework

Analysing fiscal deficit bias in theory and practice is important in the European context because it is one of the key economic theories underpinning the European fiscal rules framework. The linkage between fiscal deficit bias theory and the Stability and Growth Pact (SGP) will therefore be briefly set out, to highlight the importance of this topic of investigation, especially given the current debate on reform of the European fiscal rules. The implications of the analysis in this thesis for institutional reform in the EMU will then be explored in Chapter 4. The fiscal rules are also important to set out as they help explain pro-cyclicality during bad times in the EMU.

The SGP is the secondary legislation that implements the rules-based framework for budgetary surveillance in the EU. When the European EMU was launched with the Maastricht Treaty in 1992, the need for fiscal coordination and surveillance was acknowledged and implemented through the creation of the SGP - first adopted in 1997, and reformed and supplemented in 2005 and then 2011. EMU is based on common monetary policy and decentralised national fiscal policies, therefore, fiscal rules were established to avoid potential negative cross-border spillovers from national fiscal policy choices, enable effective monetary policy and ensure long-term debt sustainability. A common currency increases interdependence and spillovers between participating members, therefore, the SGP was designed to reduce the "possibility of negative impacts on other euro area countries – whether stemming from the inflationary impact of large deficits or the destabilising effect of unsustainability or insolvency" (European Commission 2013).

The basis of European budgetary surveillance is firstly the principle that economic policies are “a matter of common concern” and should be coordinated, set out in Article 121 TFEU; this preventive arm is focused on coordination to ensure sound medium-term fiscal positions. Secondly, Article 126 TFEU requires the avoidance of excessive deficits and debts, establishing the ‘excessive deficit procedure’ of the corrective arm of the SGP:

Article 126 TFEU

1. Member States shall avoid excessive government deficits.
2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria: [...]

The core reference values of the Treaty are 3% of GDP deficit rule and 60% of GDP government debt rule, subject to various exceptions. As shown in the Treaty’s text, “budgetary discipline” is at the core of the fiscal framework, due to interdependence and spillovers. Therefore, rules are imposed in the EMU in order to ensure fiscal discipline and coordinate fiscal policy. The assumption underpinning the need for fiscal discipline is that there is a natural tendency for governments to run deficits, namely a deficit bias. The fiscal surveillance framework in the EMU is therefore predicated on the theory of fiscal deficits bias creating a need for fiscal discipline enforced through fiscal rules.

2.5. Literature on Varieties of European Capitalism and Growth Models

In order to explain deficit patterns in some countries and not others, the explanatory power of varieties of capitalism and growth model literature will be analysed in contrast to, and to complement, deficit bias theories. The key aspects of this literature will be briefly set out in this chapter ahead of using these theories to analyse the results of the empirical analysis in Chapter 4.

Varieties of capitalism literature is within the political economy theoretical framework and is focused on institutional differences characterising developed economies, which shape macroeconomic performance and policymaking. Varieties of capitalism is an approach to comparative political economy first studied by Hall and Soskice (2001). It contrasts with OCA theory literature, such as De Grauwe (2012), which is focused on institutions that should be in place for an effective shared currency area, shifting the focus to the actual institutions in place in economies and their resilience. OCA theory does not analyse the structural heterogeneity in the varieties of capitalism that may be in place and reduce the likelihood of shock convergence emerging endogenously overtime in a currency area. This structural heterogeneity is presented on a spectrum between the core political economic archetypes of liberal market economies (LMEs) and coordinated market economies (CMEs), with mixed market economies (MMEs) along the spectrum (Hall and Soskice 2001). These are the ideal-type poles of the varieties of capitalism spectrum. LMEs include the USA, UK, Canada, and are characterised by high degrees of competition in markets, especially liberal labour markets

and among firms, as well as short-term financing of firms and key role of capital markets. Conversely, CMEs such as Germany and Japan, are based on long-term financing of firms, through banking finance, and there is a crucial role of negotiations in the labour market through coordination of sectoral unions (Szabó 2014: 2).

In the European context, authors have broadly contrasted the CMEs of Northern Europe, especially including Germany, Austria, Belgium, the Netherlands, and Finland; with MMEs including France and within the mixed market models the Mediterranean market economies of Southern Europe, especially encompassing Italy, Spain, Portugal, and Greece. Hall and Soskice (2001) noted the legacy of large levels of state intervention in the latter group, characterising them as mixed models. Molina and Rhodes (2007) also defined mixed market economies with reference to Spain and Italy in particular, noting the key role of coordination in markets, but that collective goods cannot be delivered as effectively as in CMEs. Investigation of these countries by further authors concludes that these economies lack institutions for strategic coordination of wages among unions, businesses have less wage restraint and relations are clientelist between state and firms (Hall 2018: 12).

A crucial contention of the literature is that different varieties of capitalism pursue different approaches to achieve economic growth through different growth models. The integration of the demand-side into the supply side analysis emphasised by early varieties of capitalism theorists, results in a rich new body of literature on national growth models, and the ability to classify economies based on demand side drivers as well as supply side.

CMEs generally operate export-driven growth models, securing economic growth through the expansion of exports. The institutional set up that enables this growth model is coordination of producers facilitating coordinated wage bargaining, high skill levels and innovation favourable to medium to high technology production, creating a political economy favourable to promoting high-value-added exports (Hall and Soskice 2001).

While Hall and Soskice's (2001) original framework was actor-centred and viewed firms as the key actors in the capitalist economy. More recent literature places more emphasis on policies and government strategies that drive the economy based on the growth model. This literature suggests that these export-led growth models also crucially depend on complementary macroeconomic policies to facilitate reliance on exports. Namely, non-accommodating monetary policies ensuring a hard exchange rate, deterring wage increases, complemented by a restrained fiscal policy stance, limiting public-sector wage increases that could drive up the real exchange rate and hurt competitiveness (Iversen *et al.* 2016).

In contrast to the CMEs in Northern Europe, the MMEs in Southern Europe are more prone to pursue demand-led growth. This growth model involves the pursuit of economic growth through expanding consumer demand, this model is also characteristic for liberal market economies. The government macroeconomic strategy that is the corollary to demand-led growth models is accommodating monetary as well as fiscal policies aimed at boosting domestic demand. Though Hall (2016) notes excep-

tions to this, including when Thatcher's government in the UK chose an austere economic policy to weaken unions.

The export-driven CMEs are broadly considered the 'core of the eurozone', while the peripheral economies and France and Italy are in the second category of demand-driven mixed market models and Mediterranean market economies.

Crucially, this literature views economies as driven by government strategies, and therefore the fiscal and monetary policy preferences underpinning these strategies are based directly and indirectly on the national variety of capitalism. This is therefore an alternative political economic explanatory theory for the budgetary choices of governments, which sees north European CMEs operating quite differently to the liberal, mixed and Mediterranean market economies in Southern Europe.

This theory also raises important questions of how in a monetary union with structural heterogeneity in national growth models, the Southern Europe periphery of the eurozone can best secure economic growth. Although the period from initial inception to the eurozone crisis was an arguably well-functioning "dual growth model" period (Iversen *et al.* 2016: 167). As European integration has not reduced the varieties of European capitalism over time, indicative of institutional path dependence and creating a risk of "growth models without growth" (Hall 2018: 25). Moreover, although there is some debate in the literature on the classification of France in the varieties of capitalism framework, most scholars argue France is in the mixed market group of European economies (Hassel 2014). It is therefore especially important to note that establishing a common economic policy framework with the twin engines of the eurozone, France and Germany, having such different growth models, enhances the challenges for European integration and fiscal framework reform.

3. Empirical analysis of historical deficit bias in the EU and results

This chapter aims to empirically investigate the existence of a deficit bias in EU countries over the last decade. Firstly, setting out the data source, choice of variables, methodology and estimation techniques. Secondly, the empirical results are presented, investigating member states as a group and then individually, exploring the procyclicality in fiscal policy during years of positive output gap, to investigate the likelihood of a deficit bias in fiscal policy choices. Finally, endogeneity and causality concerns are explored. The potential theoretical explanations behind the empirical results are presented in the following chapter. This chapter aims to answer the first research question: Do all EU countries exhibit a persistent deficit bias over time, based on pro-cyclical expansionary fiscal policy during periods of positive output gap?

3.1. Data source

The European Commission's AMECO database is the data source for the analysis. AMECO has panel data for EU member states, or cross-sectional time-series data for fiscal variables. This single data source is chosen as it uses the same methodology to

calculate the variables for each member state, this is important given the diverging methods used to calculate certain variables, especially the output gap. Therefore, this choice ensures consistency across data values for each country and the ability to compare across countries overtime. This data source is also commonly used in the ‘fiscal reaction function’ literature for the European context (European Central Bank 2017). The panel is unbalanced, because there are some missing observations towards the beginning of the sample, and so the analysis is restricted to the years where full data is available for the variables of interest for all member states. The data sample covers all 27 member states, including the 19 countries in the eurozone.

3.2. Choice of variables

The main dependent fiscal variable of interest is the ‘fiscal effort’ of governments, to assess whether there is a deficit bias in this effort. In the literature this is best estimated through the structural balance excluding interests as a percentage of potential GDP, also referred to as the cyclically-adjusted primary balance. This thesis investigates the political economic determinants of this dependent variable, especially deficit or surplus bias and varieties of capitalism as explanatory factors that shape the fiscal effort, fiscal impulse and policy environment.

The AMECO database includes the main dependent variable of interest, within chapter 17.1 of the database - cyclical adjustment of public finance variables based on potential GDP. Within this chapter is the relevant policy variable: structural balance excluding interests as a percentage of potential GDP, at current prices (AMECO Database 2022). This variable is referred to as the cyclically adjusted primary balance (CAPB).

Several authors highlight that the cyclically adjusted primary balance is the predominant “measurement of discretionary fiscal policy” (Larch 2021). Nonetheless, it must be noted that the CAPB measures with some degree of error the fiscal authority’s discretionary actions and the Commission insists on interpreting results with necessary caution (European Commission 2000: 138). Overtime from 2005-2015, the EU increased the emphasis on cyclical corrections and therefore structural balance indicators. The Fiscal Compact of 2013 committing signatories to maintain structural deficits below 0.5% of GDP for the medium term, with this set out in national legislation. Given the unobservability of the structural deficit it raises some technical difficulties and controversies. However, there is no better alternative in the literature (Golinelli and Momigliano 2006), and the Commission continues to focus on structural variables in the European Semester process. Therefore, this thesis follows the literature in using the CAPB as a proxy for the fiscal effort of the fiscal authority, making it the main dependent variable of choice.

The Economic and Financial Affairs Directorate General use a, “simple and transparent method” of calculation, providing uniformity in the fiscal framework of the EU (European Commission 2000: 137). This is a two-step method that does not involve subjective fine-tuning. Firstly, the output trend is estimated using the Hodrick-

Prescott filter, then cyclical components are calculated by multiplying the output gap with elasticities of revenues and expenditures to GDP. The Commission uses elasticities calculated by the OECD (Girouard and André 2005). These elasticities are assumed constant overtime, a justifiable assumption for mature economies (Fiess 2002: 5). Finally the CAPB is calculated. The following formulas illustrate these steps.

$$(\text{Cyclically adjusted budget balance})_t = (\text{actual budget balance})_t - (\text{cyclical component})_t$$

$$\text{Where: } (\text{Cyclically adjusted budget balance})_t = (\text{actual budget balance})_t - (\epsilon_{\text{revenue}} + \epsilon_{\text{expenditure}}) * (\text{output gap})_t$$

$$\text{Therefore: } (\text{Cyclically adjusted primary balance})_t = (\text{actual budget balance})_t - (\epsilon_{\text{revenue}} + \epsilon_{\text{expenditure}}) * (\text{output gap})_t - (\text{interest payments}) - (\text{one-off measures})$$

The output gap is the other key variable in this analysis. Empirical studies vary in using the level of output gap or the change in output gap and real time or ex-post figures. This analysis chooses to use ex-post level of output gap. This variable for output gap is found within chapter 6.5 of the AMECO database – potential gross domestic product at constant prices. Within this chapter the variable used is: gap between actual GDP and potential GDP at constant market prices (AMECO Database 2022). This variable is referred to as the output gap.

$$(\text{Output gap})_t = (\text{actual GDP})_t - (\text{potential GDP})_t$$

Where potential GDP is the solution the following minimisation problem (European Commission 2000: 137):

$$\text{Min}_{\{y_t^T\}} \sum_{t=1}^T \left[(y_t - y_t^T)^2 + \lambda [(y_{t+1}^T - y_t^T) - (y_t^T - y_{t-1}^T)]^2 \right]$$

This formula obtains the trend GDP estimates by using the Hodrick-Prescott filter, which is the application of weighted moving averages to actual output. The output gap is then the difference between actual and trend GDP. A positive change in the output gap indicates improved cyclical conditions, and vice versa for a negative output gap.

Therefore, both variables of choice include potential output within their calculation; however, potential output is unobservable. CAPB also includes the unobservable elasticities of revenue and expenditure to GDP, which are estimated. There is consequently a high degree of uncertainty and variability around the variables. This reinforces the benefit is using a single data source, because a variety of estimation methods exist, each with their own shortcomings. Using one data source ensures cross-country consistency and uniformity.

3.3. Summary Statistics of Main Variables of Interest

3.3.1. Cyclically Adjusted Primary Balance (CAPB)

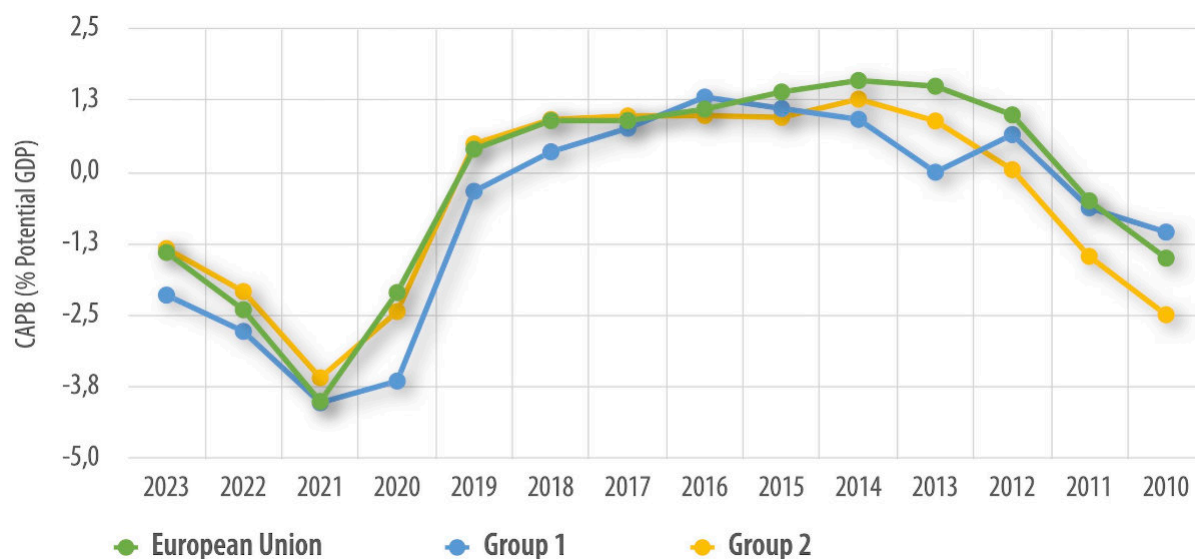
Before assessing pro-cyclicality of fiscal policy using the CAPB and output gap variables, high-level summary statistics are presented to show an overview of the variables. The CAPB variable is only available for all EU MSs from 2010-2023 on

AMECO. Although for Italy and Slovenia data is available from 1997. In order to use a balanced panel data set, the analysis will therefore begin in 2010.

Table 1 shows summary statistics of the CAPB for each country over the time period of the analysis. Indicating the minimum, maximum and standard deviation of CAPB. Notably, Greece has the largest standard deviation in CAPB. Subsequently, Figure 3 shows a line graph overtime of CAPB for the EU and the Group 1 and Group 2 of MSs that are found to be relevant for the analysis that follows (and are listed in Table 3 following the main empirical analysis).

	Min	Max	Mean	Standard deviation
European Union	-4,00	1,60	-0,22	1,77
Euro area	-4,30	1,80	-0,23	1,89
Belgium	-5,20	0,90	-1,14	2,00
Bulgaria	-2,70	2,30	-0,46	1,80
Czechia	-5,00	1,80	-0,85	2,15
Denmark	-1,30	4,90	1,92	1,54
Germany	-4,50	2,50	0,76	2,14
Estonia	-3,70	1,40	-0,61	1,66
Ireland	-6,50	3,60	-1,48	2,74
Greece	-5,40	8,60	3,69	4,87
Spain	-4,90	2,70	-0,99	2,18
France	-5,60	-0,50	-2,06	1,53
Croatia	-4,50	2,70	-0,66	2,11
Italy	-4,60	4,20	0,90	2,77
Cyprus	-3,00	7,80	1,32	3,60
Latvia	-7,90	0,80	-0,91	2,27
Lithuania	-6,10	1,00	-0,91	1,98
Luxembourg	-1,30	3,70	1,68	1,23
Hungary	-4,50	3,50	-0,27	2,45
Malta	-8,00	2,90	-0,95	3,15
Netherlands	-8,00	1,60	-0,47	1,71
Austria	-3,70	2,30	0,06	1,78
Poland	-5,60	0,00	-1,55	1,76
Portugal	-5,70	3,30	0,56	2,43
Romania	-6,10	1,40	-2,31	2,38
Slovenia	-8,60	2,60	-1,68	3,74
Slovakia	-6,10	0,30	-1,95	1,95
Finland	-2,70	0,50	-0,44	1,05
Sweden	-0,20	1,80	0,84	0,59

Figure 3: CAPB in the EU 2010-2023



3.3.2. Output gap

Data for the output gap variable is available in AMECO from 2001-2023. Figure 4 shows the output gap from 2001-2023 across the EU and for the Group 1 and Group 2 countries that are found to be relevant groupings in the analysis that follows. The empirical analysis focuses on the specific time period for which CAPB data is also available on AMECO, namely 2010-2023. Therefore, Table 2 provides summary statistics for the output gap figures across EU member states, as well as the EU and euro area overall from 2010-2023 to be comparable to Table 1.

Figure 4: Output gap in the EU (2001-2023)

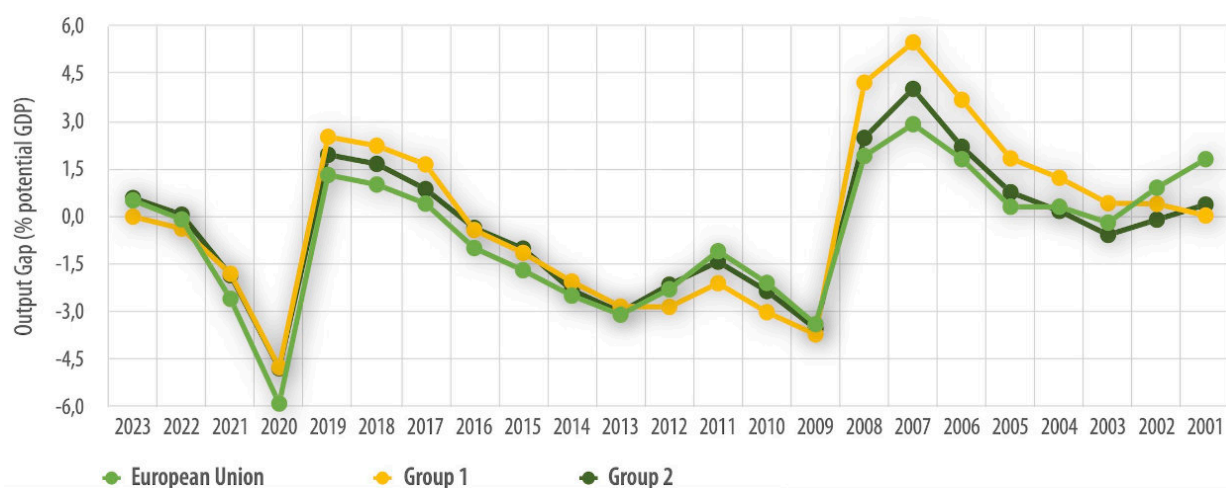


Table 2: Output Gap (% Potential GDP) 2010-2023

Country	Min	Max	Mean	Standard Deviation
European Union	-5,90	1,30	-1,37	1,94
Euro area	-6,20	1,30	-1,44	2,03
Belgium	-5,40	1,50	-0,50	1,60
Bulgaria	-3,50	2,60	-0,26	1,55
Czechia	-4,40	2,90	-0,76	2,13
Denmark	-4,10	-0,20	-2,17	1,25
Germany	-4,40	1,50	-0,26	1,72
Estonia	-8,40	1,90	-1,08	2,77
Ireland	-4,80	5,30	0,13	3,03
Greece	-16,70	1,50	-8,67	5,74
Spain	-9,30	2,40	-3,96	4,02
France	-7,00	1,80	-1,20	2,09
Croatia	-6,00	3,60	-1,08	2,86
Italy	-8,60	0,80	-2,19	2,59
Cyprus	-9,50	5,70	-1,49	4,45
Latvia	-11,00	3,20	-1,24	4,00
Lithuania	-9,40	3,20	-0,76	3,32
Luxembourg	-4,50	0,70	-1,47	1,24
Hungary	-4,90	3,50	-0,91	2,82
Malta	-5,90	5,50	0,19	3,59
Netherlands	-3,80	1,40	-1,00	1,66
Austria	-5,80	2,00	-0,65	1,98
Poland	-2,50	3,30	-0,01	1,77
Portugal	-6,10	3,90	-1,27	2,89
Romania	-5,60	1,70	-1,78	2,27
Slovenia	-7,40	3,80	-1,49	3,65
Slovakia	-3,80	2,20	-0,72	1,90
Finland	-3,70	0,70	-1,32	1,46
Sweden	-4,30	0,60	-0,91	1,45

avoid outlier bias resulting from the euro debt crisis. The focus of this paper's analysis is on bias in fiscal policy choices during normal times, therefore, the euro crisis is considered an outlier. Therefore, by not using data from before the crisis, it avoids presenting continuous data that includes a crisis period, where fiscal policy behaviour would be abnormal. This follows the approach by Larch *et al.* (2020), who split their regressions into subsamples based on the following time periods, 1980-1998, 1999-2004, 2005-2011, 2012-2017. There was substantial reform of the European fiscal rules following the euro crisis, with the 2-pack, 6-pack and fiscal compact changing the 'rules of the game'. Consequently, the pre-2010 period is an inherently different decision-making environment; and so, focusing on post-2010 is beneficial to remove potential bias from the fundamental institutional change that took place.

3.3.3. Outliers

Summary statistics are used to identify potential outliers in the data, which are "unusual" observations that are substantially different from the bulk of the dataset and greatly influence the econometric estimates. Outliers are a cause for concern if they change estimates by a large amount. Generally, it's recommended to report results with and without outlying observations, to observe whether certain data points substantially modify the results. Tables 1 and 2 show that the variables of interest for Greece are substantially different from the other member states, with the highest standard deviation. Therefore, to check robustness of the results to outliers, the result for the EU as a whole will be re-analysed removing figures for Greece, to observe whether this has a substantial impact on the results.

The short time period of available CAPB data on AMECO is also favourable to

3.4. Methodology and Estimation Techniques - Testing for Pro-cyclical Expansionary Fiscal Stance

A deficit bias is the tendency to run budget deficits irrespective of the cyclical conditions in the economy, the various theoretical explanations for this are outlined in Chapter 2. Pro-cyclicality of fiscal policy in good times, namely expansionary policies when the economy is above potential output, is assumed to be an indication of a deficit bias. During good times, policymakers should consolidate, stabilise output and free up fiscal space buffers for future downturns, reducing spending, pay-off debts and reduce the deficit. However, if there is a deficit bias, this behaviour is less likely to manifest and instead policymakers will amplify the cycle by contributing to aggregate demand through expenditure increases and tax cuts – resulting in a pro-cyclical effect (Larch *et al.* 2019). This preference for tax cuts and expenditure increases, or a deficit bias, would still exist during bad times, but fiscal rules would have more of a constraining effect and so there is also likely to be pro-cyclicality in bad times. Several empirical studies found pro-cyclicality of fiscal policy, restrictive in bad times and expansionary in good times (Larch 2021: 4). Crucially, pro-cyclicality in good times is assumed to stem from deficit bias behaviour. This assumption is based on the literature explored in Chapter 1. Therefore, the methodology of this analysis is focused on exploring pro-cyclicality in fiscal policy, if this is detected during good times it is likely to be indicative of a deficit bias. Though it is important to note the possibility that governments may choose expansionary policies in good times to reap medium term growth effects that would support the economy in upcoming downturns, when the fiscal rules will restrict ability to run counter-cyclical policy. This possibility of EU fiscal rules playing a role in upturns as well as downturns is not tested in this analysis, and pro-cyclicality in upturns is assumed to be due to deficit bias behaviour. However, in the next chapter this assumption is relaxed, in order to better explain the heterogeneity that is found across MSs fiscal behaviour in upturns and account for the important role of the fiscal framework in shaping fiscal decisions.

The baseline specification to test for pro-cyclicality is the reaction of the CAPB to the output gap. If the sign of both the change in the CAPB and output gap is the same (both positive or both negative) then the fiscal stance is counter-cyclical. If the signs are different and change in CAPB is negative (positive) and output gap is positive (negative), then fiscal stance is pro-cyclical. Broadly:

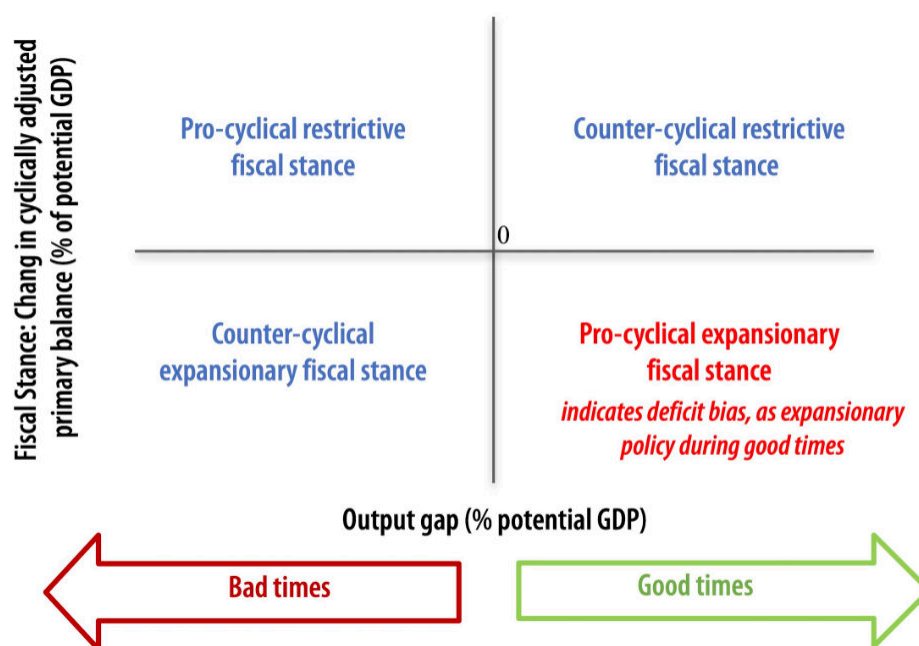
If, $(CAPB)_t - (CAPB)_{t-1} / (output\ gap)_t < 0$, then indicative of a pro-cyclical fiscal policy stance.

If, $(CAPB)_t - (CAPB)_{t-1} / (output\ gap)_t > 0$, then indicative of a counter-cyclical fiscal policy stance.

If the change in the CAPB is negative, then there has not been a consolidation of discretionary fiscal policy over the year and expenditure (and/or tax cuts) has increased relatively, resulting in an expansionary fiscal stance. If the output gap is positive, so actual GDP is above potential GDP, then the ratio of the change in the balance to output gap will be negative; and this indicates pro-cyclical expansionary fiscal stance. Figure 3 illustrates how the fiscal stance is measured by the change in CAPB and whether it is pro-cyclical or not depending on the sign of the output gap.

Figure 5 clearly shows the 4 types of fiscal stances, when the fiscal stance is in quadrant 4 then it is indicative of a deficit bias, running a budget deficit even though there are good cyclical conditions, amplifying the cycle. Figure 5 is the basis of the methodology to explore the existence of a deficit bias in the EU members states. This figure shows the hypothesis based on deficit bias theory: when cyclical conditions are favourable countries will exhibit a pro-cyclical expansionary fiscal stance.

Figure 5: Classifying the Fiscal Stance

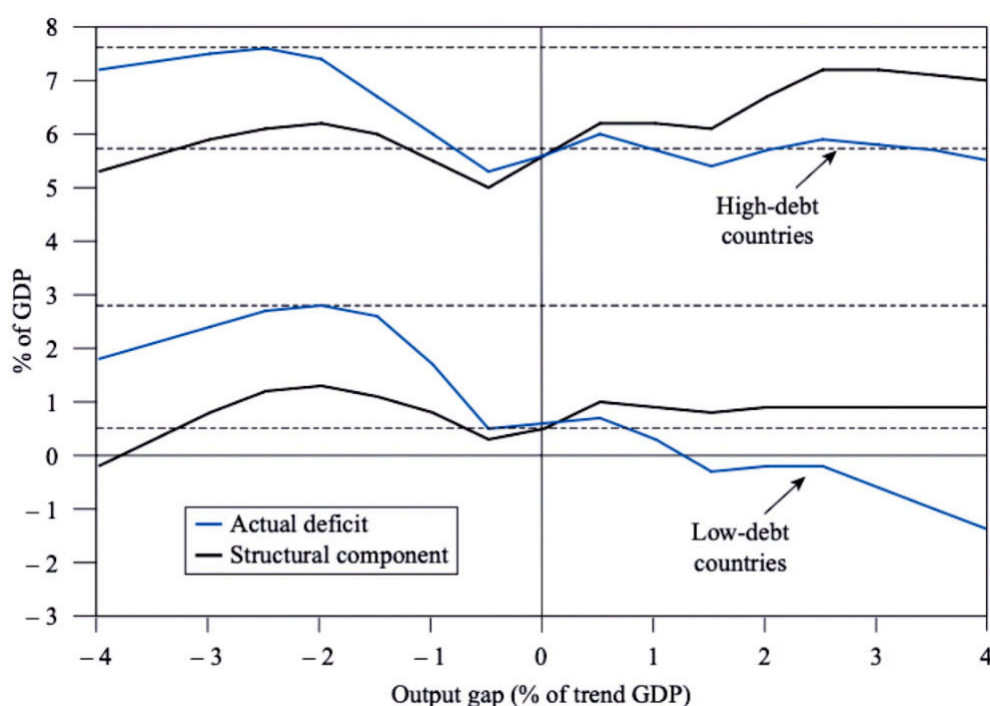


This hypothesis is based on political economy theories of deficit bias as well as several empirical studies. Larch *et al.* (2020), in particular, find evidence using various estimation techniques confirming pro-cyclicality of fiscal policy for a sample of 40 developed countries, including EU and non-EU. They find political economy factors to be meaningful up to the point where debt becomes unsustainable and ensuring sustainable public budget balance becomes key motivation behind policy interventions and pro-cyclical choices (though this is largely relevant during bad times). In particular, Larch *et al.* (2020) find, "evidence that discretionary fiscal policy becomes more pro-cyclical when cyclical conditions improve. This result confirms earlier findings according to which policymakers are less inclined to withdraw fiscal support to aggregate demand when times get better" (Larch *et al.* 2020:16). The key political economy consideration the authors highlight that contributes to the pro-cyclicality they find empirically in good times is the deficit bias. They also highlight that pro-cyclicality in bad times counteracts deficit bias as it has different drivers, especially high public debts and sustainability problems. Overall, substantial empirical literature indicates tendency towards deficit bias during upturns, hence pro-cyclicality during good times.

The main hypothesis therefore has theoretical and empirical grounding in the literature. The empirical literature uses highly sophisticated econometric estimation techniques, in comparison to the simple statistical analysis in this methodology. However, while the literature generally investigates advanced economies as a group - as larger samples increase validity of results - this analysis has the benefit of looking at individual countries overtime. As the aim is to investigate whether there is heterogeneity across behaviour of countries, and if alternative theories can better explain fiscal interventions. Therefore, key to the methodology is exploring individual country behaviour and whether there are certain common heterogeneities, such as across core and periphery EU countries with different growth models. This is the added value of this simpler statistical analysis, compared to most of the empirical literature that focuses on the cross-country aggregates to draw broad conclusions, rather than looking for nuances, idiosyncrasies, and alternative explanations.

Generally empirical studies find evidence of pro-cyclicality in fiscal policy stances overtime for the EU countries on aggregate, with discretionary fiscal policy choices amplifying output swings on average. The Commission also finds evidence of pro-cyclical euro area fiscal policy since 1977, but notes that, "individual countries behaved differently as not all countries ran pro-cyclical policies" (European Commission 2000: 14). The Commission distinguishes between high low debt countries, noting the former group pursued pro-cyclical policies across all positive output gaps and large negative output gaps. Whereas low debt countries have broadly neutral fiscal stances for positive output gaps. The Commission uses Figure 6 to depict the changes in CAPB against output gap across high and low debt countries in the EU.

Figure 6: Output gap and budget deficit in the EU (1970-90) (European Commission, 2000: 15)



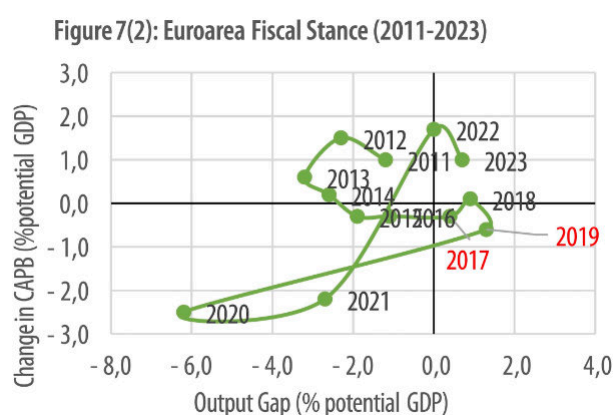
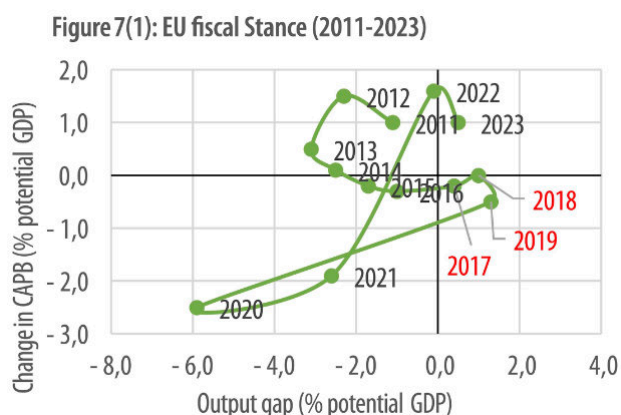
The methodology in this paper will follow this approach by exploring countries' fiscal stance individually, to explore nuances, patterns, and heterogeneities in individual-level fiscal behaviour. This will enable an indication of whether there is a 'law-like' deficit bias for all countries, or this is mainly at aggregate level with significant variation on individual member state level, that can be explained through other factors.

3.5. Deductive Reasoning in Theoretical Economics

The methodology outlined above uses hypothetico-deductive reasoning, where an overarching theory is taken and used to predict an observable outcome. In this case, deficit bias theory is used to predict the hypothesis of a pro-cyclical expansionary fiscal stance during good times. This hypothesis is then tested, and if the prediction is not supported by the empirical results, an alternative theory is proposed. Generally, the deductive method in theoretical economics involves an economic theory deducing generalisations through logical reasoning, and then inferences are drawn from this theory which are confirmed or non-falsified against observable outcomes. It is a methodology working from the wide to the narrow and is commonly used in mathematical and econometric analyses. Direct experiments are generally not possible in Economics, therefore, findings that are based on overarching principles are said to be universal and hold external validity.

3.6. Empirical Results

The methodology set out in Figure 5 will be used for the EU, euro area and then each MS individually, to explore potential fiscal deficit bias. Graphing the change in CAPB against the output gap roughly shows the fiscal stance of each country each year, and values in quadrant 4 are indicative of pro-cyclical expansionary fiscal policy which is generally associated with deficit bias behaviour – spending more in good times and amplifying the cycle. Figures 7(1) to Figure 7(29) show the empirical results of the analysis.



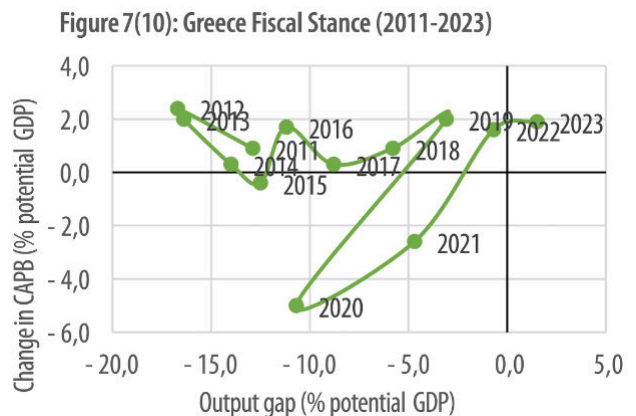
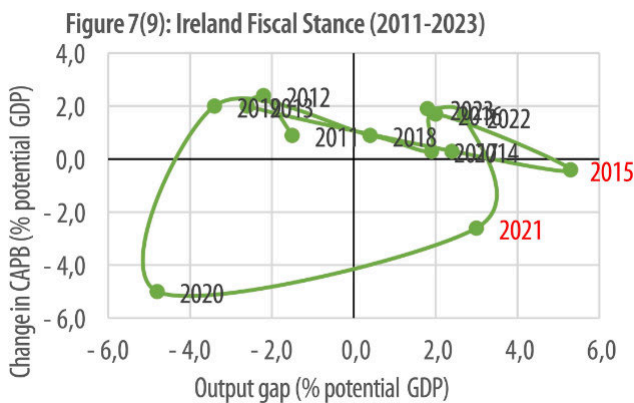
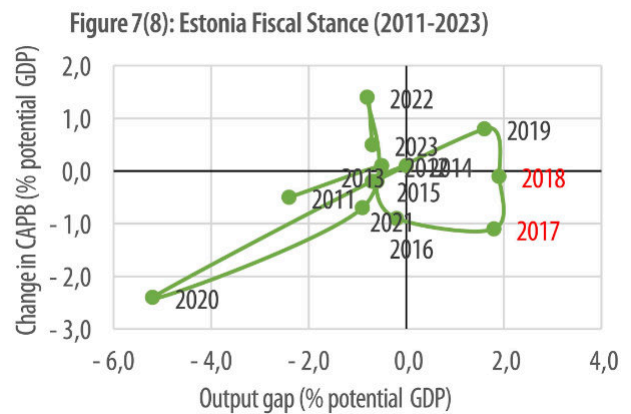
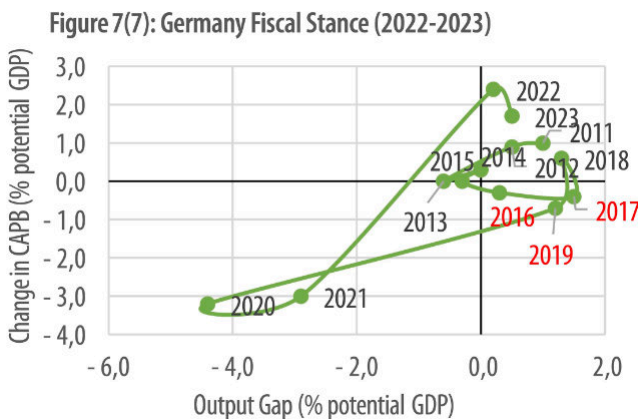
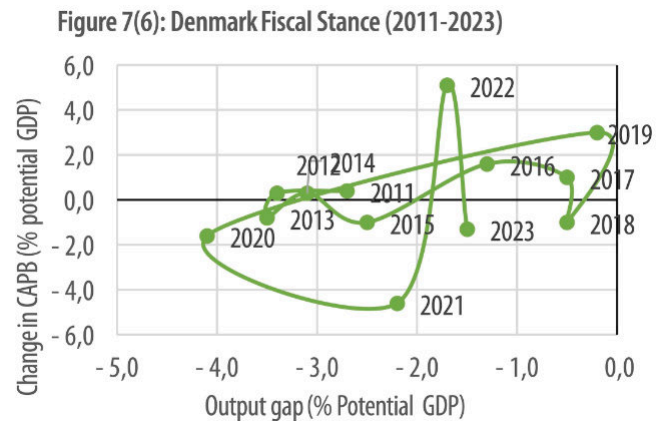
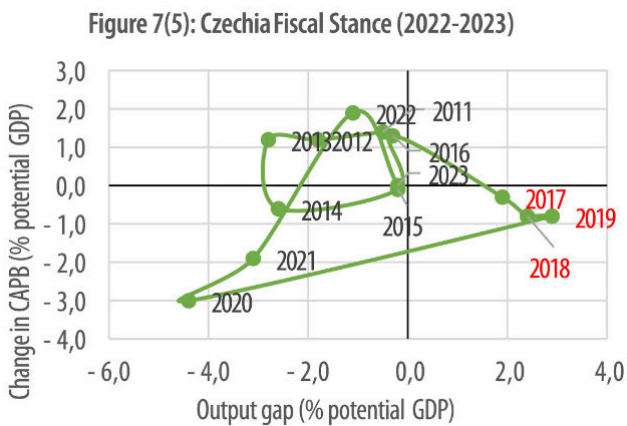
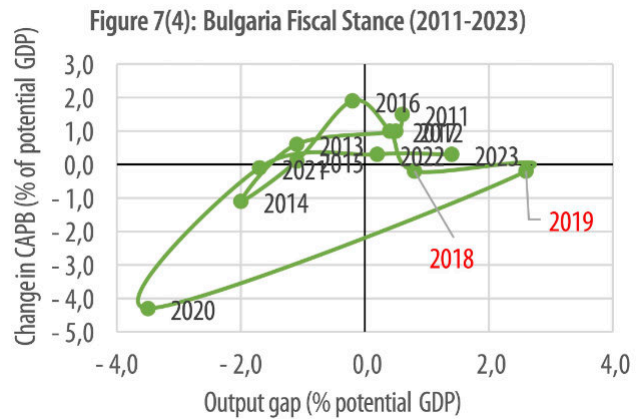
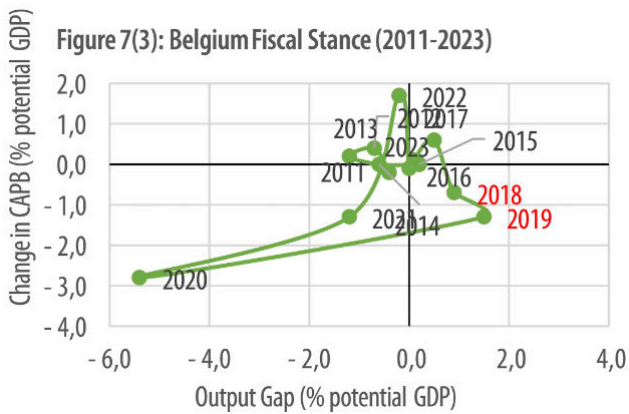


Figure 7(11): Spain Fiscal Stance (2011-2023)



Figure 7(12): France Fiscal Stance (2011-2023)

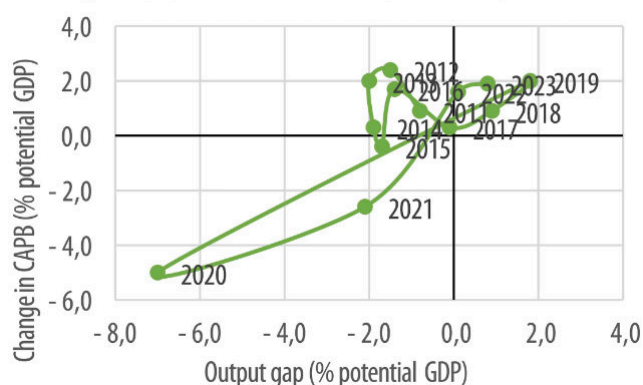


Figure 7(13): Croatia Fiscal Stance 2022-2023

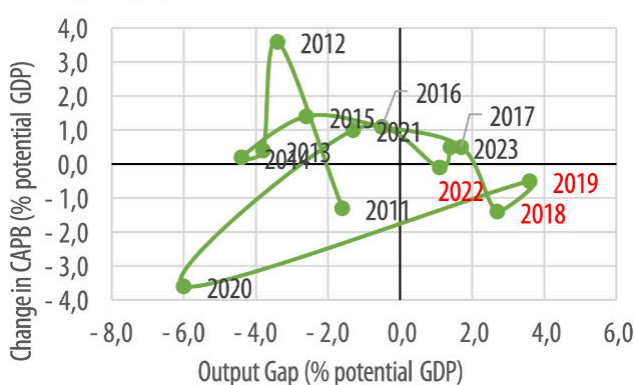


Figure 7(14): Italy Fiscal Stance (2011-2023)

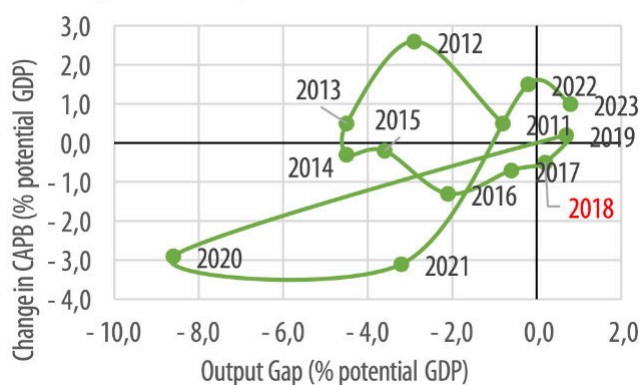


Figure 7(15): Cyprus Fiscal Stance (2011-2023)



Figure 7(16): Latvia Fiscal Policy Stance (2011-2023)

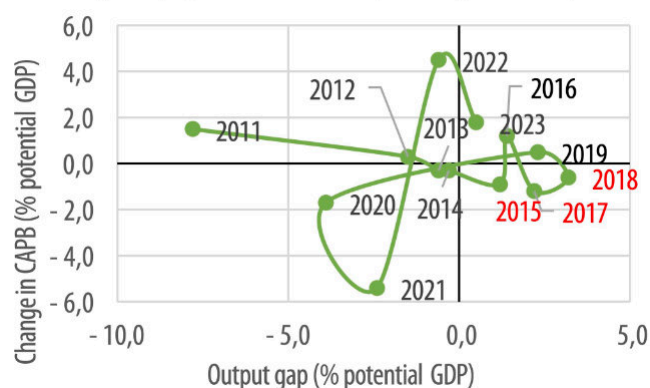


Figure 7(17): Lithuania Fiscal Stance (2011-2023)

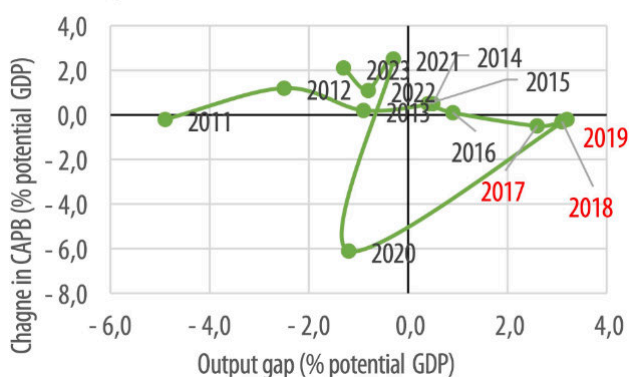


Figure 7(18): Luxembourg Fiscal Stance (2011-2023)

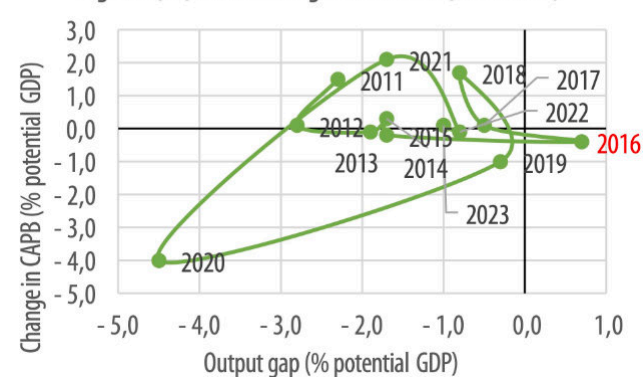


Figure 7(19): Hungary Fiscal Stance (2011-2023)

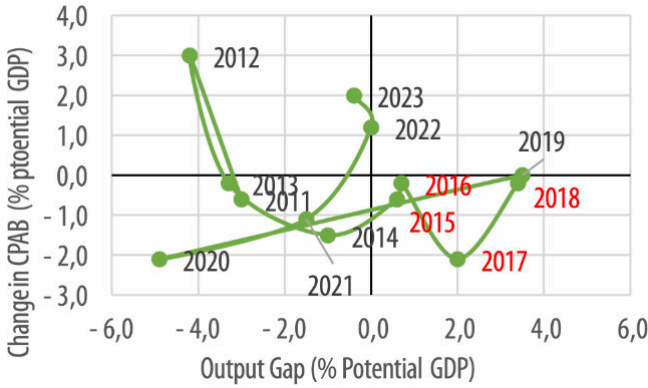


Figure 7(20): Malta Fiscal Stance (2011-2023)

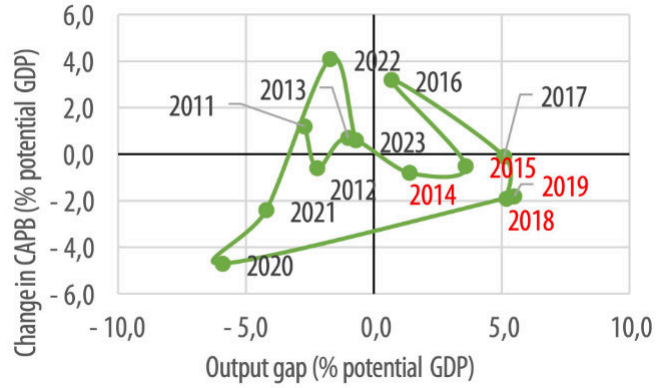


Figure 7(21): Netherlands Fiscal Stance (2011-2023)

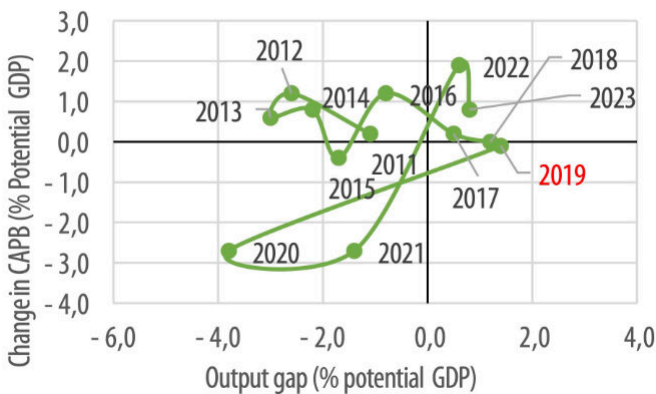


Figure 7(22): Austria Fiscal Stance (2011-2023)

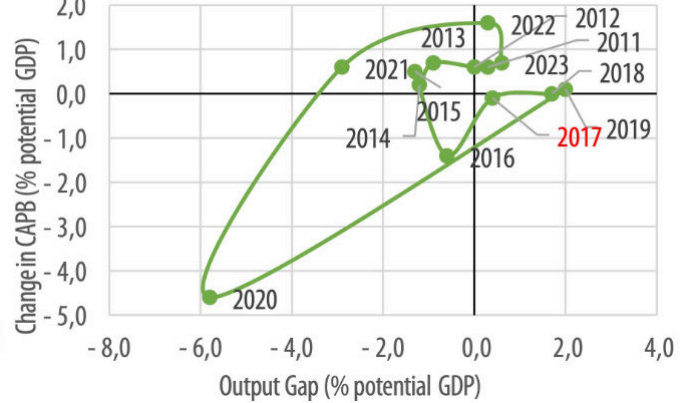


Figure 7(23): Poland Fiscal Stance (2011-2023)

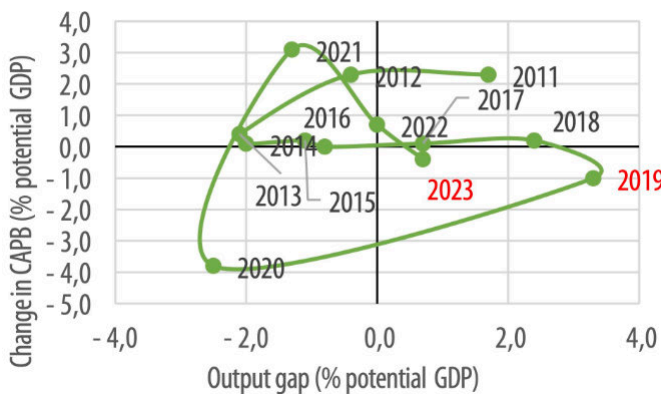


Figure 7(24): Portugal Fiscal Stance (2022-2023)

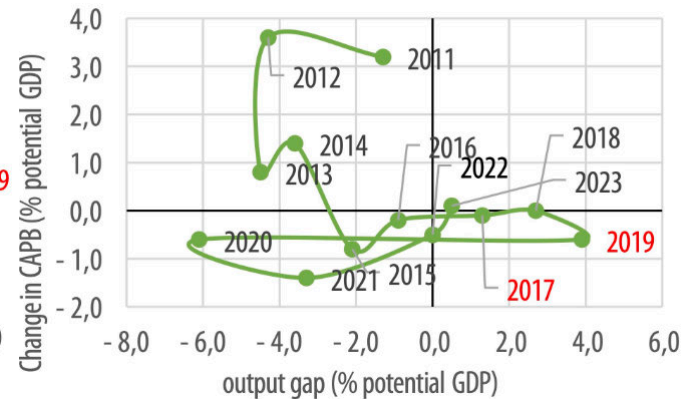


Figure 7(25): Romania Fiscal Stance (2022-2023)

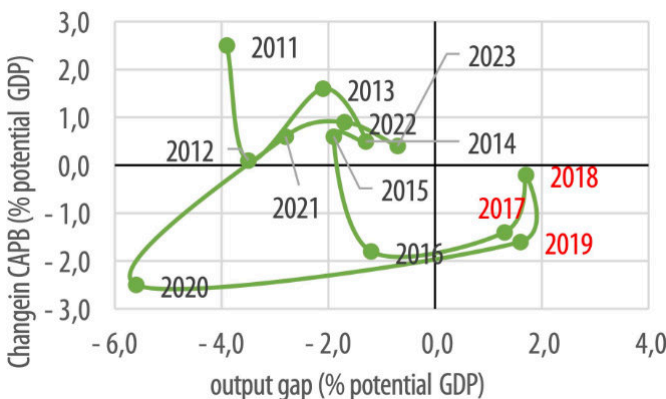


Figure 7(26): Slovenia Fiscal Stance (2011-2023)

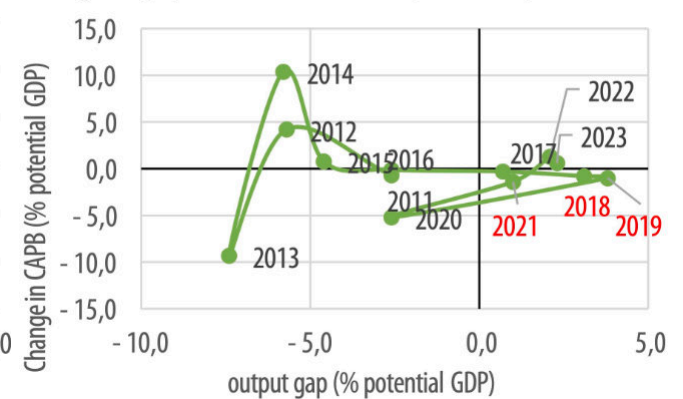


Figure 7(27): Slovakia Fiscal Stance (2011-2023)

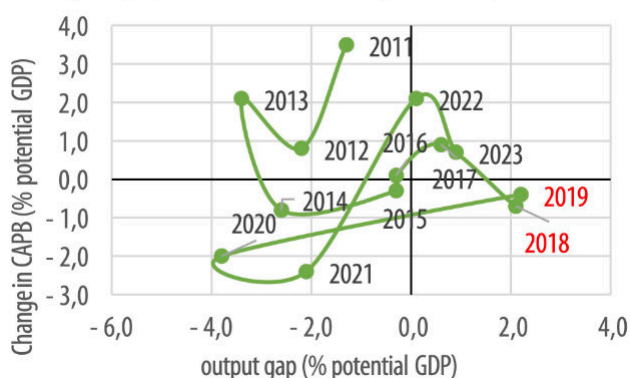


Figure 7(28): Finland Fiscal Stance (2011-2023)

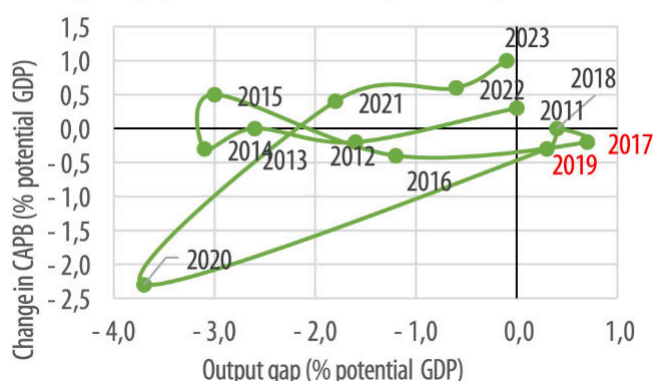
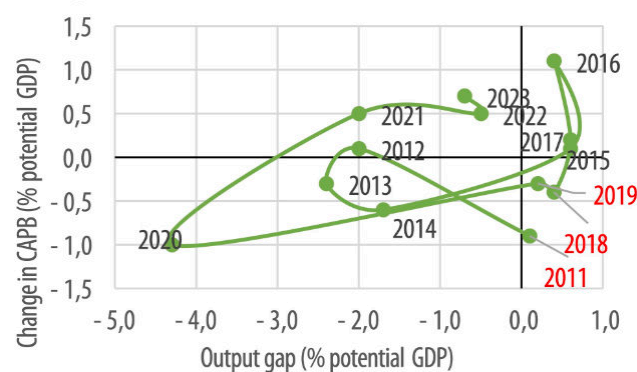


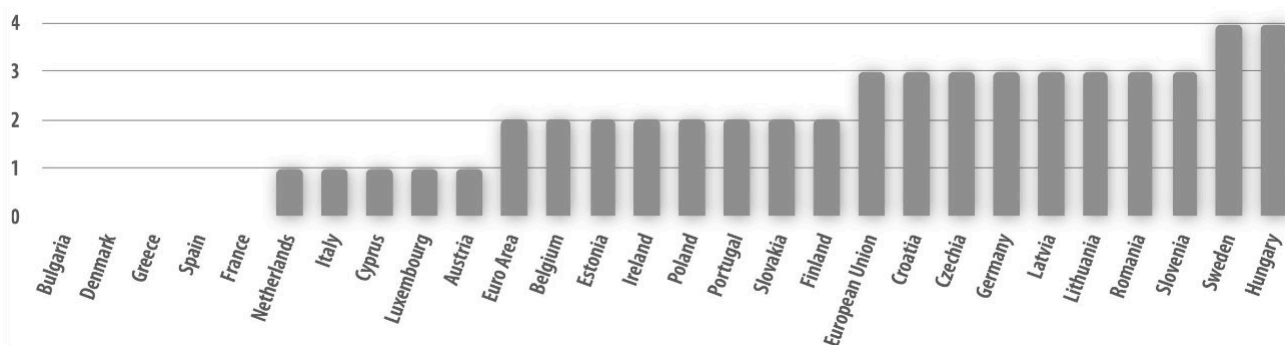
Figure 7(29): Sweden Fiscal Stance (2011-2023)



3.7. Summary of results

Figure 8 summarises the results of the analysis in figures 7(1) to 7(29), grouping countries according to number of years they exhibited pro-cyclical expansionary fiscal behaviour - according to the basic methodology of comparing change in CAPB to output gap. Across the time period of study, the results vary from five countries not having a fiscal stance indicative of a deficit bias, five countries in 1 year, eight countries in 2 years, eight countries in 3 years, and two countries in 4 years. 2017-2019 were generally years of positive output gaps in the member states, and these are often years where some countries maintained an expansionary fiscal stance, despite the positive cyclical conditions, indicating a deficit bias. When looking at the aggregate level of EU and euro-area, there is indicative evidence of deficit bias, but on the individual level some countries persistently do not exhibit this fiscal behaviour. Therefore, the results do not support the hypothesis, because for a significant proportion of countries there is not a persistent deficit bias overtime.

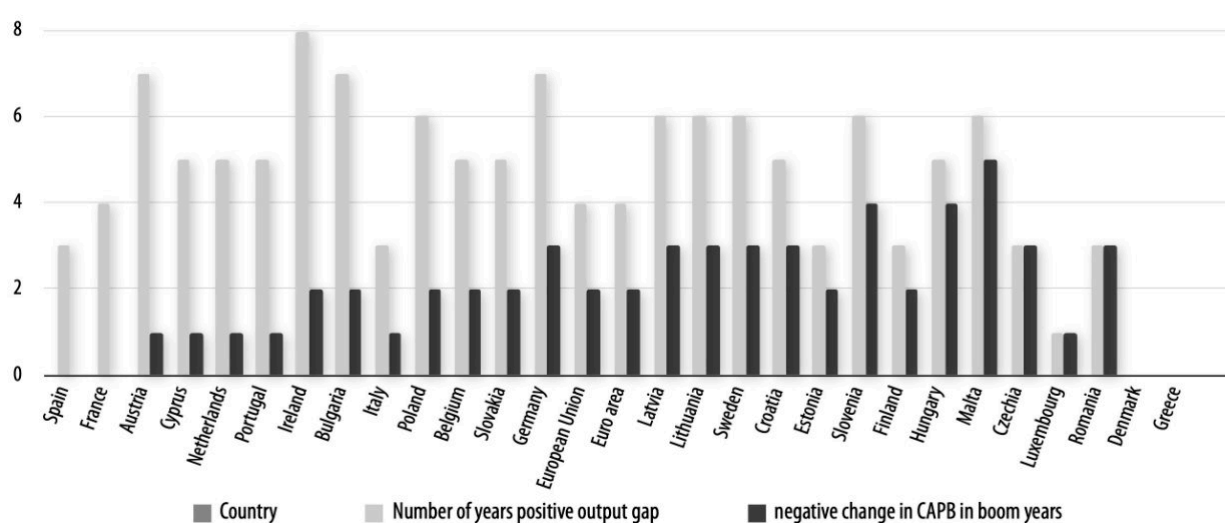
Figure 8: Number of years with pro-cyclical expansionary fiscal policy stance (2011-2023)



A crucial aspect of the hypothesis needs further exploration, however, namely the tendency to choose expansionary policy when cyclical conditions are favourable. For example, Denmark, Greece and Luxembourg had few years of positive output gap, making an interpretation of lack of deficit bias misleading. Therefore, Figure 9 shows the ratio of expansionary to restrictive fiscal policy stance in years of positive output gap. The gray bars are the number of years of positive output gap, and the black are the years the government chose expansionary fiscal policy stance within those years, indicating the tendency to exhibit deficit bias behaviour. These results are then shown in percentage form in Figure 10, showing the percentage of the years there was procyclical expansionary policy in boom years. Only nine of the member states have procyclical expansionary fiscal stance over 50% of the boom years. Therefore, the results shown in Figures 9 and 10 do not support the hypothesis, because when cyclical conditions are favourable, not all countries exhibit a persistent procyclical expansionary fiscal stance. There is significant variance across countries and only three member states persistently indicate behaviour of a deficit bias in good times.

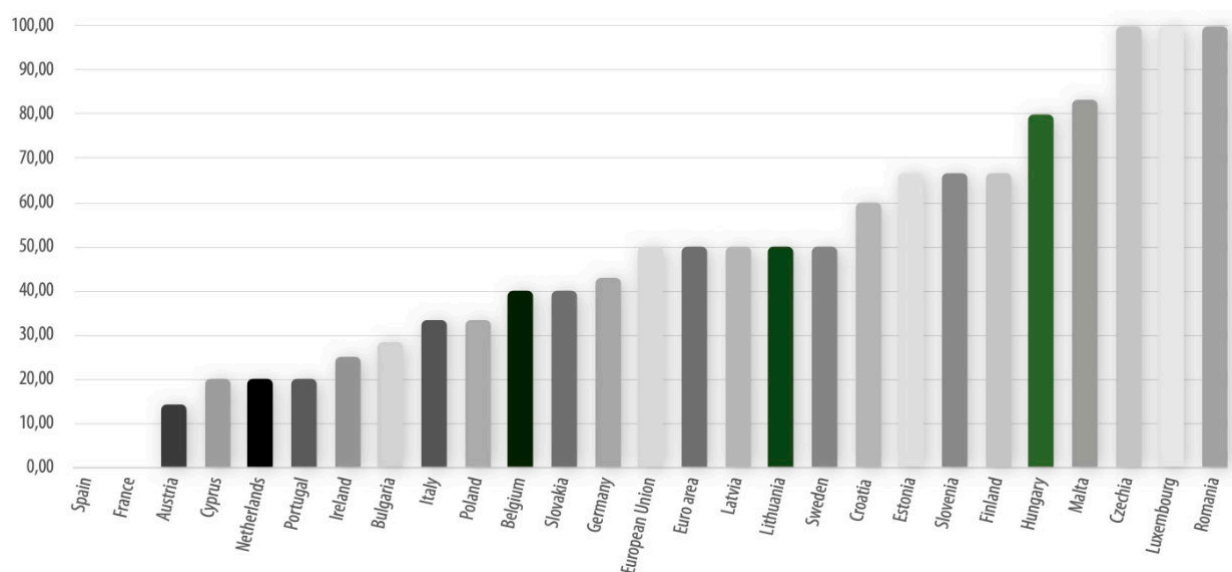
Therefore, the overarching conclusion of this analysis is that when cyclical conditions are favourable not all countries exhibit a procyclical expansionary fiscal stance, and the hypothesis of a 'law-like' deficit bias is not supported.

Figure 9: Tendency to run procyclical expansionary fiscal policy in boom years



From Figure 10 it is now possible to group the MSs into two groups. Table 3 shows Group 1, countries which had a procyclical fiscal stance during boom years more than 50% of the time (as shown in orange in Figure 10). Group 2, conversely, is countries that had this fiscal stance during boom years less than or equal to 50% of the time. Greece and Denmark are not included because there were no years of positive output gap in the period of analysis, therefore no evidence of whether the governments would have chosen to run a pro-cyclical fiscal stance or not.

Figure 10: Percentage Tendency to run procyclical expansionary fiscal policy in boom years



3.8. Robustness of Results

The summary statistics above revealed Greece to be an outlier for the two variables of interest, as the values are substantially different from other member states. Therefore, Figure 11 re-assesses the result for the EU, removing the figures for Greece from the calculation of EU-wide averages in the change in CAPB and the output gap. The impact of Greece as an outlier is shown to be minimal, as there is still an EU-wide expansionary fiscal stance in years 2017, 2018 and 2019, as there was in Figure 7(1). Therefore, the result is robust to the impact of Greece as an outlier.

However, as the focus of the analysis is on individual country-level variations, outliers are less of a concern than for EU-level analyses. No further robustness checks are performed, but significant causality and endogeneity concerns remain, nonetheless.

Table 3: Grouping Member States with higher and lower tendencies to run pro-cyclical Fiscal Policy in boom years

Group 1: Higher tendency to run pro-cyclical FP in boom years	Group 2: Lower tendency to run pro-cyclical FP in boom years
Croatia	Spain
Estonia	France
Slovenia	Austria
Finland	Cyprus
Hungary	Netherlands
Malta	Portugal
Czechia	Ireland
Luxembourg	Bulgaria
Romania	Italy
	Poland
	Belgium
	Slovakia
	Germany
	Latvia
	Lithuania
	Sweden

Figure 11: Robustness Check - EU Fiscal Stance (excluding Greece) 2010-2023



3.9. Endogeneity and Causality Concerns

There are several points of concern in interpretation of the results, which should be outlined to ensure caution and restraint in forming strict conclusions from the analysis.

A key shortcoming of the analysis is the sample size, a longer time scale would improve the stability of interpretations from the results. Though the larger sample would need consistency in the calculation of key variables to ensure uniformity across the full panel dataset.

Another shortcoming is the use of ex-post rather than real-time data for the output gap, despite most empirical studies also using ex-post output gaps figures. Estimates of the output gap are revised considerably ex-post with the availability of new information. This makes it a challenge for policymakers to be aware of the exact position in the cycle, and intentions using real-time output gaps figures may be different to conclusions about discretionary fiscal choices using ex-post output gap figures. Therefore, the analysis could be improved or extended by using alternatives to the output gap that are available in real time and less revised ex-post, such as change in unemployment rate or industrial production, to better understand government choices and biases in real-time. This could better elucidate motivations behind fiscal policy choices. Though these variables also have their weaknesses and are less indicative of the cyclical conditions, despite being correlated generally with the business cycle. Nonetheless, Larch *et al.* (2020) investigate this consideration using these alternative variables and find pro-cyclicality is not an unintended consequence from volatility in real-time cyclical measurements, and it is found for three different measures of the cycle.

Larch *et al.* (2020) use the maximum sample of around 40 developed economies in their analysis, in order to ensure the sample is “exogenous to the questions addressed in our analysis” (Larch *et al.* 2020:9). This highlights a potential endogeneity

concern regarding this analysis as it focuses only on EU countries. Deficit bias, or absence of, may be endogenous to the EU countries themselves, as it is not a random sample of economies. The interdependencies, cross-pollination of ideas and peer pressure of convergence and spillovers, as well as general similarities in political systems, may contribute towards endogeneity concerns regarding generalisable conclusions about the existence of deficit bias. A shortcoming linked to this is analysing euro-area and non-euro member states simultaneously. There is inherent endogeneity in a common currency area through the coordination of fiscal policy by the Commission, as well as spillovers and interdependencies. This creates causality concerns, as euro-area member states arguably have less discretion over fiscal policy choices than non-euro area member states, reducing the ability to draw conclusions from the results regarding the discretionary nature of fiscal choices.

Another shortcoming of the methodology is that values close to the zero could be considered neutral fiscal policy rather than pro-cyclical. For example, Netherlands in 2019 and Croatia in 2022, Austria in 2017, had a change in CAPB as (-0.1), which is arguably neutral. For the sake of consistency, the methodology considered all negative values in boom years as expansionary fiscal stance. However, this is likely within the margin of error of decision-making using real time data, rather than indicative of a strong deficit bias. Figures 7(1) to 7(29) are therefore useful to show the magnitude of values, and whether a fiscal stance is more neutral or not.

In general, the methodology does not take a sophisticated econometric approach to remove endogeneity in results through control variables, dummies and other econometric techniques. This limits the ability to draw conclusions regarding causality. Nonetheless, the results are indicative that deficit bias is not a 'law-like' behaviour for policymakers and there alternative, or complementary, explanations for drivers behind fiscal policy choices and objectives. These will be explored in the next chapter.

4. Theoretical Explanations for Lack of Supporting Empirical Evidence in the EU for 'law-like' Deficit Bias and Implications for Reform

The hypothesis of a persistent and 'law-like' deficit bias was not supported by the empirical results. Therefore, following the deductive reasoning method, this chapter will explore the explanatory power of alternative political economic theories to contrast, and complement, deficit bias theory and more effectively explain the heterogeneity found in the empirical results. This chapter attempts to answer the second research question: Why do we observe a persistent deficit bias in certain countries in the EU and not in others, and what other explanatory factors contribute towards discretionary fiscal policy patterns?

Finally, the implications of this analysis for institutional reform in the EU will be evaluated, as well as the policy options the EU should consider pursuing to generate structural convergence and avoid persistence of the heterogeneous cyclical conditions and fiscal policy stances across countries.

4.1. Alternative Theories to Explain Cross-Country Heterogeneity

Although the foundational assumption of the European fiscal framework is a deficit bias, the empirical results indicate important alternative drivers of fiscal policy choices. Given the results show substantial variation in fiscal stances across countries over time and while experiencing similar cyclical conditions, these alternative explanatory factors are necessarily factors that vary across countries rather than all-encompassing theories such as the deficit bias. Proxy variables are used to assess the relative explanatory power of these alternative factors.

4.1.1. Heterogeneity across political systems

Fiscal policy choices are inherently political choices, made by governments elected with a specific political programme. Therefore, the type of political system, level of political fragmentation among political parties, as well as volatility of electoral cycle, will inherently influence the fiscal options available and the final choices made, irrespective of the cyclical conditions. There are still variations in political systems, although all MS are democracies with regular elections, several political parties across the spectrum and freedom of speech enabling fair electoral competition (notwithstanding recent trends of democratic backsliding).

As a proxy for the political system factors which vary across countries the results of Döring & Johan Hellström (2013: 687) are used to estimate party systems and electoral volatility in Europe. The authors used mixed effects logit models to reveal substantial differences across government formation patterns and party systems in Europe. The author's variables on the level of polarisation of legislative parties, as well as volatility of seat share are used as proxies to compare level of heterogeneities in political systems across the two groups found above.

There are various types of political fragmentation in the literature, including size (of coalition and ideological coherence), institutional and time fragmentation (Ricciuti 2004: 369). Generally, the larger the fragmentation, the less the costs of spending are internalised by the governing party, making it less fiscally responsible.

Table 4 compares the average values of these two proxy variables for the countries in Group 1 and Group 2, and then presents the results of a two-sample t-test (assuming unequal variances). Group 1 is found to be less fiscally responsible in good times in the previous chapter; and on average there is greater fragmentation in terms of polarisation of ideology in this group, but this expected pattern of larger fragmentation in Group 1 is not found for the volatility of seat share variable. Moreover, the p-value is greater than the significance level and therefore the null hypothesis that there is a significant difference in means is not rejected. Fragmentation may therefore be a partially explanatory factor in fiscal stance choices, complementing other factors. Although, several authors note that the effects of political fragmentation are found to be more negligible in periods of growth (Ricciuti 2004: 369). This perhaps explains why proxies for this factor are not found to be significant in the difference between the two groups that behave differently during periods of growth.

4.1.2. Heterogeneity across Fiscal Frameworks and Budgetary Institutions

The fiscal policy decision-making environment varies across countries, even in the context of the supranational fiscal rule framework set by the SGP. The Commission even highlights the heterogeneity of fiscal rule frameworks in the EU (European Commission, 2006). As well as several authors highlighting the crucial impact of budget institutions on fiscal outcomes (Eslava 2011: 660), the growing importance placed on this factor is highlighted in the literature review. Therefore, this aspect warrants further exploration even in the EU context where there are supranational fiscal rules and institutions at the EU-level to manage the increased interdependencies and spillovers in the EMU. The Commission defines the strength of domestic fiscal frameworks based on five components across the institutional environment that shapes fiscal policymaking nationally, including rules, procedures, monitoring and enforcement institutions (Nerlich and Reuter, 2013). The Fiscal Rule Strength Index is an aggregation and weighting across the criteria, calculated by DG ECFIN (European Commission, 2022).

Table 4 compares the average fiscal rule strength scores across member states in Group 1 and 2, in 2019 the latest year of available data. The mean is larger for Group 1, and the p-value of a two-tailed t-test is less than the significance level. Therefore, the null hypothesis can be rejected in favour of the alternative that there is a statistically significant difference in means between the groups in terms of their fiscal rule strength index scores. The heterogeneity found between the two groups behaviour may therefore be linked to the strength of the fiscal rules framework implemented in a particular country. Group 1, which has larger tendency to run pro-cyclical policy in upturns, is found to have statistically significantly stronger fiscal rules, based on the proxy of the fiscal rule strength index scores.

This goes against the assumption made in the analysis section that the fiscal rules play less of a role during good times. This highlights the important role of budgetary institutions in determining fiscal behaviour and decision-making. This result indicates that governments may decide to expand during upturns running pro-cyclical fiscal stances, in order to reap the growth effects of looser fiscal policy over the medium term. In a stronger rules framework, in an upcoming downturn the strong rules will constrain fiscal space and the ability to run counter-cyclical policy. This increases the rationale for pro-cyclical policy in upturns, to reap medium term growth effects. This decision would countercyclically support growth in a downturn, reducing likely breaches of the SGP rules. Group 1 countries, with looser fiscal stances in upturns, may therefore be planning for growth effects in upcoming downturns, given the stronger fiscal rules framework in their country constraining fiscal space in downturns. Therefore, this is a key explanatory factor and area for further exploration.

4.1.3. Heterogeneity across varieties of capitalism and growth models

Beyond these more traditional explanatory factors of cross-country variance in fiscal outcomes, is the growing literature on varieties of capitalism and the growth models that delineate these varieties. Where restrained fiscal policy choices complement export-

led growth models of the coordinated market economies, and conversely, looser fiscal policy choices complement demand-led growth models of mixed market economies. Although, these combinations of growth models and macroeconomic policy choices are not necessarily always tightly-coupled, for example, if price elasticity of export demand is low there is more space for expansionary fiscal policy in export-led growth model countries (Ricciuti 2004: 50). It would also be misleading to describe pro-cyclical policy in upturns as fiscal indiscipline, as in this theoretical framework, a looser fiscal policy is an active policy choice rather than the result of a bias or negative externality.

To explore the viability of this explanatory theory, Group 1 and 2 are compared using the variable of export dependence as a proxy for the type of growth model. Export dependence would be higher for more coordinated market economies that pursue export-led growth strategies. This follows the methodology of Hall (2018: 11) and uses 2020 data from the World Bank (2022). As predicted by the theory, the average export dependence of Group 2 is larger than Group 1. This indicates that the group with more restrained fiscal policy in upturns is more export dependent, in order to minimise impact of fiscal policy on the real exchange rate or hurt competitiveness. Nonetheless, the t-test does not reject the null hypothesis of a significant difference in means of the two groups, even though Group 2 has a larger mean. The grouping of countries found in this analysis is also different to the grouping of CMEs and MMEs in Hall (2018). Therefore, the heterogeneity found in the analysis in behaviour of countries during upturns may be related to the growth model pursued that sets fiscal policy objectives, and the evidence points in this direction but not definitively. Varieties of capitalism are likely an explanatory aspect that should be considered alongside other factors that result in heterogeneity of fiscal choices during similar cyclical conditions.

4.2. Bias and Persistence of Alternative Explanatory Factors and Implications

This exploration of alternative theoretical explanations to the cross-country heterogeneity found in the analysis highlights that there are several explanatory factors con-

Table 4: Testing Areas of Heterogeneity Across Countries that May Impact Fiscal Policy Decisions

	Group 1: Higher tendency to run pro-cyclical FP in boom years (Croatia, Estonia, Slovenia, Finland, Hungary, Malta, Czechia, Luxembourg, Romania)	Group 2: lower tendency to run pro-cyclical FP in boom years (Spain, France, Austria, Cyprus, Netherlands, Portugal, Ireland, Bulgaria, Italy, Poland, Belgium, Slovakia, Germany, Latvia, Lithuania, Sweden)	P-Value of Two-Sample T-test Assuming Unequal Variances Null hypothesis: $H_0: \mu_1 - \mu_2 = 0$ Alternative hypothesis: $H_A: \mu_1 - \mu_2 \neq 0$ (Significance level of 0.05)	
1	Polarisation of legislative parties, mean in group (standard deviation) (source: Döring & Johan Hellström, 2013)	0.36867 (0.0595)	0.3671 (0.0763)	p-value = 0.966 df = 9 Cannot reject null hypothesis that means are different.
2	Volatility of seat share, mean in group (standard deviation) (source: Döring & Johan Hellström, 2013)	24.32 (15.17)	28.75 (12.10)	p-value = 0.499 df = 14 Cannot reject null hypothesis that means are different.
3	Fiscal rule index 2019, mean in group (standard deviation) (source: European Commission, DG ECFIN, Fiscal Rule Database)	1.895 (0.647)	1.30 (0.474)	p-value = 0.020 df = 21 Reject null hypothesis that means are different. (P-value < significance level)
4	Exports % of GDP 2020, mean in group (standard deviation) (source: World Bank)	60.02 (26.03)	84.48 (52.06)	p-value = 0.240 df = 10 Cannot reject null hypothesis that means are different.

tributing towards fiscal policy decision-making in upturns. Beyond those factors explored in Table 4, there are other areas that vary across countries that merit further exploration also, but do not have as clear of a proxy index to enable comparison between groups.

Generally, the effect of a fiscal deficit bias will be muted and distorted by political economic factors that are specific to, and vary across, individual countries. The strength of these factors in influencing fiscal policy decisions will determine whether any potential deficit bias is eroded and overpowered or not. These alternative factors to the deficit bias will also persist and create their own country-specific biases in fiscal policy, as political coalitions are formed around policy options and institutions (Hall 2018: 19). This creates resistance to change and reinforces the bias in policy options. For example, a growth model bias will be generated over time as a coalition will form around the demand-led growth model for some countries, generating resistance to more restrictive fiscal policy that would hurt the demand-led growth strategy, and the interest groups that profit from this strategy. The growth model will be doubled down upon in response to a shock, rather than an adaptation that would be more efficient. For example, there would be political resistance to reducing Germany's trade surplus with looser fiscal policy, as wages in the export sector would be threatened among other interest groups that would resist initiatives to move to more demand-led strategies (Hall 2018: 19). The policy choice persists due to political coalitions, not simply the institutional set up of the variety of capitalism.

Similarly, to the theory of persistence of a deficit bias, there will be a persistence of growth model bias, political system bias, fiscal framework and budgetary institution bias, among other factors that will persist and create recurring patterns of heterogeneity of fiscal stances. So even if cyclical fluctuations in the EMU become increasingly symmetric over time, fiscal policy may not converge due to biases in the systems across countries and resistance to changing these political economic factors and objectives.

Therefore, during similar cyclical environments, individual countries exhibit varying fiscal policy stances depending on the relative strength of specific influential factors, rather than a 'law-like' deficit bias resulting similar fiscal behaviour across all countries. This exploration has also highlighted that there is also not a 'law-like' way to group European countries according to impact of these various biases, with one group having a clear influence of one particular factor or not, each is specific to the country context. So EU MSs cannot be simply sorted into two groups that enables clear explanation of fiscal policy choices.

This exploration of alternative theories adds nuance and context to the fiscal choices of European MSs and is important to bear in mind as the EU embarks on a process of institutional reform of the fiscal framework.

4.3. Implications for the Design of the European fiscal framework

The suspension of the SGP following the outbreak of the Covid-19 Pandemic has created a unique opportunity for EMU institutional reform (Commission, 2022), and the Commission has even launched a consultation on the future of the fiscal frame-

work. Although a full detailed exploration of the implications of this analysis for fiscal framework reform is beyond the scope of this thesis, the key high-level implication is that the foundational assumption of a 'law-like' deficit bias is not clearly proven by empirical evaluation of historical fiscal policy choices. This analysis does not support the hypothesis of an all-encompassing deficit bias overpowering other factors to result in pro-cyclical policy choices in upturns. The implication of this is that the European fiscal rules may currently be imperfectly designed to maximise efficiencies and opportunities in the EMU.

There are also other influential factors governing fiscal policy choices in MSs, which should have greater consideration in the design of the supranational fiscal framework. The multiplicity of drivers, including budgetary institutions, political systems, and growth models, among others, need to be considered in fiscal policy reform efforts. Crucially, a one size fits all approach may not be the most effective or appropriate, because of fundamental structural heterogeneities across countries. If these heterogeneities do not reduce over time, endogenously or intentionally, then they should be factored into the fiscal framework design to enable growth with different models and for different varieties of European capitalism. A fiscal framework that is country-specific and flexible to the political economic context would be most appropriate when considering the crucial heterogeneities across MS that this analysis has highlighted.

4.4. Policy Options to Generate Structural Convergence

This analysis highlights that irrespective of the prevailing cyclical conditions, individual EU countries adopt highly heterogeneous fiscal positions. Therefore, convergence of economic cycles is necessary but not sufficient to avoid and cope with crises. OCA theory highlights the need for convergence of shocks, and that crises are rooted in asymmetric shocks. Within a monetary union, this cyclical convergence may also happen endogenously as intra-union trade increases consistently over time. Irrespective of economic convergence, however, varieties of capitalism analysts argue that long term crises are rooted in institutional asymmetries across divergent varieties of capitalism that encourage governments to persistently pursue divergent growth strategies, increasing the imbalances and risk of crisis in the monetary union (Hall 2018). Growth models, however, are persistent and do not converge endogenously over time, given the difficulties in altering institutional political economy (Hall and Soskice, 2001). Hall (2018: 17) highlights that the question of what institutional arrangements make persistent institutional imbalances feasible in the Eurozone is still unresolved in political economy.

The policy options that would entail an institutional convergence of varieties of capitalism in the EMU are an EU growth strategy and an EU industrial policy, both on the path towards full fiscal union. Despite the benefits a single institutional setup would bring, the policies adopted within the institutional shell would determine which countries and constituencies lost out from adjustment processes. As a growth

strategy and industrial policy would need to be based on a specific growth model, and progress towards these strategies would reduce structural heterogeneity over time and create convergence in the varieties of capitalism in Europe. Notably, there is political will behind the ongoing debate on fiscal framework reform in the EU, and Draghi and Macron recently advocated for a new growth strategy in the EU (Financial Times, 2021). However, their proposals lacked any indicative detail, specifically whether one growth model is championed to address the structural heterogeneity or not. As the long-term benefits of a single European growth strategy would come from generating structural convergence, to avoid future crises caused by macroeconomic imbalances.

A growth strategy would need to be export-led or demand-led, with complementary austere or loose fiscal policy, respectively, to generate structural convergence. This creates a stalemate in what institutions need to be created and what policies they should pursue, as Southern Europe favours very different fiscal policy objectives to Northern Europe, based on the fundamentally different variety of capitalism creating entrenched interest groups. To be viable, both these institutional reform options would require significant political will coupled with a strong EU identity and solidarity. This would require a paradigm shift in the EU psyche.

In the absence of policy changes to generate structural convergence, the reality of structural heterogeneity and lack of 'law-like' deficit bias needs to be internalised into the reformed EU fiscal framework. Structural convergence is painful but effective in the long term, but as a second-best option, the debate on fiscal framework reform should take into consideration the variety of factors that influence fiscal policy decision-making, such as budgetary institutions, structural heterogeneity and persistent growth models, meaning a one-size-fits all solutions will not be effective or viable. Therefore, these reforms should aim to ensure that there is more than one path to growth in the EU, so that the EMU works for each individual country.

The danger, of course, is that some parts of Europe may end up with growth models without growth, which will ultimately threaten the very existence of the monetary union. In such respects, the euro crisis is far from over. (Hall 2018: 25)

Conclusion

This thesis has explored whether individual member states exhibit persistent deficit bias behaviour over time, to inform the ongoing policy debate on fiscal framework reform in the EU. In answer to the first research question, the empirical results highlighted that not all countries tend to run pro-cyclical fiscal policy during good times, results are not indicative of a persistent or 'law-like' deficit bias, but rather of several influential factors determining fiscal policy choices. Rather than a persistent deficit bias, there is a tendency to make heterogeneous fiscal choices across member states, irrespective of cyclical conditions.

To answer the second research question, several alternative theoretical explanations are explored to better understand the differentiated behaviour across country's

fiscal policy patterns. In particular, the strength of budgetary institutions and fiscal rules was found to be a significant factor worth further exploration during upturns. Variations across political systems and varieties of capitalism and growth models were also explored as alternatives and complements to the overarching deficit bias theory. These other explanatory factors that vary across countries will persist over time creating their own country-specific biases in fiscal behaviour, this will especially be the case for the growth model pursued based on the institutional variety of capitalism. Such a 'growth model bias', and other country-specific biases contrast the overarching fiscal deficit bias theory and should be considered as the EU embarks on fiscal framework reform.

The high-level implications of this analysis for the ongoing debate on reform of the European fiscal framework were then investigated. Structural convergence policies are considered a first-best option for long term growth in the EU and avoidance of future crises, but an EU growth strategy and industrial policy would require currently unseen levels of political will and solidarity. Therefore, as a second-best policy option, fiscal framework reform should consider the structural heterogeneity and nuances across fiscal decision-making patterns in member states. This entails taking a flexible rather than one-size-fits-all approach to the reformed fiscal framework, which explicitly acknowledges that there is more than one path to growth, enabling the full spectrum of European varieties of capitalism to flourish.

List of abbreviations

CAPB - Cyclically adjusted budget balance

CME - Coordinated Market Economy

DG ECFIN - Directorate General for Economic and Financial Affairs

ECB - European Central Bank

EMU - Economic and Monetary Union

EU - European Union

IMF - International Monetary Fund

LME - Liberal Market Economy

MME - Mixed Market Economy

MS - Member State

OCA - Optimum Currency Area

OECD - Organisation for Economic Cooperation and Development

SGP - Stability and Growth Pact

TFEU - Treaty on the Functioning of the European Union

References

Alesina *et al.* (2008). "Why is fiscal policy so often procyclical?" *Journal of the European Economic Association*, 6,5, 1006-1036.

Alesina, A. and Drazen, A. (1991). "Why are fiscal stabilizations delayed," *American Economic Review*, 81, 1170-1180.

Alesina, A. and Tabellini, G. (1990). "Voting on the budget deficit," *American Economic Review* 80,1, 37-49.

Alesina, A., and Perotti, R. (1995). "The Political Economy of Budget Deficits." *IMF Staff Papers* 1995, no. 001.

Alesina, A., Ardagna, S. and Trebbi, F. (2006). "Who adjusts and when? The political economy of reforms," *IMF Staff Papers* 53, 1-29.

Alesina, A., *et al.* (1999). "Budget institutions and fiscal performance in Latin America," *Journal of Development Economics*, 59, 2, 253-273.

Alt, J. and Lassen, D. (2006). "Fiscal transparency, political parties, and debt in OECD countries," *European Economic Review*, 50, 1430-1439.

AMECO Database | European Commission." Accessed May 1, 2022. https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/macro-economic-database-ameco/ameco-database_en#database.

Barro, Robert J. (1979). "On the Determination of the Public Debt." *Journal of Political Economy* 87, no. 5(1), 940-71.

Bawn, K. and Rosenbluth, F. (2006). "Short versus long government coalitions: electoral accountability and the size of the public sector." *American Journal of Political Science* 50, 2, 251-265.

Benassy-Quere, Agnes, Benoit Coeure, Pierre Jacquet, and Jean Pisani-Ferry (2018). *Economic Policy: Theory and Practice*. Second Edition. Oxford, New York: Oxford University Press.

Blanchard O J, Á Leandro and J Zettelmeyer (2021). "Redesigning EU Fiscal Rules: From Rules to Standards", PIIE Working Paper No. 21/1.

Buchanan, J. and Wagner, R. (1977). *Democracy in Deficit*. New York: Academic Press.

Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VIII: ECONOMIC AND MONETARY POLICY - Chapter 1: Economic policy - Article 121 (ex Article 99 TEC), 115 OJ C (1957).

Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VIII: ECONOMIC AND MONETARY POLICY - Chapter 1: Economic policy - Article 126 (ex Article 104 TEC), 115 OJ C (1957).

D'Amico, Leonardo, *et al.* (2022). "Revising the European Fiscal Framework, Part 2: Debt Management." *VoxEU.Org*.

Döring, Holger, and Johan Hellström (2013). "Who Gets into Government? Coalition Formation in European Democracies." *West European Politics* 36, no. 4, 683–703.

Drazen, Allan (2018). *Political Economy in Macroeconomics*. *Political Economy in Macroeconomics*. Princeton University Press.

Eslava, Marcela (2011). "The Political Economy of Fiscal Deficits: A Survey." *Journal of Economic Surveys* 25, no. 4, 649–650.

European Central Bank (2017). "Fiscal Reaction Function and Fiscal Fatigue: Evidence for the Euro Area." ECB Working Paper, no. 2036.

European Commission - European Commission. "Fiscal Rules Database." Text. Accessed May 1, 2022. https://ec.europa.eu/info/publications/fiscal-rules-database_en.

European Commission and Directorate-General for Economic and Financial Affairs. *Building a Strengthened Fiscal Framework in the European Union: A Guide to the Stability and Growth Pact*. Occasional Papers 150, 2013.

European Commission Directorate- General for Economic and Financial Affairs. "European Economy Public Finances in EMU - 2000." 3. European Economy, Reports and Studies, 2000.

European Commission, "Public Finances in EMU", European Economy 3, Luxembourg: Office for Official Publications of the European Communities (2006).

European Commission, "Commission Presents Review of EU Economic Governance." Text. Accessed April 13, 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_170.

European Commission, "Recovery and Resilience Facility." Text. Accessed April 13, 2022. https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en.

European Commission. "Spring 2022 Economic Forecast: Russian Invasion Tests EU Economic Resilience." Text. Accessed May 18, 2022. https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts/spring-2022-economic-forecast_en.

Fiess, Norbert (2002). "Chile's Fiscal Rule." *World Bank*.

Financial Times (December 23, 2021). "Mario Draghi and Emmanuel Macron: The EU's Fiscal Rules Must Be Reformed," <https://www.ft.com/content/ecbdd1ad-fcb0-4908-a29a-5a3e14185966>.

- Girouard, Nathalie, and Christophe André (2005). "Measuring Cyclically-Adjusted Budget Balances for OECD Countries." Paris: OECD Economics Department, Working Papers n° 434.
- Golinelli, Roberto, and Sandro Momigliano (2006). "Real-Time Determinants of Fiscal Policies in the Euro Area." *Journal of Policy Modeling* 28, no. 9, 943–64.
- Hall, Peter A. (2018). "Varieties of Capitalism in Light of the Euro Crisis." *Journal of European Public Policy* 25, no. 1, 7–30.
- Hall, Peter A., and David Soskice, eds. (2001). *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press.
- Hassel, Anke (2014). "Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe." *SSRN Electronic Journal*.
- Hodzic, Sabina, and Emira Becic (2015). "Analysis of the Fiscal Rule Index in EU Member States." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network.
- Iversen, Torben, David Soskice, and David Hope (2016). "The Eurozone and Political Economic Institutions." *Annual Review of Political Science* 19, no. 1, 163–85.
- Johnson, Colleen F. (1996). "Deductive versus Inductive Reasoning: A Closer Look at Economics." *The Social Science Journal* 33, no. 3, 287–99.
- Krogstrup, S. and Wyplosz, C. (2010). "A common pool theory of supranational deficit ceilings." *European Economic Review* 54, 2, 269–278.
- Larch, Martin, Alessandro Cugnasca, Diederik Kumps, and Eloïse Orseau (2019). "Fiscal Policy and the Assessment of Output Gaps in Real Time: An Exercise in Risk Management." *ZEW Discussion Papers*. ZEW Discussion Papers.
- Larch, Martin, Eloïse Orseau, and Wouter van der Wielen (2021) "Do EU Fiscal Rules Support or Hinder Counter-Cyclical Fiscal Policy?" *Journal of International Money and Finance* 112 , 102328.
- Martin, Philippe, Jean Pisani-Ferry, and Xavier Ragot (2021). "A New Template for the European Fiscal Framework." *VOX, CEPR Policy Portal*.
- Milesi-Ferretti, G.M. (2003). "Good, bad or ugly? On the effects of fiscal rules with creative accounting," *Journal of Public Economics* 88, 377–394.
- Molina, Óscar, and Martin Rhodes (2007). "The Political Economy of Adjustment in Mixed Market Economies: A Study of Spain and Italy." In *Beyond Varieties of Capitalism*. Oxford: Oxford University Press.
- Nerlich, Carolin, and Wolf Heinrich Reuter (2013). "The Design of National Fiscal Frameworks and Their Budgetary Impact." *SSRN Electronic Journal*.
- Nordhaus, W. (1975). The political business cycle. *Review of Economic Studies*, 42, 169–190.
- Persson, T. and Svensson, L. (1989). "Why a Stubborn conservative would run a deficit," *Quarterly Journal of Economics* 104, 2, 325–345.
- Petterson-Lidbom, P. (2001). "An empirical investigation of the strategic use of debt." *Journal of Political Economy*, 109, 3, 570–583.
- POLITICO. (April 4, 2022). "Brussels Playbook: Orbán Wins in Hungary — Dutch-Spanish Axis — War Crimes in Ukraine," <https://www.politico.eu/newsletter/brussels-playbook/orban-wins-in-hungary-dutch-spanish-axis-war-crimes-in-ukraine/>.

- Price, Robert (2010). "The Political Economy of Fiscal Consolidation." Paris: OECD.
- Ricciuti, Roberto (2004). "Political Fragmentation and Fiscal Outcomes." *Public Choice* 118, no. 3/4, 365–88.
- Rogoff, K. (1990). "Equilibrium political budget cycles," *American Economic Review* 80, 21–36.
- Shi, M. and Svensson, J. (2006). "Political budget cycles: do they differ across countries and why?," *Journal of Public Economics*, 90, 1367–1389.
- Stiglitz, Joseph. "Economics of the Interregnum." *Groupe d'études Géopolitiques*, March 21, 2022.
- Szabó, Zsolt (2014). "Varieties of Capitalism and Public Finances in Central and Eastern Europe." In *Deficit and Debt in Transition*, 87–103. CEU.
- Talvi, Ernesto, and Carlos Vegh (2000). "Tax Base Variability and Pro-cyclical Fiscal Policy." NBER Working Paper. National Bureau of Economic Research, Inc.
- Von Hagen (2006). "Fiscal rules and fiscal performance in the European Union and Japan," *Monetary and Economic Studies, Institute for Monetary and Economic Studies, Bank of Japan* 24(1), 25–60.
- Von Hagen, J. and Harden, I. (1995). "Budget processes and commitment to fiscal discipline," *European Economic Review*, 39, 771–779.
- Wooldridge, Jeffrey M. (2012). *Introductory Econometrics: A Modern Approach*. 5th edition. Mason, OH: Cengage Learning.
- World Bank (Accessed May 12, 2022). Data. "Exports of Goods and Services (% of GDP)." https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?end=2020&most_recent_year_desc=false&start=1960&view=chart.

The use of scientific arguments as a mode of justification. What place does it have in politics and law? A case study of EU GMO regulation

Pierre Walckiers

“You are a king, then!” said Pilate.
Jesus answered, “You say that I am a king. In fact, the reason I was born and came into the world is to testify to the truth. Everyone on the side of truth listens to me”.

“What is truth?” retorted Pilate.

With this he went out again to the Jews gathered there and said, “I find no basis for a charge against him. But it is your custom for me to release to you one prisoner at the time of the Passover. Do you want me to release ‘the king of the Jews?’”

They shouted back, “No, not him! Give us Barabbas!”

Now Barabbas had taken part in an uprising.

(John 18:37).

1. Introduction

Taken up by Kelsen, the “democratic tragedy” carefully crystallises the dilemma between ‘Truth’, politics and law. In this scene, Jesus seeks to uphold a divine truth (Kelsen 2004: 101-110; Lagi 2020:106) while Pontius Pilate relativises and leaves democracy in charge (John 18:37; Tiercelin 2019). Indeed, Pilate, free of any divine belief, can ignore any statement of Jesus Christ and let the people decide to condemn Jesus to death while sparing Barabbas the thief (Kelsen 2004: 101-110; Tiercelin 2019). The ‘democratic tragedy’ challenges classical theories of law: on the one hand, natural law will consider a rule valid if it conforms to divine rules, the laws of nature, or in any case, rationality (Kelsen 1949: 481; Kunz 1961: 951; Langford, Bryan, McGarry 2019:101). On the other hand, positive law is only interested in formal law and not in the content of the norm (social values conveyed, conformity with science or religion) (Druffin-Bricca, Henry 2009: 67; Kelsen 2004: 108).

According to Kelsen, even if a divine truth could exist, this truth has no place and would bow to the democratic decision (Lagi 2020: 106; Tiercelin 2019; Kelsen 2004: 101-110). In this way, Pilate acts according to the precepts of legal positivism, for only procedural or formal rules matter. Since he is free from absolute belief or conviction - that is, he is a ‘relativist’ - Pilate lets the people decide about Jesus' faith. On the other hand, Jesus Christ falls within the scope of natural law, because He holds a divine truth, and any other contrary opinion is irrelevant (Kelsen Lagi 2020: 106; Kelsen 2004: 101-110). Kelsen argues for legal positivism and relativism. This does not imply a posture denying the existence of values or truth, but rather to integrate the founding components of democracy (Lagi 2020: 95; Langford, Bryan, McGarry 2019: 462).

Kelsen's democratic tragedy allows us to introduce a reflection on the place, authority, roles, and functions of discourses of truth in politics and law. This master's thesis will look at scientific narratives as discourses of truth and see how they fit into and are used in the legal and political spheres. We want to see how certain actors can claim scientific arguments as truth and authority to exert pressure in law and in politics. Latour had already worried that the use of scientific discourse - charged with understanding the world - would block and impose itself against any political or legal discussion - charged with regulating social life- (Latour 2004: 10; Latour 1993: 23). More specifically, we want to raise the way in which certain actors can invoke scientific arguments to impose 'objective' elements of fact in the debate and, in this way, refrain from discussing politically and 'subjectively' these same elements (or, at least, their social consequences) (McGee 2015: 38; Latour 2013: 489).

In this way, the invocation of science in politics and law would correspond to a return to natural law (Druffin-Bricca, Henry 2009: 67; Viala 2010: 162). In fact, the rule would be valid if it is scientifically correct, not legally correct. However, the legal positivism perspective does not seem to be sufficient either. Indeed, legal positivism takes up the distinction between nature and objective science on the one hand, and objective law and politics on the other (Latour 2010: 198; Latour 2004: 18). The problem is not with the source of law, because law derives its legitimacy from the rules of law (not from nature). On the contrary, the problem with legal positivism comes from its ideological underbelly, which reinforces the narrative of an objective science, neutral and external to all political consideration (Hart 1958: 71; Latour 2013: 248; Conway 2012: 20).

In a transversal way, the narrative of a natural and objective science cannot possibly consider the multitudes of physical, social links between the object and the subject of knowledge (Haraway 2018: 33; Gardey 2013: 118) and must be criticised with regards to the normative temptation of 'knowledge-power' (Foucault 1980: 133; Foucault 1990: 93; Dreyfus, Rabinow 1984: 118). Furthermore, the modern separation of nature and politics seems to have become inadequate regarding 'hybrid' issues (Latour 1993:1-12). These 'hybrids' refer to 'object/subject' problems combining the need for a technical approach (without having scientific certainty) and having major consequences at the societal level (Latour 1993: 1-12; Latour 2004: 11; Gutwirth, van Dijk 2020: 123). For example, the proper use of scientific data can be found in the fields of vaccination and health policies, genome editing or within non-discrimination law (Papon 2020: 7-17; Stengers 2018: 3-22; Stengers 1993: 30; Stengers 2015; Shan 2020). In this work, we will look at the GMO event as a hybrid: studying the role of scientific discourse in legal and political regimes.

Finally, the problem that interests us is the reconciliation between, on the one hand, the authority of a discourse of truth (such as religion or science), which assumes an argument that is better than the others (Castoriadis 2005: 244), and, on the other hand, the values of positivist law (where a rule must be formally just to be legally just) (Kelsen 1989:44) and positivist democracy (where majority rule is sufficient for a law to be valid) (Kelsen 2004: 101-110). This project is challenged by the prin-

ciples of truth arguments (religious or scientific), which assert a superiority over any other register (Latour 2004:10; Latour 2013: 233, 283; Papaux 2009: 105). However, the idea of a 'better' or superior argument seems to be the basis of a communication ethic, and thus of democratic principles. According to Perelman, Olbrechts-Tyteca and Habermas, when one argues, one enters a certain register that presupposes a truth (or at least, a more rationally acceptable argument). This implies that the authority of one argument would be superior over others, even if all interlocutors are equal (Habermas 1986: 34; Perelman, Olbrechts-Tyteca 2008: 441; Cometti 2007: 19; Berten 1989: 87). Thus, whether from a divine truth or a scientific truth, the idea of a better argument persists: gods have not completely abandoned us.

2. Research Questions, Approach, and Methodology

The research questions (RQs) are the following: What roles, functions and risks are involved in using a scientific argument in politics and law? (RQ1). Without questioning the importance of the place of scientific arguments in these debates, RQ1 will seek to understand how a scientific message (although it may include uncertainties, conflicts of interest, gender biases, etc.) (Papon 2020: 61; Haraway 2013: 183; Latour 2015a: 27; Gutwirth, Christiaens 2015: 21) can be perceived as an 'objective' argument and will therefore impose itself in the face of all political and legal debates (which remain 'subjective'). While these issues are highly topical considering the current public health crisis (Papon 2020: 9; Latour 1984: 340), this article will focus on GMO regulation. Indeed, a second research question arises from this, illustrated by our case study: What are the uses of scientific arguments in the political and legal implication of GMO regulation? (RQ2).

The first research objective (RO) is to clarify the scientific public debate and to establish limits for the use of scientific arguments to prevent them from being (mis)used for political or legal purposes (RO1). This contribution will propose to illustrate these theoretical questions through a case-study analysis of the regulation of GMOs in the European Union. In particular, the 2018 ruling of the Court of Justice (CJEU) is particularly significant, as it links New Breeding Techniques (NBTs) (CJEU 2018) to the legal regimes of GMOs (and goes against the opinion of some actors, claiming a scientific truth). A second research objective will therefore derive from this case study, namely, to provide a comprehensive and coherent analysis of the regulation of NBTs since the CJEU (RO2).

The hypotheses are as follows: first, whether in general or applied specifically to GMO regulation, the actors involved in public deliberation will mobilise scientific data to justify decisions and interpretations that would be convenient to them (RQ1, RQ2). The GMO regulation will be the case study to confront these hypotheses (RQ2).

In terms of methodology and structure, this article is divided into two chapters, with different objectives and approaches. Chapter one addresses a theoretical approach to present the interrelation between science, politics, and law. In general, this first chapter will propose an interdisciplinary theoretical framework combining the

philosophy of science and the philosophy of law to present how science should be integrated into politics and law and to apply it to my research material. *Primo*, philosophy of law is used because the interaction between science and law challenges both the theories of positive law and natural law (Corten 2017: 26; Ost 2007: 117; Ost, van de Kerchove 1989). *Secondo*, we will borrow from the philosophies of science the critiques of science in practice (Latour 2015a: 60) and the introduction of situated knowledge (Haraway 2015: 183; Cretu, Massimi 2020: 71) and knowledge pluralism (Cretu, Massimi 2020: 141). In a second step, our theoretical framework will be applied to a casuistic analysis (RQ2). Mixing legal technique (Corten 2017: 23; Kestemont 2018) and analytical legal theories technique (Corten 2017: 23; Kestemont 2018; Fordham 2004:91), we will apply the applications of principles and rules of legal interpretation in the EU to analyse the EU legal regime on GMO, before and after the judgement of CJEU of 25 July 2018 (Corten 2017: 26; Spranger 2015; Lenaert, Guiterrez-Fons 2020: 8; Bengoetxea 1993: 141-144). In addition, we will mobilise the sociology of law, legal technique, and analytical theories to study the role scientific arguments have played in the CJEU judgment and in the work to recast the GMO Directive (O1, O2) (Corten 2017: 22-45). In this case, the CJEU 2018 judgment is relevant to analyse the interaction between law and science (Latour 2013: 129; Gutwirth, van Dijk 2020: 127; McGee 2015: 184). The study of these relations is particularly important in the European Union, where the use of scientific/technical arguments to justify policies is common (Mérand 2021: 5-22).

3. The mobilisation of scientific discourse in the political and legal fields

In this chapter, we will provide theoretical elements for rethinking the interaction between science, politics, and law. First, we will discuss theoretical choices for a truth-in-construction path rather than a transcendental one (Section 1, RQ1). Then, it will be necessary to expose two movements to criticise the authoritarian claims of sciences: on the one hand, the relations between knowledge and power traced by Foucault and Haraway (Section 2, RQ1) and on the other hand, the critiques of science in action (Section 3, RQ1).

3.1 Truth under construction and regime of truth

We wish to place our reflections in the continuity of the philosophy of science which accepts the “truth under construction”, the “pluralism of truth”, and the “perspectivism of knowledge” (Cretu, Massimi 2020: 89; Latour Wooglar 1979: 30). This truth under construction can be claimed by following a set of regulated processes (Tiercelin 2011; Boghossian 2009). As a result, truth under construction is then opposed to the discourse of an external, divine, and objective truth (Latour 2004: 30). According to Latour and Stengers, the invocation of an unsurpassable and external scientific truth will have the effect of paralysing the political exercise, in the sense that it should only socially record the laws of nature (Latour 2004: 218: 235; Stengers

2018: 106; de Vries 2018: 99). On the contrary, if there is an objective character to science, it is derived from a scientific method (Chalmers 1976: 21; Feyerabend 1981: 5). Consequently, we arrive at a scientific consensus by the sum of the convergences of scientists according to coherent method and values (Papon 202: 44; Poper 1973). In this sense, the follow-up of a process and a method of construction and rectification allows us to relate to a scientific truth (Merton 1938: 321). In this sense, even though scientific truths and paradigm will be corrected in the future, we have good reason to hold them as true for the moment (Kuhn 1996:160; Stengers 1997: 43; Boudon 2011: 121-123).

In this respect, within the idea of a science under construction, there are great divergences between: on the one hand, the idea of a solid objectivity of the sciences by following their methods (Latour 2015a: 17; Shapin, Schaffer 2011: 37), and on the other hand, a relation of force and interpenetration between the sciences and their social, axiological, economic, or gender context (Haraway 2013: 21; Haraway 2018: 99; Barad 2007: 37). It is in this sense that “reality is not independent of our explorations of it” (Harway 2013: 21; Haraway 2018:99; Gutwirth, Christiaens 2015: 33; Martin 1991: 16; Martin, Schiebinger 1993), because there is a set of physical, natural and social constructions and links between the researcher and his/her knowledge (Haraway 2018: 99). In the same vein, Foucault does not consider truth as the result of a pure, objective, and disinterested knowledge (Foucault 2011; Thirion 2013: 180). Conversely, truth will vary according to the way it is socially constructed and disseminated (Foucault 2011: 90; Frydman, Genicot 2020). Knowledge is directly inserted in a power relationship and in a set of external determinations (Foucault 1997: 13; Foucault 2001: 2639; Thirion 2013: 181).

Still in this idea of truth under construction, another of Foucault's concepts seems essential to explain the ways in which a subject can access a truth. In *Le gouvernement des vivants*, Foucault proposes to follow an approach from the angle of “regimes of truths” (Foucault 2012: 91; Thirion 2013: 185). He defines the regime of truth as the corpus of rules and obligations that determine the procedures that individuals must follow to access a truth (Thirion 2013: 183; Weir 2008: 367). In other words, it is essentially a framework of action that has the effect of obliging individuals to relate to the truth in a specific way, according to predefined rules, and whose origin is not necessarily limited to the framework of action in question (Thirion 2013: 184).

Therefore, the concept of truth regime gives legitimacy to several types of truths (scientific truth, judicial truth, religious truth) because they are issued from several regimes of truths that can claim their truths (the regime of science, law, or religion) (Introna 2003: 235). This idea corresponds to the concept of truth pluralism, which inserts the singular and specific character of the scientific domain while conceiving a balancing with other truths and their contexts and their discourses (Lynch 1998). For Gutwirth, truth pluralism establishes a space for discussion and controversy between the different truths, without one wanting to take the place of the other (Gutwirth, Naim-Gesbert 1995: 57-58).

In contemporary societies, perhaps science is the main regime of truth (Gutwirth, Christiaens 2015: 30). Science defines its protocols for constructing truth and even provides mechanisms for arbitrating possible disagreements (Foucault 1981: 165, 179, 219; Gutwirth, Christiaens 2015: 25). In a nutshell, science is characterised by collective rules and practices aimed at producing solid, reliable knowledge that is rectified and rectifiable (Gutwirth, Christiaens 2015: 25; Latour 2010: 208). However, from Foucault's point of view, Science is only a special case of the regime of truth. In the case of science, the manifestation of truth is self-constrained and it aims to be as autonomous as possible from the influence of other regimes (i.e. law and politics). But in most cases, truth is not manifested in this way. It depends on the respect of a set of obligations that are not articulated on themselves, but rather involve other types of regimes. With this articulation of truth regime, it is possible through a particular truth regime to exert legal, moral or political pressure from another truth regime (Thirion 2013: 188). Moreover, we believe that the articulation of truth regimes is mutually reinforcing and justifying. As an example, Foucault shows that the patient incarcerated in a psychiatric clinic finds himself in an articulation of regimes of truths (regime of the institution in charge, economic constraints of the policies, psychiatric understanding of his illness, legal regimes concerning him, etc.) (Foucault 2013: 213; Long 1992: 119).

For some of the cases between science, politics and law, which we will call 'hybrid', the problem lies not only in the specificity of one regime, but also in its articulations with other regimes. For Foucault, this is the expected benefit of the new method, the place for the development of a new knowledge: that which concerns the intersection between different regimes of truth and power and which are part of a larger complex of power-knowledge (Frydman, Genicot 2020: 4; Wetherell, Taylor, Yates 2001: 12-81). Finally, the truth regime approach allows us to link the idea of a truth under construction and the interaction between disciplines (law, politics and science). Having set out our methodological choices, we will in the next section take up the risks between the relations between knowledge and power.

3.2 Relationship between knowledge and power

Our reflections on the integration of scientific narratives in politics and law aim to anticipate an authoritarian claim of science considering the relationship that science can have with power.

In this case, Foucault had already pointed out that the wills of knowledge contain relations of power and domination (Foucault 2004: 616-622; Foucault 2011: 114). In a way, discourses are strategic elements of power relations, among which knowledge discourses take a strategic place (Foucault 1994: 465). For him, knowledge and power are linked by systems of co-ownership, accumulation, communication, information forming "power-knowledge" (Foucault 2004: 231; Foucault 2011: 114; Favreau 2017: 147-199). As part of a *genealogy of knowledge*, Foucault repositioned power-knowledge as the result of a particular process of enactment by which the individual en-

gages in an active inquisition of knowledge (in a disciplinary dimension) (Foucault 2004: 1495); Foucault 2011: 3-19; Frydman, Genicot 2020: 5; Thirion 2013: 181). In *Surveiller et punir*, Foucault notes that disciplinary power has constructed new tools of knowledge/power such as the examination and the norm (Foucault 1975: 260; Thirion 2013: 183-184; Frydman, Genicot 2020: 6). On the one hand, the norm becomes an anonymous authority, defined as the nature of things (Angenot 2013: 124), inscribed in all spheres of society (scientific, moral, legal) and acting in parallel to strict criminal law (Frydman, Genicot 2020: 7-8; Foucault 2011: 122). According to theories of global law, this process of normalisation, justified by a science, has a normative and dominating dimension, while not being part of law in the strict sense (Frydman, Genicot 2020: 7-8). On the other hand, examination is a process that seeks and constructs truths (present and not past) and seeks to return the subject under examination to normality (Thirion 2013: 184). In this way, normality is established from an accumulation of knowledge and regulates the abnormal individual (Angenot 2013: 126-130). These techniques examine the subject according to his degree of abnormality to bring him back to the norm in a logic of continuous surveillance (Thirion 2013: 184).

In connection with our reflection, this relationship of knowledge-power, domination under scientific justification and normalisation can be found in the fields of punitive medicalisation (Binet 2002: 197-219) and the regulation of deviants (André 2000; Angenot 2013: 126-130; Foucault 1999), in physical criminology (with the search for 'born criminals' or 'born prostitutes') (Rodler 2012), or in justification for eugenic, sexist and racist policies (Quichon-Caudal 2013: 8; Engs 2011: 332; Blanc 2020: 60), etc. Presented as "objective" and indisputable facts, it becomes worrying when law (especially according to legal positivism) will transcribe and emphasise these processes of domination into the social spheres (Supiot 2017: 8; Gutwirth, Naim-Gesbert 1995: 40).

This co-implication between power and knowledge was also incorporated by Haraway and mixed with critiques of the neutrality and exteriority of science. On the one hand, Haraway denounces the "modest witness" narratives of an external science that proceeds with gender, class and race exclusion (Haraway 2007: 316). Indeed, the "modest witness" is only received and validated by gentlemen, of the right nationality, white, chaste, able to certify the objective facts (Haraway 2007: 316). On the contrary, Haraway argues for an epistemology of situated knowledge and positionality in the sciences, as a condition for rational knowledge (Haraway 2007: 113, 126, 325; Charbonnier 2009: 163). Situated knowledge is part of a scientific pluralism where the scientist is invited to identify and acknowledge his or her biases in his or her perspectives and to avoid claiming a neutral and objective discourse on the world. On the other hand, in *Primate vision*, Haraway marks an interaction between the prescriptive and the descriptive in the natural sciences. In this case, the study of apes was used to explain and legitimise sexual difference within human society. In fact, scientific narratives are reintegrated to prescribe behaviour based on the interpretation of facts. However, these facts themselves take on meanings based on the narratives and values of the scientists (Haraway 1986: 79-81). Accordingly, Haraway warns

against a rhetorical strategy using a “biological law” as a vehicle for social domination, as it would be a discourse of values that hides behind a supposedly natural, neutral and objective norm (Haraway 1986: 109). This rhetoric borrows from natural law, as the rule should be aligned with the “just” or “natural” (Druffin-Bricca, & Henry: 67). However, as Viala points out, the invocation of “nature” makes it possible to impose certain values that one wishes to see imposed in society, whereas behind this idea of nature, reputed to be objective, there is always an arbitrary and subjective order (Viala 2010: 147).

In the end, Foucault and Haraway’s perspective offers a critical approach to the co-implications between discourses of knowledge and power. Thus, this digression by these two authors serves as a warning when science is used as a mode of justification, as it could take on a normative dimension without being identified with politics or law. On a different note, our next section takes up critiques of the sociology and philosophy of science to rethink science in context or in action.

3.3 Critics of science in practice

This section will take up the work of Science in Action to deconstruct the grand narratives of modern science (which are dangerous when taken up in politics and law). As presented above, we are concerned about the instrumentalisation of a science defined as neutral and objective in the political and legal field. The science in action approach therefore offers an opening for alternative narratives on science that are more appropriate in democracies (Latour 2004: 18; Stengers 2018: 4).

We find in the accounts of modern science this ‘great division’ between science (upper chamber) and politics (lower chamber) (Latour 2004: 15; Latour 1993: 13-46; Prigogine, Stengers 1979: 75; Gutwirth, Naim-Gesbert 1995: 35). The natural world is then seen as objective and manageable (Prigogine, Stengers 1979: 63; Gutwirth 2001: 305-342), in which man is a scientist who has a right of reason over the world, because he is outside it and objective (Latour 2004: 19; Gutwirth, Naim-Gesbert 1995: 35). This “Modern Constitution” (Latour 1993: 136) proposes the object/subject separation as the epistemic principle for political and social organisation (Latour 1993: 136; Descola 2005: 122; Gutwirth, Naim-Gesbert 1995: 35). According to these accounts, science is presented as objective and independent of any political, cultural or moral values (Shapin, Schaffer 2011: 37; Gutwirth, Naim-Gesbert 1995: 19). The scientist is also outside society and escapes political discussions and power relations (Stengers 1993: 30; Gutwirth, Christiaens 2015: 26). His word is therefore indisputable, objective, direct and extra-political (*adequatio rei et intellectus*) (Gutwirth, Naim-Gesbert 1995: 35). Therefore, only scientists are competent to tell an objective and rational truth about their objects: they are the only ones who have a legitimate word about the world (Gutwirth, Naim-Gesbert 1995: 57; Gutwirth 1993: 93). In this sense, when we mobilise the narratives of modern science to justify our claims in the social world, we invoke a monopoly of universality, truth and fact (Gutwirth, Naim-Gesbert 1995: 56).

However, the narratives of “modern science” are not respected in practice on several levels. First, while the “Great Divide” seems to be clear on the science/policy dichotomy, scientists and politicians keep switching them around unofficially (Latour 2004: 98). According to Stengers, scientists can no longer ignore the hybrid interdependence between humans, their values, and their environment (Stengers 2018: 221-226). In this case, it rather invites to assume these interferences and that scientists can express their values and position themselves regarding their knowledge without their ethos being called into question (Stengers 2018: 16; Haraway 2007: 107-144; Latour 2015b: 295). Like Haraway, we argue for localisation and perspectivism in scientific discourse (Haraway 2007: 133).

These interferences between science and politics are more marked around “hybrid” problems which are marked by a scientific complexity, and which have a great societal impact (Latour 1993: 51; Latour 2004: 32). Certain subjects such as climate change, genome editing, public health policies, etc. constitute “hybrids” because they mix nature and politics, scientific uncertainties, and high societal impact (Servigne, Stevens and Chapelle 2018: 94). We can take up the concept of ‘hybrid’ in what some call “hyperobjects”, the “divergent problems”, or the “wicked problem” (Servigne, Stevens and Chapelle 2018: 94). Hybrids are the result of an incomplete “purification” between science and politics (Latour 1993: 51 Bourgault 2011: 75). This concept allows us to understand the links of redistribution between the different disciplines (Latour 2010: 205; Gutwirth 2020: 25). Indeed, when two regimes of action act to write the same object, this creates hybrids: this is the case of the GMO, which was characterised by the act of legal and scientific writing. Consequently, it will be argued that the legal GMO is not the same as the scientific GMO. Faced with these hybrid issues, it is no longer adequate to invoke scientific discourse as an objective truth that should impose itself on the social level.

Moreover, the idea of a world “in the laboratory” is no longer appropriate for hybrid issues (Gutwirth, Christiaens 2015: 32; Stengers 2018: 53). In this case, only the experimental sciences can provide laboratory evidence (Stengers 2018: 118; Stengers 1993: 102). The exercise has to be strictly controlled and the scientist has to stay away from the objects in the laboratory (Gutwirth, Christiaens 2015: 31). Only after being questioned in the laboratory (in the black box) can the objects studied be presented as “facts” (Latour 2004: 143; Stengers 2018: 48; Gutwirth, Naim-Gesbert 1995: 43). However, this mode of proof concerns only an exceptional segment of scientific production (Stengers 1997: 53) and is not exportable to other types of science (Gutwirth, Christiaens 2015: 33, 40; Stengers 2009: 86). This authority of science cannot therefore be invoked outside the laboratory, and even less so for ‘hybrid’ subjects: we cannot treat with the same degree of certainty GMOs in the laboratory and GMOs in cultivation (where we cannot have the same degree of mastery outside the laboratory) (Servigne, Stevens, Chapelle 2018: 94; Stengers 2018: 3; Gutwirth, van Dijk 2020: 131). Gutwirth points out that no serious scientist can attest to the safety of GMOs for health and the environment outside the laboratory. Worse still, if this scientist were to present GMOs as the means to free the world from hunger, this would be propaganda and not science (Gutwirth, van Dijk 2020: 132).

A final field of our critique concerns the consideration of the social context in which the scientific process moves. Indeed, it seems illusory to us to consider science outside of any social and economic context. On the contrary, it is advisable to think of this register as being interrelated with other registers: that of industrialists, the political context, funding or even gender, colleagues, etc. On this subject, we want to highlight the risk of instrumentalisation and blocking of science in politics. Taking tobacco as a case study, Conway and Oreskes show how some industrialists and economists have created false scientific controversies to maintain the status quo and discourage political positions (Conway, Oreskes 2010: 38, 189, 451). In the same vein, many academics are concerned that science (as a method for constructing truths) is being confused with its practical, industrial and economic applications science (Gutwirth, Christiaens 2015: 33; Stengers 2018: 49).

This can be seen at the internal level of science with the criticisms of the knowledge economy: on the one hand, science must respond to economic needs and is dependent on private funding; on the other hand, scientific practices in themselves are dictated by managerial practices (flexibility, conformism and opportunism are valued) (Gutwirth, Christiaens 2015: 39-49; Stengers 2018: 49). This criticism concerns the experimental sciences and its influence on other types of sciences (sociology, political science, law, etc.) (Gutwirth, Christiaens 2015: 42; Stengers 2018: 55; Gutwirth 2013: 108). Stengers and Bensaude-Vincent believe that these managerial techniques specific to fast science tend to weaken it on several levels: too much competition and pressure to publish, too much potential for manipulation, too much at stake for society, etc. (Stengers, Bensaude-Vincent 2003: 176).

Having outlined our theoretical framework (on truth in construction, the risks of the authoritarian dimension of science and their analysis in practice) (RQ1), we would like to complement it with a case study (RQ2). In our next chapter, we will therefore study the legal regime of GMOs as a hybrid illustration of the relationship between science, policy and law. In the end of this case study, we will suggest some ways of correctly integrating the discourse of science into law, by paying attention to "regimes of truths" and "modes of existence" (RQ1) (Funtowicz, Ravetza 1993: 739; Køniga Børsen, Emmeche 2017: 12).

4. Application of the theoretical framework: case study of GMO regulation

This chapter will present the case study of the EU GMO Regulation to illustrate our hypotheses on the relationship between law and science (RQ2). We chose GMOs because it is an "event" hybrid, marked by scientific controversies, and which shows great socio-economic implications (Stengers 2009: 38). Scientific uncertainties are marked by contradictory studies on the safety or otherwise of GMOs (Krimsky 2015: 883;

Bordonaba 2011: 734; Nicolia, *et al.* 2014: 77; Hilbeck, *et al.* 2015: 4; Krimsky 2015: 8837). Apart from that, GMO/NBT represent important economic considerations (especially for the agricultural and medical sectors) (EC 2021a; Brookes, Barfoot 2017: 156). These issues will become more important with the arrival of NBTs that make

gene editing easier, cheaper and more accurate (EC 2021b; Gutwirth, van Dijk 2020: 134; Schleissing, Pfeilmeier, Dümberger 2019: 181-196; Knott, Doudna 2018: 688; Somsen 2018: 701; Rath 2018: 107). In contrast to older genetic modification techniques (randomly introducing undirected changes) (Sikora *et al.* 2011: 1), NBT allow the genome of a plant (or virtually all living organisms) to be modified in a precise manner (Menz *et al.* 2020: 130).

We will present the legal framework for GMOs in the European Union (Section 1, RQ2). Then, we will develop the case law of the Court of Justice of 25 July 2018 on the status of NBTs in relation to the legal framework of GMOs (Section 2, RQ2). We will conclude this section with a reading of this case law in terms of "modes of existence" (Section 3, RQ1).

4.1 The European legal framework for GMOs

4.1.1 Relevant legislation

The European regulation of GMOs is specified by Directive 2001/18 on the deliberate release into the environment of Genetically Modified Organisms (the "GMO Directive") (Directive 2001), Regulation (EC) 1830/2003 on traceability and labelling of GMOs (Regulation 2003a), Regulation 1829/2003 on Genetically Modified Food and Feed (Regulation 2003b), and other regulations for drugs, pesticides and other products (Dederer, Hamburger 2019: 143). As a shared competence, the EU is competent for the definition of the GMO Directive, the general regulation, the risk assessment methodology and the authorisation of GMOs, the conditions under which a Member State may ban a GMO on its territory, and the labelling of GMOs in food (Brosset 2012; Pignataro 2011: 361). Finally, the EU GMO regulations are also part of the international legal framework with, for example, the World Trade Organisation (WTO), the FAO or Cartagena and Nagoya Protocol (Dederer, Hamburger 2019: 145).

4.1.2 Definition

Article 2 of the GMO Directive defines a GMO as follows:

means an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination;

Within the terms of this definition:

- (a) genetic modification occurs at least through the use of the techniques listed in Annex I A, part 1;
- (b) the techniques listed in Annex I A, part 2, are not considered to result in genetic modification; (Zimny *et al.* 2019: 56).

An essential point is that the definition is processual, as it focuses on the process and technique used rather than the final genetic material of the organism (Brosset, Noiville 2019: 197; Noiville 1998: 217).

The processual definition of GMOs is confirmed by Article 3(1) of the GMO Directive on exemptions, read with Annexes I A and I B. Indeed, Article 3(1) exempts from the obligations of bodies obtained by certain techniques/methods (Dederer, Hamburger 2019: 146; Gutwirth, van Dijk 2020: 125). Precisely, some techniques are included as GMOs and regulated by the directive (Annex 1A) while others are considered as GMOs but are exempt from these obligations (Annex 1B).

Since the GMO Directive, New Breeding Techniques (NBT) (or also called NGT) have diversified since the mid-2000s (Gutwirth, van Dijk 2020: 125; Brosset, Noiville 2019: 197). We define NBT as follows:

Methods that allow for the development of new varieties in a faster and more precise manner than do conventional breeding techniques, by modifying the DNA of seeds and cells, allowing for a number of limitations of conventional breeding to be overcome (Zimny *et al.* 2019: 56).

The term NBT refer to a wide range of techniques and methods to genetically modify plants, animals or human embryos (Zimny *et al.* 2019: 56); Morange 2017: 30): RNAdependent DNA methylation, Zinc finger nucleases (ZFNs 1, 2, 3), Site-Directed Nucleases (SDNs), Oligonucleotide directed mutagenesis (ODM), Reverse Breeding, Intragenesis and cisgenesis, TALENs and, CRISPR-Cas systems (see definitions: Menz *et al.* 2020: 1-2; Whelan, Martin, Lema 2015: 253; Braun 2017: 90).

These new techniques can lead to three types of plants: the plants without modifications (Wild type), those with specific mutations in their genomes (SDN 1 and SDN2), and those with large insertions of exogenous DNA (SDN 3) (Menz *et al.* 2020: 2; Schaart *et al.* 2016 438). In a way, some techniques enrich classical transgenesis with new tools; while others (such as site-directed mutagenesis) are completely different because they do not involve the insertion of a foreign gene into the organism but focus on targeted regulation of the expression of one or more genes in that organism (Menz *et al.* 2020: 1; Brosset, Noiville 2019: 197). These new techniques can have multiple applications for the plant sector: tolerance against herbicides, fight against hydric and salinity stress, change of taste or volume and improvement of conservation (Zimny *et al.* 2019: 51; Brosset, Noiville 2019: 197).

These new techniques are developed within an old normative system, which leads to uncertainty and controversy (Menz *et al.* 2020: 2). Most legislation (national and international) does not explicitly refer to new genome editing techniques, considering the novelty and diversity of these products (Menz *et al.* 2020: 2; Hartungand, Schiemann 2014: 742). Most regulations in this area refer to the commercialisation of conventional GMO (Menz *et al.* 2020: 2-3). Several controversies have emerged as to whether NBTs fall within the scope of EU legislation (Menz *et al.* 2020: 11-13; Eriksson 2018: 358). Before the Court was asked to rule on the issue in 2018, several legal controversies were raised about the legal status of these techniques (Menz *et al.* 2020: 11-12). At stake in the classification of regulated or unregulated GMOs is whether these techniques will have to undergo numerous and rigorous assessment and authorisation procedures, which will hinder their placing on the market (Zimny *et al.* 2019: 56; Lusser *et al.* 2011).

4.1.3 Obligations of the GMO Directives

The GMO Directive lays down several obligations, with a threefold objective: to ensure safety for human health and the environment, the free and informed choice of the consumer of GMOs and the harmonisation of EU market (article 1, recital 4-11; Zimny *et al.* 2019: 51). The Member State is responsible for the authorisation/notification of contained GMOs and field trials at the national level (Dederer, Hamburger 2019: 143). The authorisation is done at European level for the placing on the common market, in a process that involves the Member States and the EU institutions (Dederer, Hamburger 2019: 143).

In illustration and on food GMOs, a company must submit a scientific assessment to the national authority of its Member State for the marketing of a GMO (art. 5§5 Regulation 2003a; Dederer, Hamburger 2019: 143). The applicant provides a scientific assessment containing all available and relevant information on the risks to human, animal and environmental health (Dederer, Hamburger 2019: 143). This EU application is forwarded to the European Food Safety Authority (EFSA) which will carry out the health and environmental risk assessment (Zimny *et al.* 2019: 51; Dederer, Hamburger 2019: 143). During this evaluation procedure, the public is informed via the Commission's website and national bodies can send their comments (Zimny *et al.* 2019: 51-54). Finally, the Agency publishes safety assessment reports on GMOs and guidelines on the methodology for the assessment of applications for authorisation of GMOs to the Commission and the Member States (EFSA 2022). National forums are invited to submit their comments on GMOs during the evaluation periods.

Based on the EASA's opinion, the Commission presents a draft decision to the Member States, which vote on it by qualified majority (Zimny *et al.* 2019: 51). If the draft does not receive the necessary votes, the Commission takes the final decision (Zimny *et al.* 2019: 51). The authorisation is limited to ten years, renewable after a new evaluation (Regulation 2003a, art. 7). They are then subject to traceability, labelling and monitoring requirements (Dederer, Hamburger 2019: 143). To this end, the Commission is listing all GMOs with marketing authorisation in a database (Dederer, Hamburger 2019: 143). Although these GMO products must be labelled, there are some notable exceptions: products with less than 0.9% GMO content, or animal products fed with GMOs (Zimny *et al.* 2019: 51; Regulation 2003a, art. 7).

After the authorisation, a monitoring (both GMO Variety-specific and general) is mandatory (GMO Directive art. 23, 26; Zimny *et al.* 2019: 51). Initially valid throughout Europe, a Member State may adopt a measure to restrict or temporarily introduce the cultivation of a GMO on its territory based on new information concerning the risk to human health or the environment (Zimny *et al.* 2019: 51). In this case, the need to maintain these measures is examined at European level (GMO Directive art. 23, 26; Zimny *et al.* 2019: 51; Dederer, Hamburger 2019: 144-145).

As detailed here, this regime is complex and restrictive (RQ2). Indeed, under EU regulation, a GMO must undergo a rigorous safety assessment to be approved. As a result, GMO approvals are lengthy and costly in many countries. In the European Union, the procedure costs around 11-17 million euros and takes on average 6 years (Zimny

et al. 2019: 51; Menz et al. 2020: 2; EuropaBio 2019). In addition, most Member States have restricted or banned cultivation on their territory for biosafety reasons: only Spain and Portugal still cultivate GMOs (Menz et al. 2020: 2; ISAAA 2019). The CJEU judgement of 25 July 2018 will address these obligations, and whether they apply to NBTs.

4.2 The judgement of 25 July 2018 and the cases of NBTs

There have been several debates as to whether the products obtained by these NBTs fall within the scope of the obligations of the GMO directive (Gutwirth, van Dijk 2020: 123). Delivered in the Grand Chamber on 25 July 2018, the ruling of the CJEU *Confédération paysanne*, answers a preliminary question from the French Conseil d'État, concerning the scope of this derogation from the obligations laid down in the GMO Directive (CJEU 2018; Gutwirth, van Dijk 2020: 123; Vives-Vallés, Collonier 2020: 1813). The initial request did not focus on NBTs, but on certain herbicide-resistant crops obtained by mutagenic techniques (in the broad sense) (Vives-Vallés, Collonier 2020: 1813; Purnhagen et al. 2018: 799). However, as recognised by the Conseil d'État, the conclusions of Advocate General Bobek and the judgment itself, the judgment has a wider scope (on GMO regulation) and concerns all kinds of NBT (CJEU 2018 §21; Vives-Vallés, Collonier 2020: 1815). For some academics, this broader scope has led to a certain exaggeration of the scope of the judgment (Vives-Vallés, Collonier 2020: 1815; Wanner et al. 2019: 90).

4.2.1 The Parties' Argument

The ruling was initiated in 2015, when the not-for-profit organisation *Confédération Paysanne* (along with eight other organisations) called on the French Prime Minister to ban the cultivation and sale of herbicide-resistant varieties created through genetic engineering techniques (*in casu* mutagenesis). First, as far as the applicants (*Confédération paysanne*) are concerned, they are acting against organisms obtained via mutagenesis, which they see as "hidden GMOs" because their unclear status has exempted them from the obligations of the directive (CJUE-AG 2018 §21, 27; Brosset, Noiville 2019: 197). They point to the health and environmental risks of mutated varieties (CJUE-AG 2018 §21-27). For the defendant (the Minister of Agriculture), the pleas are unfounded, since the risks arise from the farmers' practices, rather than from the product itself (CJUE 2018 §20-21; CJUE-AG 2018 §55; Brosset, Noiville 2019: 1997). Furthermore, the Minister argues that mutations obtained by the new techniques of directed mutagenesis result in a product (outcome) like other products whose mutations would be spontaneous, random or unintentional (and that this could be eliminated during varietal selection by crossbreeding techniques).

4.2.2 Questions before the Court

Although the Conseil d'État put 4 questions to the Court, in essence, the questions asked led to a double reflection: on the one hand, it is mainly a question of

whether these new mutagenesis techniques fall within the scope of the directive? Therefore, are organisms produced by mutagenesis techniques exempt from the obligations of the directive (under Article 3 and Annex IB)? The Court will answer that organisms obtained by mutagenesis are GMOs within the meaning of the directive and that they cannot benefit from the exemption (CJUE 2018 § 54; Gutwirth, van Dijk 2020: 131). Hence, the Court of Justice held that “organisms obtained by means of techniques/methods of mutagenesis constitute genetically modified organisms within the meaning of that provision” (CJUE 2018 § 86), as the directive must include organisms from the different techniques existing at the time of its adoption. Other subsidiary questions were put to the Court, but the answer to the first questions rendered them obsolete (Garnett 2019: 4; Brosset, Noiville 2019: 197).

4.2.3 Opinion of Advocate General

The solution presented by the Court goes against the opinion of its Advocate General (AG), which is not frequent (Craig, de Búrca 2015: 61). In his opinion, the AG proposes a literal and express analysis of the GMO directive (CJUE-AG 2018 §56; Gutwirth, van Dijk 2020: 125; Vives-Vallés, Collonier 2020: 1816). Indeed, it will first address the generic definition of GMOs in the Directive (Article 2§2) and then its exemptions (Article 3 and Annex IB).

The AG will first qualify organisms obtained through mutagenesis as GMOs within the meaning of the directive, since they meet the material criteria set out in Article 2§2 of the GMO Directive (CJUE-AG 2018 §54, 57-67; Gutwirth, van Dijk 2020: 125; Garnett 2019: 4).

As regards exemptions, the AG considers that the directive is clear: Annex 1B exempts all mutagenesis techniques “on condition that they do not involve the use of recombinant [desoxyribo]nucleic acid molecules” (rDNA) (CJUE-AG 2018 § 56, 78-79; Gutwirth, van Dijk 2020: 125-126; Garnett 2019:4). Since this is the case for NBTs that do not use rDNA, the AG considers that they should benefit from the exemption (CJUE-AG 2018 § 85; Garnett 2019: 4). On the basis of a strict and literal interpretation of the GMO Directive, Advocate AG considers that the scope of the exemption should not be restricted by criteria other than those already laid down in the Directive (i.e. the use of rDNA) (CJUE-AG 2018 §79-80, 101-105; Gutwirth, van Dijk 2020: 125, 133). Indeed, it will reject other distinguishing criteria that would restrict the scope of the exemption (and thus extend the scope of the GMO Directive's obligations). Firstly, the AG considers that the exemption also covers techniques which emerged after the date of adoption of the directive (CJEU-AG 2018 § 87; van der Meer *et al.* 2021: 1). In his view, the requirement in Annex IB for the use of rDNA is an indication of the legislator's intention to integrate technological developments (CJEU-AG 2018 § 81). Secondly, the AG considers that the precautionary principle alone does not justify a restrictive interpretation of the scope of the exemption (CJEU-AG 2018 § 88). Earlier in his observations, he recalls that the precautionary principle allows the different actors (Member States, the Commission or companies) to adopt provisional meas-

ures (non-discriminatory, objective and proportionate) to *prevent* the real consequences of the alleged risks from becoming fully apparent (CJEU-AG 2018 § 48-51). However, this precautionary principle does not apply to hypothetical risks and evidence of the risk should be provided (CJEU-AG 2018 § 49). In essence, the AG considers that there is not enough knowledge to prove that NBTs pose a risk to health and the environment, and that the precautionary principle does not justify additional measures (CJEU-AG 2018 § 53; CJEU 2017 § 53). Thirdly, the AG rejects the principle of a frozen interpretation, instead of a dynamic interpretation, according to which exemptions must be limited to techniques authorised at the time of the directive (CJEU-AG 2018 § 94). Moreover, the precautionary principle cannot justify a frozen interpretation of the directive (CJEU-AG 2018 § 77, 102; Garnett 2019: 4). Fourthly, the AG goes against the argument of the applicants who want to exclude safe mutagenesis techniques based on recital 17 (CJEU-AG 2018 § 74). This recital affirms the will to exclude from GMO obligations those techniques “which have conventionally been used in a number of applications and have a long safety record” (CJEU-AG 2018 § 92). There is no need to restrict the scope of the exemption for the AG, as Annex IB was inserted after this recital was written and without reference to it (CJEU-AG 2018 § 94; Garnett 2019: 4). Fifthly, the AG considers that the Court should confine itself to the text and not interpret *contra legem*. If such an interpretation is to be defended, it would be the role of the legislator (CJEU-AG 2018 § 105).

As a result of his opinion, he will consider NBTs as GMOs, although they fall within the scope of the exemption of the GMO Directive. AG Bobek considers that NBTs are mutagenic techniques which do not mobilise rDNA molecules, and therefore should be eligible for the exemption provided for in Article 3 of the Directive (CJEU-AG 2018 § 107; Gutwirth, van Dijk 2020: 125; Garnet 2019: 4; Somsen 2018: 701). Ultimately, he will argue for a literal reading of the scope of the exemption, and for not adding other elements that would imply limiting the scope of the exemption. Thus, the precautionary principle alone cannot justify a *contra legem* interpretation.

4.2.4 The Court’s Decision

The judgment of the Court of Justice will consider that organisms obtained by mutagenesis fall within the scope of the GMO Directive (Article 2 §2) and, contrary to the conclusions of the Advocate General, that they do not enjoy the exemption from the obligation (Article 3 and Annex 1B) (Dederer, Hamburger 2019: 140-141; Garnet 2019: 4; Somsen 2018: 701). To arrive at this result, the Court followed its classical methods of interpretation (teleological, systemic, and literal) to analyse the definition of GMOs with the spirit and general scheme of the EU Directive (Neframi 1972: 327; Bengoetxea 1993: 144; Zimny *et al.* 2019: 54; van der Meer *et al.* 2021: 13-16). In this case, EU environmental legislation aims to “protect human health and the environment” rather than incentivise innovation (Garnett 2019: 5).

Regarding the qualification of GMOs, the Court will confirm that organisms obtained by these mutagenesis methods/techniques fall within the scope of the GMO

Directive (CJEU 2018 § 29-30; Brosset, Noiville 2019: 197). A key element of the discussion comes from the definition of the GMO Directive: “altered in a way that does not occur naturally by mating and/or natural recombination” (Gutwirth, van Dijk 2020: 129-133; GMO Directive, art. 2§2). This definition concerns the result, the technique used or both (EC 2011 §4.1; Sprink *et al.* 2016: 1493; van der Meer *et al.* 2021: 9; Dederer, Hamburger 2019: 150; Gutwirth, van Dijk 2020: 129):

- The process of altering the genome is unnatural (process-based) or
- additionally, the result of the altering of the genome is unnatural (product-based) (Dederer, Hamburger 2019: 149).

The Court will implicitly follow a process-based interpretation (CJUE 2018 § 29-30; Brosset, Noiville 2019: 197; Dederer, Hamburger 2019: 150). In this sense, the Court argues that organisms obtained by targeted mutagenesis undergo a process of genome modification that is not natural and are therefore GMOs (no matter what is the final result) (CJUE 2018 § 29, 48; Dederer, Hamburger 2019: 150).

This product/method distinction as a criterion for identifying GMOs is important (van der Meer *et al.* 2021: 13; *contra*: Gutwirth, van Dijk 2020: 129). Indeed, contrary to the Court's interpretation, several countries exporting products obtained by NBT have relaxed their regulations considering the final product (USDA 2022; Whelan, Martin, Lema 2015: 53-65; van der Meer *et al.* 2021: 7). Firstly, the United States bases its regulation on the claimed genetic and biochemical characteristics of the final product rather than on the method of production of that product and the risks involved (van der Meer *et al.* 2021: 7). In this respect, the product criterion is retained by the United-Kingdom government in its proposal to legalise GMOs: the method is different, but the final product would be a plant similar to one that could be obtained by “natural” techniques (Grohamnn *et al.* 2019: 1; Menz *et al.* 2020: 13-14). Finally, this is also the direction the Commission seems to be taking in its draft revision of the directive (voy. *infra*).

As suggested by the AG, the Court relies on the economy of the GMO Directive (i.e., exemptions from the obligation for techniques considered to be GMOs) to qualify these mutagenesis techniques/methods as GMOs within the meaning of the Directive (CJUE 2018 §27-38, 54; CJEU-AG 2018 §67; Garnett 2019: 5).

Since organisms obtained by mutagenesis techniques/methods are considered GMOs within the meaning of Article 2 §2 of the GMO Directive, the next question was whether they fall within the scope of the exemption from the obligations of the GMO Directive under Article 3 and Annex I B (Dederer, Hamburger 2019:150). In the Court's view, organisms obtained by techniques/methods of mutagenese cannot be exempted from obligations (CJEU 2018 §58), and in this sense differs from the opinion of AG Bobek (voy. *supra*). Two reasons are given by the Court:

Firstly, it refers to Recital 17 of the Directive on the conditions under which GMOs should be excluded from the obligations (CJEU 2018 §44-47; Dederer, Hamburger 2019:150; Gutwirth, van Dijk 2020: 125-128). In this case, the directive provides for an exclusion for: “organisms obtained through certain techniques of genetic modifica-

tion which have conventionally been used in a number of applications and have a long safety record" (CJEU 2018 §46-57). However, the Court considers that NBTs should not benefit from this exception regime (CJEU 2018 §48; Zimny *et al.* 2019: 54). Indeed, the Court interprets the Directive in the light of its *ratio legis*: the legislators' objectives were to ensure the effectiveness of the principle of precaution while tolerating certain techniques that existed prior to the directive (Brosset, Noiville 2019: 211; Gutwirth, van Dijk 2020: 125-128; Brosset 2018: 219-225).

Hence, this exception is reasoned and justified given that this was the case for traditional mutagenesis referred to by the GMO Directive at the time of its conception (CJEU 2018 § 48-54; Gutwirth, van Dijk 2020: 129; Zimny *et al.* 2019: 54; Garnett 2019: 5). In fact, the directive had provided for a list of exceptions (Annex I B) for mutagenesis means whose safety had been proven for a long time with an established history. Some of the research had been going on since the 1980s and therefore before the directive was drafted (Custers 2017: 221). This is the result of the legislator's intention, which is reflected in the spirit of the directive. It is therefore appropriate to adopt a "frozen" interpretation to limit the scope of Recital 17 and the exemption from obligations (CJEU 2018 § 51). As a result, the Court considered that, of all the mutagenic techniques (scientifically speaking), only those in use at the time of the adoption of the directive, and which have been established as "safe", can enjoy the exemption of Article 3 and Annex 1B, interpreted in the light of recital 17 of the GMO Directive (CJEU 2018 § 51; *contra*: CJUE-AG 2018 § 68-78).

Secondly, the Court adds that the risks of these new techniques/methods are seen as similar to those resulting from the use of GMOs by transgenesis (CJEU 2018 §48; Schleissing, Pfeilmeier, Dürnberger 2019: 10). The Court associates NBTs with GMO regulation considering their similar effects (CJEU 2018 § 49). The Court notes that any release of these new GMOs (even if experimental) may reproduce in the environment, have irreversible effects on the environment and cross-national borders. This is precisely what the directive seeks to avoid (CJEU 2018 §49-51).

To summarise, the Court considers that the system of exceptions (art. 3 combined with annexe I B) must be interpreted strictly to respect the safety objective and the principle of precaution (CJEU 2018 §43, 48-51). This results in three categories of organisms: Firstly, non-GMOs; Secondly, obligation-exempt GMOs (i.e. obtained via traditional techniques of random mutagenesis); Thirdly, obligation GMOs, among which organisms obtained by NBT are included (Vives-Vallés, Collonier 2020: 1814; Urnov *et al.* 2018: 800). The Court notes that NBTs were developed after the GMO Directive (2001), and that their risks to health and the environment have not yet been assessed (CJUE 2018 §54; van der Meer *et al.* 2021: 6; Zimny *et al.* 2019: 54). The precautionary principle affirmed by the directive must therefore be applied throughout the evolution of techniques in this area (GMO directive, art. 1; CJUE 2018 §52). The exemptions must be interpreted narrowly, and Recital 17 only refers to techniques "which have conventionally been used in a number of applications and have a long safety record" (Vives-Vallés, Collonier 2020: 1819; Spranger 2015: 25).

On February 7, 2020, the French *Conseil d'État* confirmed this interpretation and called on the government to take steps to bring French legislation into line with the ruling and the GMO Directive (Vives-Vallés, Collonier 2020: 1820; CE 2020). In the meantime, based on this judgment, the French Tribunal de Grand Instance has decided that, in addition to genome editing, organisms obtained through classical "*in vitro*" mutagenesis technique must also comply with GMO regulations (Menz *et al.* 2020: 4). This decision based on the interpretation of the ruling risks damaging the common market (as France will regulate GMOs more than other member states) and is still under discussion (Menz *et al.* 2020: 12; Bartsch *et al.* 2020: 1-4).

In the end, the judgment of the Court of Justice has had major practical consequences for Member States and industry (Schebesta 2020: 373). The ruling makes it clear that any release and placing on the market of products produced using NBT (directed mutagenesis, genome editing) must comply with the requirements of the GMO Directive in the European Union (Gutwirth, van Dijk 2020: 127-129). Therefore, explicit or tacit agreements between companies and public authorities concerning NBT are now prohibited (Menz *et al.* 2020: 12; Somsen 2018: 701-718). It seems that without additional regulatory measures, which would imply separate approval procedures for certain NBT products, the products of precise mutagenesis could be difficult to market in the EU (concerns research and development: legal and extra-legal obligations) (Gutwirth, van Dijk 2020: 127). However, others may consider that the impact of the judgement has been overestimated, and that the application of certain NBT techniques (OMD, SDN1 and SDN2) may fall outside the scope of the GMO obligations under certain conditions (Vives-Vallés, Collonier 2020: 1820; van der Meer *et al.* 2021: 17). In all cases, stakeholders agree that legislative clarification would be appropriate.

4.2.5 Reception of the judgment: critics and new GMO regulation

This judgement is particularly interesting in view of the scientific, political and economic criticism it has received (Dederer, Hamburger 2019: 150; Vives-Vallés, Collonier 2020: 1813; Gutwirth, van Dijk 2020: 127; Martin 2019: 132; Callaway 2018: 16). Although some legal and scientific actors were more measured, the ruling has deeply disappointed a certain scientific community, who did not hesitate to describe this judgment as absurd or unscientific (Garnett 2019: 5; Gutwirth, van Dijk 2020: 129; Leonelli 2021: 184; Purnhagen 2019: 1; Purnhagen, *et al.* 2018: 799-800).

More precisely, the product/method issue crystallises several tensions in the field of industry and innovation: some actors consider that these techniques are safe and should not be subject to heavy European regulation (Gutwirth, van Dijk 2020: 127; VIB 2022; ALLEA 2020); while others point out that these NBTs produce the same unintended effects that do not occur naturally (Gutwirth, van Dijk 2020: 132-135; Haeussler 2020 : 5-9; Gaj, *et al.* 2013: 397-405; Fu *et al.* 2013: 822-826).

Indeed, using scientific studies, some argued in the opposite direction, claiming that the "final product" cannot be distinguished depending on how it was produced (whether it was a mutagenesis-free method or by genome editing) (EC 2019; Menz *et*

al. 2020: 14; Gutwirth, van Dijk 2020: 129). For others, the product argument is not convincing, and they denounce it (Gutwirth, van Dijk 2020: 136; Millstone, Brunner, Mayer 1999: 525).

Since the ruling, there is a call to put GMOs back on the political and legislative agenda, from scientists, advisory bodies (VIB, German Bioeconomy Council), The European Commission's Group of Chief scientific Advisors European Commissioner for Health and Food Safety (Gutwirth, van Dijk 2020: 127; Vives-Vallés, Collonier 2020: 1814; Urnov *et al.* 2018: 800-802; EC 2019: 6 ; Bioökonomierat 2018). Indeed, the Commission's Group of Scientific Advisors has identified the scientific limitations of the current legislation and recommends in their statements to amend the GMO Directive (EC 2019: 6). Considering the CJEU ruling, the Council of the European Union (Council) asked the Commission in October 2019 to submit a study to revise the GMO regulation (Menz *et al.* 2020: 12; van der Meer *et al.* 2021: 3). More precisely, the Council asked the Commission to submit a proposal considering the results of the study (van der Meer *et al.* 2021: 3; Council 2019). The Commission has launched a consultation of stakeholders in early 2020 on the technical status and impact of 'new genomic techniques' (NGTs, like NBTs), and publish its study on April 2021 (van der Meer *et al.* 2021: 3; EC 2021b). The study concerns the use of NGTs "which have emerged or have been developed since 2001" for plants, animals and micro-organisms in agri-food, industrial and pharmaceutical sectors (EC 2021b: 2-7).

This study had several objectives: clarification of the legal status of organisms that have been produced by NBTs, regarding GMO regulation; a summary of research and innovation in this field, including risk assessment; a consultation of stakeholders and Member States on the opportunities and risks of NGTs; and, finally, information on public dialogue, national surveys and ethical aspects (EC 2021b: 6).

The conclusions of the study are as follows: First, NGTs have developed rapidly in many regions outside Europe (EC 2021b: 8-18-25). Secondly, the EU regulatory framework is inadequate and difficult to implement (EC 2021b: 25). In this case, the study points to the difficulties of detecting and differentiating NGT products that do not contain any foreign genetic material, as the European Network of GMO Laboratories had already stated so pointed (ENGL 2019; Grohmann *et al.* 2019: 2).

The study concludes that the legislation needs to be adapted to scientific and technological progress (EC 2021b: 59). Indeed, the study considers that it is unjustified to apply different rules for end products that present similar risks (conventional cultures vs. NGT cultures) (EC 2021b: 23-24). Thirdly, the regulatory framework is inadequate for research into NGTs, which is of growing interest in the EU (EC 2021b: 59). Fourth, NGTs can contribute to the EU's sustainable agri-food (green deal and farm-to-fork strategy) and pharmaceutical (faster and cheaper drug development) objectives (EC 2021b: 4-6, 51-59). However, the study notes that the main concerns are related to safety and the environment, notably on the impact of these organisms on biodiversity and on cohabitation with biological cultures. In this respect, the study points out that NGTs should not harm organic crops (EC 2021b: 27). For EFSA, the risks of NGTs are similar to organisms obtained by conventional breeding, targeted mutagen-

esis or cisgenesis (EC 2021b: 29). However, other NGT techniques do not have sufficient studies to attest to their safety (EC 2021b: 31). Finally, the study highlights the need to inform the public about NGTs and to assess their views (EC 2021b: 4).

The Council has now asked the Commission to present a new proposal, if appropriate: "in view of the outcomes of the study, or otherwise to inform the Council on other measures required" (EC 2021b). In this case, the Commission is committed to initiating a science-based policy on plants produced by NGTs.

Having reached the end of our study of legal technique and analytical theory on the regulation of GMOs in Europe (RQ2), and after a sociological analysis concerning the invocation of science in politics and law (as far as the case of GMO regulation in Europe is concerned), we would like to end our chapter by proposing a broader reflection with legal philosophy on the roles and functions of the "modes of existence" of each discipline this hybrid situation.

4.3 Common world and modes of existence

Having constructed a theoretical framework (chapter 1) and a case study on GMOs (chapter 2, sections 1 and 2), we will confront our theories with our analysis and propose a section on the philosophy of law by proposing an alternative path. This will be inspired by the concept of the regime of truth, and will take up the theories of "modes of existence" (RQ1) (Souriau 1943; Latour 2013: 357; Latour 2010: 256; McGee 2015: 122-196).

In our view, the judgment thus disavowed by a certain scientific and industrial community is highly relevant in two respects. Firstly, the Court of Justice's judgment represents a hybrid case that highlights the interaction between scientific, political and legal disciplines. But most important, this decision fulfils the "felicity conditions" of a judgment according to the existence mode of law (Gutwirth 2021a: 24; Fossier, Gardella 2006). Hence, the legitimacy of legal reasoning depends on compliance with the procedural requirements of the legal field in question (and must not be subordinated to any scientific opinion) (Gutwirth, van Dijk 2020: 127). Equivalently, to be valid, a scientific judgement must respond to the body of rules derived from the scientific domain to its "mode of existence" (Gutwirth, van Dijk 2020: 127; McGee, 2015: 160). According to Gutwirth and Van Dijk, the judgement must not be scientifically correct, but legally correct:

Law, science and politics have different constraints and conditions of success, which cannot be interchanged or hierarchized. A legal decision needs to first be understood from a legal perspective, which is not to say that it won't have consequences for science, politics, ethics or economy (Gutwirth, van Dijk 2020: 127).

Conversely, to criticise a judgement for not considering the consequences for science, politics, economics and especially morality would be a "category error" (McGee 2015: 4, 55, 137, 160; Fossier, Gardella 2006; Gutwirth, van Dijk 2020: 127). To be clear, the lawyer can be guided by science as a basis for reasoning. However, he cannot be forced to do so, on pain of making a category error.

Thinking in terms of a mode of existence will imply a different approach to the classical definitions of law, politics and science which have the tendency to reduce the law to society and its infrastructure without focusing on its proper function (Latour 2010: 256; Gutwirth 2013: 108). *A contrario*, it will be necessary to study how the law is made in practice, to define the constraints that oblige lawyers to act in a singular way and to investigate how the law produces its own "truths" and "false". This implies taking seriously the register of creativity, of hesitation, that actors wield in their modes of existence (Gutwirth 2021a: 17-18; Latour 2013: 5-11; Latour 2010: 179, 219, 244). Indeed, the approach to modes of existence is more topical (de Sutter 2018: 229; de Sutter, McGee 2012: 14), paying attention to the constraints, doubts, and ontological fields summoned by the actors when they practise a discipline. According to Latour, a practice is defined by the set of constraints and beliefs to be followed as a practitioner, as a lawyer or as a scientist (Gutwirth 2021a: 6). Consequently, the mode of existence of a discipline is expressed through its "ontological fields", its "regime of enunciation", and its constraints (Gutwirth 2013: 108). According to the modes of existence approach, to make law is to summon and bring into existence another world, which legally brings into existence the things it grasps (Hermitte 1998: 17-38; Gutwirth: 2013: 108). For example, when we look for the legal regime of GMOs, we are going to make the legal GMO exist in a common world (McGee 2015: 147-148).

In these conditions, the environment form a "common world", an "articulation of the regime of truth" or an "ecology of practice", where the disciplines are interrelated (Gutwirth 2021a: 5; Stengers 2009: 117, 146). These multiple concepts designate the situation where several disciplines (with their actors, their practices, their conditions of felicity and their truths) will take hold of hybrid objects/subjects with several dimensions (Gutwirth 2021a: 5). Therefore, if we can distinguish the 'modes of existence' of different disciplines (science, politics, law), these registers articulate each other and form objects with several modes (Gutwirth 2021a: 3, 13, 17). By way of illustration, GMOs are hybrids because they are characterised by the modes of existence of law, science, agri-food economics and politics (Gutwirth 2021a: 3). In these circumstances, when the lawyer has to respond to external mobilisations - i.e. a hybrid case with big political and economic implications - the lawyer is not free and is forced to follow different rules of practice of law (Gutwirth 2021a: 2-3).

The analysis of the modes of existence will thus incite us to be attentive to the internal success regime of law: its own conditions of felicity (Gutwirth 2021a: 2-3; Stengers 2008: 14). This approach is similar to Foucault's regimes of truths: there is a singular set of obligations to be respected in order to bring out scientific or legal "truth" (Gutwirth 2021a: 6). By respecting the rules of legal practice, by observing its ontological fields and its regime of enunciations, the subject will "make law" and build a legal truth (Gutwirth 2021a: 14). By respecting the conditions of felicity of a discipline, we can act as a "true" scientist or "true" jurist and, therefore, bring about a type of truthfulness appropriate to the discipline (Gutwirth 2021a: 6). On the contrary, the scientist's or lawyer's actors who refuse to meet these requirements will lose the scientificity or legality of their actions.

Following these conditions of felicity makes it possible to bring about a type of truthfulness (its "true", its "false"). For example, "Science" establishes one type of "truthfulness", which is incompatible with the others. In the case of law, what is judged must be taken as the truth and must not be confused with what is actually true (hence the adage: *res judicata pro veritate habetur*) (Gutwirth 2021a: 16; McGee 2015: 49; Latour 2010: 235; Latour 2013: 129). This judicial truth links the general rule and the singular and establishes a new qualification or interpretation to find a solution to conflicts (voy. 3.1; Gutwirth 2021a: 25; Latour 2010: 196-197, 254). In this sense, truth does exist in law (as it does in science), but it is articulated in a different regime of truth. Indeed, science responds to a different temporality; on the one hand, the law seeks a solution here and now to stop a conflict; on the other hand, science is self-correcting, prospective, and diachronic (Papon 2020: 225-240; Latour 2010: 239-244). This legal truth is therefore different from scientific truth. It has other purposes: legal security, conflict resolution and social peace (McGee 2015: 296; Perelman, Olbrechts-Tyteca 2008:554; Gutwirth 2001: 21-26).

In conclusion, science, law and politics constitute distinct regimes of truths and practices with different objectives. Thus, rethinking law, science and politics as modes of existence allows us to highlight their different social functions, their specific constraints and singular truths and the consequences of their articulation (Gutwirth 2021a: 10). When we confuse their purposes, rules and functions, then we make category errors. However, these modes of existence form a common and inter-related world. Hybrids also attest to the coexistence of these modes of existence (McGee 2015: 296). In this common world, where modes of existence coexist, the great theoretical division between nature and politics must be overcome (Latour 2010: 242). Theorising on the functions of law, Alain Supiot had argued that:

Law is not the expression of a truth revealed by God or discovered by science; and it is not simply a tool which could be judged on the basis of its efficiency (efficient for whom?). Like the measuring instruments in Dürer's *Melancholia*, its role is to come as close as possible to an accurate and just representation of the world, in the knowledge that this can never be achieved absolutely (Supiot 2017: 23).

Indeed, for Latour:

It is precisely because there are no longer two distinct domains of reality, that we should be all the more careful in distinguishing the complementary functions of lawyers and of researchers. It is now essential that science should not be asked to judge, and that law should not be asked to pronounce truth (Latour 2010: 242) (RQ1).

5. Conclusion

In this master's thesis, we had two RQs: What roles, functions and risks are involved in using a scientific argument in politics and law? (RQ1) What are the uses of scientific arguments in the political and legal implication of GMO regulation? (RQ2).

Our first chapter presented an interdisciplinary theoretical framework combining philosophy of law and philosophy of science related to RQ1. We have chosen for

a truth-in-construction thesis, and thus develop the idea of a truth regime (Section 1). We then demonstrated the problems of an appeal to an authority of truth discourses (scientific *in casu*, but this may concern religion): from the critiques of 'knowledge-power' (Section 2) and science in action (Section 3). The second chapter has taken this theoretical framework and applied it to the case study of GMO regulation (RQ1, RQ2). We presented the legal framework of GMOs and the issue of NBTs (Section 1). We then analysed the ruling of the Court of Justice of the *Confédération Paysannes* on the status of NBTs (CJUE 2018). This judgment has been highly criticised by a range of actors (scientists, industrialists, jurists, politicians), notably on the grounds that it is unscientific (Section 2, RQ2). However, and by adopting a reading of the modes of existence, we understand that legal reasoning has other roles and functions than scientific reasoning (Section 3).

Taking these two RQs into account, we have two conclusions *ceteris paribus*: Firstly, we want to remain critical of this use of scientific discourse to put pressure on political and legal bodies. As seen earlier with our theoretical reflections on science, the approaches presented here do not contribute to the constitution of robust, reliable and rectifiable knowledge (RQ1)n (Audren, De Sutter 2008: 77-88; Dewey 1954). The innovation of NBT does not stem from a neutral and disinterested science, but is governed by a set of intercepting actors, in collaboration with scientific, interested industries, public institutions that send economic interests. In this way, we believe that it is more a matter of using the rhetoric of scientific truth to put pressure on the political and legal spheres, coming from actors with interests in the matter (RQ1, RQ2) (Gutwirth, van Dijk 2020: 129). Secondly, while judgement is subject to various scientific criticisms and controversies, it should be noted that judgement must meet the conditions of success of law (i.e., to be legally correct) and not of science, economics or politics (RQ1, RQ2). Regardless of political, economic or even scientific controversies, the legal question is concluded here. The Court has presented an interpretation that is logical, convincing in law, and consistent with the negotiating history of the directive (Gutwirth, van Dijk 2020: 128; van der Meer *et al.* 2022: 5; Spranger 2015; 25; Purnhagen *et al.* 2018: 799). According to Gutwirth, the judgment is legally correct, and any criticism of it must be made on legal grounds (RQ1). The criticism that the judgement is not scientific (whatever that means) is irrelevant as the judgement had to answer a legal question and not a scientific one. If the legal status of GMOs is to be changed, no scientific study will be relevant to the Court at the time of the judgment (directive (Gutwirth, van Dijk 2020: 130). Instead, it will be necessary to change the register and turn to the political sphere. As the Court notes, changing the legal status of GMOs will require a legislative (and therefore political) process to amend the GMO Directive directive (RQ2) (Gutwirth, van Dijk 2020: 130). The appeal to science will be welcome, but again, science cannot replace the political register, nor can it replace the legal register (RQ1).

List of abbreviations

AG - Advocate General

CJEU - Court of Justice of the European Union

CRISPR-Cas9 - Clustered Regularly Interspaced Short Palindromic Repeats - Associated protein 9

DNA - Deoxyribonucleic acid

EFSA - European Food Safety Authority

EU - European Union

GMO - Genetically Modified Organism

GMO Directive (the) - Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106

NBT - New breeding techniques

NGT - New Genome techniques

ODM - Oligonucleotide directed mutagenesis

rDNA - Recombinant [Desoxyribo]Nucleic Acid

RNA - Ribonucleic acid

RO - Research Objective

RQ - Research Question

SDNs - Site-Directed Nucleases

References

ALLEA (2020) lead authors: Oana Dima, Bocken Hubert, Custers René, Inze Dirk, Puigdomenech Pere. *Genome Editing for Crop Improvement. Symposium summary*. Berlin: Allea. DOI: 10.26356/gen-editing-crop

Animal and Plant Health Inspection Service (USDA) (2020). "Statement on Plant Breeding Innovation," <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/1e599ff> > accessed 18 April 2022.

Angenot Marc (2013). *Rhétorique de la confiance et de l'autorité*. Montréal: Université McGill.

Audren Frédéric, de Sutter Laurent (2004). *Pratiques cosmopolitiques du droit*. Paris : Ed. de l'Aube.

Barad Karen (2007). *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning*. Durham: Duke University Press.

Barreau Aurélien (2016). *De la vérité dans les sciences*. Paris: Dunod.

Bartsch Detlef, Ehlers Ulrich, Hartung Frank, Kahrmann Jens, Leggewie Georg, Sprink Thorben, Wilhelm Ralf (2020). "Questions Regarding the Implementation of EU Mutagenesis Ruling in France". *Frontiers in Plant Science*, 11. <https://www.frontiersin.org/article/10.3389/fpls.2020.584485>

- Basumatary Jagadish. (2020). "Michel Foucault on Regenerative Relatedness of Power/Knowledge and Truth". *Journal of Indian Council of Philosophical Research*, 37(3), 323–341. <https://doi.org/10.1007/s40961-020-00224-4>
- Berten André. (1989). « Habermas, l'éthique et la politique ». *Revue Philosophique de Louvain*, 87(73), 74–96.
- Binet Jean-René (2002). *Droit et progrès scientifique. Science du droit, valeurs et biomédecine*. Paris: PUF.
- Birman Joel (2010). "Truth-telling and psychoanalysis: Regarding Foucault and Lacan". *Recherches en psychanalyse*, 9(1), 63–72.
- Blanc Guillaume (2020). *L'invention du colonialisme vert: Pour en finir avec le mythe de l'Éden africain*. Paris: Flammarion.
- Boghossian Paul (2009). *La peur du savoir. Sur le relativisme et le constructivisme de la connaissance*. Paris: Agone.
- Boudon Raymond (2011). *L'idéologie. Ou l'origine des idées reçues*. Paris: Points.
- Bourgault Jean. (2011). « Un collectif plus ou moins bien articulé ». *L'Homme la Société*, n° 181(3), 75–98.
- Braun Nils (2017). "Portée et limites des nouvelles techniques d'obtention végétale, les *New Plant Breeding Techniques* (NPBT)". *Annales des Mines - Realites industrielles*, 2017(1), 90–93.
- Brookes Graham, Barfoot Paul. (2017). "Farm income and production impacts of using GM crop technology 1996–2015". *GM Crops, Food*, 8(3), 156–193. <https://doi.org/10.1080/21645698.2017.1317919>
- Brosset Estelle (2012). « Le droit de l'Union européenne des OGM: Entre harmonisation et renationalisation ». In: Brosset Estelle (Dir.) (Ed.). *Droit et biotechnologies*. Les études hospitalières. <https://hal.archives-ouvertes.fr/hal-00871974>
- Brosset Estelle, Noiville Christine (2019). « Droit des biotechnologies ». *Cahiers Droit, Sciences & Technologies*, 8, 197–212. <https://doi.org/10.4000/cdst.866>
- Brownsword Roger, Yeung Karen (eds) (2008). *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Illustrated edition). Oxford: Hart Publishing.
- Callaway, Ewen (2018). "CRISPR Plants now Subject to Tough GM Laws in European Union". *Nature*, 560, 16.
- Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, <https://bch.cbd.int/protocol> (accessed 15.11.2022)
- Chalmers, Alan Francis (1976). *What is This Thing Called Science?* Indianapolis: Univ. Of Queensland Press.
- Chandrasegaran, Srinivasan and Carroll, Dana (2016). "Origins of Programmable Nucleases for Genome Engineering". *Journal of Molecular Biology*, 428(5, Part B), 963–989. <https://doi.org/10.1016/j.jmb.2015.10.014>
- Chaput, Catherine (2009). "Regimes of truth, disciplined bodies, secured populations: An overview of Michel Foucault". *Science Fiction Film and Television*, 2(1), 91–104.
- Charbonnier, Pierre (2009). « Donna Haraway: Réinventer la nature ». *Mouvements*, 60(4), 163–166. <https://doi.org/10.3917/mouv.060.0163>

- Court of Justice (CJUE) (2018). *Confédération paysanne*. Case C-528/16 : ECLI:EU:C:2018:583. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62016CJ0528>
- CJUE-AG (2018). *Confédération paysanne*. Case C-528/16 : ECLI:EU:C:2018:583, Opinion of AG Bobek. <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62019CC0083>
- Cometti, Jean-Pierre (2007). « Raison, argumentation et légitimation: Habermas, Apel et les apories de la communication ». *Philosophiques*, 19(1), 3–24. <https://doi.org/10.7202/027169ar>
- Consolidated version of the Treaty on the Functioning of the European Union. Art. 194. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E194>
- Conseil d'État (France), 3 October. 2016, n° 388649. <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000033191647/>
- Conseil d'État (France), 7 February 2020 n°388649. <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041569364>
- Conway, Gérard (2012). *The Limits of Legal Reasoning and the European Court of Justice*. Cambridge: Cambridge University Press.
- Corten, Olivier (2017). *Méthodologie du droit international public*. Bruxelles : Université de Bruxelles.
- Council of the European Union (2002). *On the Common Catalogue of Varieties of Agricultural Plant Species*. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32002L0053>
- Council of the European Union (2019). *Requesting the Commission to submit a study in light of the Court of Justice's judgment in Case C-528/16 regarding the status of novel genomic techniques under Union law, and a proposal, if appropriate in view of the outcomes of the study*. <https://eur-lex.europa.eu/eli/dec/2019/1904/oj>
- Craig, Paul and De Búrca, Gráinne (2015). *EU Law: Text, Cases, and Materials* (6e édition). Oxford: Oxford University Press.
- Crețu, Ana-Maria, Massimi, Michaela (eds) (2020). *Knowledge from a Human Point of View*. New York: Springer International Publishing.
- Custers, René (2017). "The regulatory status of gene-edited agricultural products in the EU and beyond". *Emerging Topics in Life Sciences*, 1(2), 221–229. <https://doi.org/10.1042/ETLS20170019>
- de Sutter, Laurent (2008). *Après la loi*. Paris: PUF.
- de Vries, Gérard (2018). *Bruno Latour. Une introduction*. Paris: La Découverte.
- Dederer, Hans-Georg, Hamburger, David (eds) (2019). *Regulation of genome editing in plant biotechnology*. New York: Springer International Publishing.
- Descola, Phillipe (2005). *Par-delà nature et culture*. Paris: Gallimard.
- Domingo, José L., Giné Bordonaba, Jordi (2011). "A literature review on the safety assessment of genetically modified plants". *Environment International*, 37(4), 734–742. <https://doi.org/10.1016/j.envint.2011.01.003>
- Dreyfus, Hubert L., Rabinow, Paul (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics* (2d edition). Chicago: University of Chicago Press.
- Druffin-Bricca, Sophie, Henry, Laurence Caroline (2022). *Introduction générale au droit*. Paris: Gualino.

Dürnberger, Christian, Pfeilmeier, Sebastian, Schleissing, Stephan (2019). *Genome Editing in Agriculture: Between Precaution and Responsibility*. Baden-Baden: Nomos Verlag.

EFSA. (2022). *Organismes génétiquement modifiés* | EFSA. Retrieved 12 January 2022, from <https://www.efsa.europa.eu/fr/topics/topic/gmo>

Engs, Ruth Clifford (2011). "A Century of Eugenics in America: From the Indiana Experiment to the Human Genome Era edited by Paul A. Lombardo". *The Quarterly Review of Biology*, 86(4), 332–332. <https://doi.org/10.1086/662511>

Eriksson, Dennis (2018). "The Swedish policy approach to directed mutagenesis in a European context". *Physiologia Plantarum*, 164(4), 385–395. <https://doi.org/10.1111/ppl.12740>

EuropaBio (2008), "Pricing Innovation out of the EU: Counting the Costs of GMO Authorisations". https://croplifeeurope.eu/wp-content/uploads/2021/05/INFOGRAPHIC_PRICING_INNOVATION_OUT_v6_final.pdf

European Commission (2021a). *Current and Future Market Applications of New Genomic Techniques*. Brussel : Publications Office. <https://data.europa.eu/doi/10.2760/02472>.

European Commission. (2021b). "Study on the status of new genomic techniques under Union law and in light of the Court of Justice ruling in Case C-528/16". Brussel. ec.europa.eu/food/plant/gmo/modern_biotech/new-genomic-techniques_en accessed 18 April 2022.

European Commission (2020). "Decree Amending the List of Techniques for Obtaining Genetically Modified Organisms Traditionally Used Without Any Noted Drawbacks with Regard to Public Health or the Environment: Communication from the Commission". Brussel. <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=280> Accessed on 2 March 2022.

European Commission. (2019). *Une perspective scientifique sur le statut réglementaire des produits dérivés de l'édition génomique et ses implications pour la directive OGM : déclaration du groupe des conseillers scientifiques principaux*, Brussel : Publications Office, <https://data.europa.eu/doi/10.2777/53078>

European Commission (2011). *New plant breeding techniques: State-of-the-art and prospects for commercial development*. Luxembourg: JRC Scientific and Technical Reports. <https://data.europa.eu/doi/10.2791/54761>

European Commission. (2011). *New Techniques Working Groupe*, Brussel.

European Parliament (2001). "Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC". <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0018&from=EN> (Accessed 15.12.2022)

European Parliament and European Council (2003a). On genetically modified food and feed. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R1829> .

European Parliament and European Council (2003b). Regulation (EC) 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32003R1830>

EUSage (2021). "EU-SAGE EC letter February 2021". Brussel, <https://eu-sage.eu/sites/default/files/2021-03/EU-SAGE%20EC%20letter%20February%202021.pdf> Accessed April 18, 2022.

- Favreau, Jean-François (2017). *Vertige de l'écriture : Michel Foucault et la littérature (1954-1970)*. Paris: ENS Éditions.
- Feyerabend, Paul Karl (1981). *Realism, Rationalism and Scientific Method*. Cambridge: Cambridge University Press.
- Fordham, Michael (2004). *Judicial review handbook* (4th ed). Bloomsbury: Hart Pub.
- Fossier, Arnaud, Gardella, Édouard (2006). « Entretien avec Bruno Latour ». *Tracés. Revue de Sciences humaines*, 10, 113–129. <https://doi.org/10.4000/traces.158>
- Foucault, Michel (1973). *Moi, Pierre Rivière, ayant égorgé ma mère, ma sœur et mon frère... un cas de parricide au XIXème siècle*. Paris: Gallimard.
- Foucault, Michel (1975). *Surveiller et punir. Naissance de la prison*. Paris: Gallimard.
- Foucault, Michel (1980). *Power/knowledge*. New York: Patheon.
- Foucault, Michel (1990). *The History of Sexuality*. London: Penguin.
- Foucault, Michel (1994). *Dits et Ecrits III*. Paris: Gallimard.
- Foucault, Michel (1997). *Il faut défendre la société, Cours au Collège de France 1975-1976*. Paris : Gallimard.
- Foucault, Michel (1999). *Les anormaux. Cours au Collège de France. 1974-1975* Paris : Gallimard.
- Foucault, Michel (2001). *Dits et écrits I*. Paris: Gallimard.
- Foucault, Michel (2004). *La Naissance de la biopolitique. Cours au Collège de France*. Paris: Le Seuil.
- Foucault, Michel (2011). *Leçons sur la volonté de savoir, suivi de Le savoir d'Œdipe. Cours au Collège de France 1970-1971*. Paris: Gallimard.
- Foucault, Michel (2012). *Du gouvernement des vivants, Cours au Collège de France, 1978-1979*. Paris: Gallimard.
- Foucault, Michel (2015). *Théories et institutions pénales. Cours au Collège de France*. Paris: Le Seuil.
- Foucault, Michel, Prado, Plinio Walder, Routhier, Françoise (1990). "La vérité et les formes juridiques". *Chimères. Revue des schizoanalyses*, 10(1), 8–28. <https://doi.org/10.3406/chime.1990.1729>
- Frydman, Benoit, Genicot, Nathan (2020). « Foucault, le droit et la dynastie du savoir ». In: Cyril Sintez, Emeric Nicolas, Jacqueline Guittard (eds). *Foucault face à la norme*. Paris: Mare, Martin.
- Fu, Yanfang, Foden, Jennifer A., Khayter, Cyd, Maeder, Morgan L., Reyon, Deepak, Joung, J. Keith, Sander, Jeffry D (2013). "High-frequency off-target mutagenesis induced by CRISPR-Cas nucleases in human cells". *Nature Biotechnology*, 31(9), 822–826. <https://doi.org/10.1038/nbt.2623>
- Funtowicz, Silvio O., Ravetz, Jerome R. (1993). "Science for the post-normal age". *Futures*, 25(7), 739–755. [https://doi.org/10.1016/0016-3287\(93\)90022-L](https://doi.org/10.1016/0016-3287(93)90022-L)
- Gaj, Thomas, Gersbach, Charles A., Barbas, Carlos F. (2013). "ZFN, TALEN, and CRISPR/Cas-based methods for genome engineering". *Trends in Biotechnology*, 31(7), 397–405. <https://doi.org/10.1016/j.tibtech.2013.04.004>
- Garnett, Karen (2019). "Hold your pipettes: The European Court of Justice's findings in Confédération Paysanne, Others stirs GMotions". *Review of European, Comparative, International Environmental Law*, 28(3), 349–355. <https://doi.org/10.1111/reel.12291>

- Gauchet, Marcel (1985). *Le désenchantement du monde. Une histoire politique de la religion*. Paris: Gallimard.
- Gaultier, Benoit (2017). "A Neglected Ramseyan View of Truth, Belief, and Inquiry". *The Journal of Philosophy*, 114(7), 366–380. <https://doi.org/10.5840/jphil2017114725>
- Grohmann, Lutz, Jens Keilwagen, Nina Duensing, Emilie Dagand, Frank Hartung, Ralf Wilhelm, Joachim Bendiek, et Thorben Sprink (2019). "Detection and Identification of Genome Editing in Plants: Challenges and Opportunities". *Frontiers in Plant Science*, 10. <https://www.frontiersin.org/articles/10.3389/fpls.2019.00236>
- Gutwirth, Serge (2019). « Autour du contrat naturel ». In : Philippe Gérard, François Ost, Michel Van de Kerchove (eds). *Images et usages de la nature en droit*, Bruxelles: Presses de l'Université Saint-Louis. <http://books.openedition.org/puosl/23451>.
- Gutwirth, Serge (2001). "Une petite réflexion sur l'importance de la flibusterie épistémologique des littéraires. Dostoïevski, la criminologie, les sciences, le droit et la littérature". In: François Ost, Laurent van Eynde, et al. (eds) *Lettres et lois. Le droit au miroir de la littérature*. Brussel: Publications des FUSL.
- Gutwirth, Serge (2021a). « Leçon Inaugurale, Retour Au Droit ». *Chaire Francqui à l'Université de Namur 2019-2020*. https://works.bepress.com/serge_gutwirth/141/ accessed 18 April 2022.
- Gutwirth, Serge (2021b). « Le gene editing entre droit, sciences, innovation et politique », *Chaire Francqui à l'Université de Namur 2019-2020*. https://works.bepress.com/serge_gutwirth/ accessed 18 April 2022.
- Gutwirth, Serge (2021c). « Les Communs. Comment changer 'le' ou même, 'de' droit ? ». *Chaire Francqui à l'Université de Namur 2019-2020*. http://works.bepress.com/serge_gutwirth/140/ accessed 18 April 2022.
- Gutwirth, Serge, Christiaens, Jenneke (2015). "Les sciences et leurs problèmes: La fraude scientifique, un moyen de diversion ?" *Revue interdisciplinaire d'études juridiques*, 74(1), 21–49. <https://doi.org/10.3917/riej.074.0021>
- Gutwirth, Serge (2013). "Le contexte du droit ce sont ses sources formelles et les faits et moyens qui exigent son intervention". *Revue interdisciplinaire d'études juridiques*, 70(1), 108–116. <https://doi.org/10.3917/riej.070.0108>
- Gutwirth, Serge, Van Dijk, Niels (2020). "Judging New Plant Modification Techniques: Law, Science, Innovation and Cosmopolitics". *Revue juridique de l'environnement*, 45(1), 123–145.
- Haeussler, Maximilian (2020). "CRISPR off-targets: A question of context". *Cell Biology and Toxicology*, 36(1), 5–9. <https://doi.org/10.1007/s10565-019-09497-1>
- Haraway, Donna. (1986). "Primateology is Politics by Other Means", *Feminist Approaches to Science*. New York: Pergamon Press.
- Haraway, Donna (2013). *Simians, Cyborgs, and Women*. London: Routledge.
- Haraway, Donna (2016). *Staying With the Trouble: Making Kin in the Chthulucene*. Durham: Duke University Press.
- Haraway, Donna (2018). *Modest_Witness@Second_Millennium. FemaleMan_Meets_OncoMouse: Feminism and Technoscience*. London: Routledge.
- Haraway, Donna, Allard, Laurence, Gardey, Delphine, Magnan, Nathalie (2007). *Manifeste cyborg et autres essais: Sciences - Fictions - Féminismes*. Paris: Editions Exils.

- Hart, Herbert L. A. (1958). "Positivism and the Separation of Law and Morals". *Harvard Law Review*, 71(4), 593–629. <https://doi.org/10.2307/1338225>
- Hartung, Frank Schiemann, Joachim (2014). "Precise plant breeding using new genome editing techniques: Opportunities, safety and regulation in the EU". *The Plant Journal*, 78(5), 742–752. <https://doi.org/10.1111/tpj.12413>
- Hilbeck, Angelika, Rosa Binimelis, Nicolas Defarge, Ricarda Steinbrecher, András Székács, Fern Wickson, Michael Antoniou, *et al.* (2015). "No scientific consensus on GMO safety". *Environmental Sciences Europe*, 27(1), 4. <https://doi.org/10.1186/s12302-014-0034-1>
- ISAAA. (2019). *Global Status of Commercialized Biotech/GM Crops in 2018: Biotech Crops Continue to Help Meet the Challenges of increased Population and Climate Change: Executive Summary*. Ithaca: ISAAA.
- Jami, Irène (2008). "Donna Haraway, Manifeste cyborg et autres essais. Sciences-Fictions-Féminismes. Anthologie établie par Laurence Allard, Delphine Gardey et Nathalie Magnan. Paris, Exils, Essais, 2007, 333 pages". *Genre & Histoire*, 3, art. 3. <http://journals.openedition.org/genrehistoire/405>
- Kelsen, Hans (1949). "The Natural-Law Doctrine Before the Tribunal of Science". *Western Political Quarterly*, 2(4), 481–513. <https://doi.org/10.1177/106591294900200401>
- Kelsen, Hans (1962). *Théorie pure du droit*. Paris: Dalloz.
- Kelsen, Hans (1997). *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198265658.001.0001>
- Kelsen, Hans (2004). *La démocratie : sa nature, sa valeur*. Dalloz: Paris.
- Kestemont, Lina (2018). *Handbook on Legal Methodology: From Objective to Method*. Antwerp: Intersentia Ltd.
- Khun Thomas (1996). *The Structure of Scientific Revolutions*. Chicago: The University of Chicago Press.
- Kim Kyung-Man (2011). "Habermas on Understanding: Virtual Participation, Dialogue and the Universality of Truth". *Human Studies*, 34(4), 393–406.
- Klümper, Wilhelm, Qaim, Martin (2014). "A Meta-Analysis of the Impacts of Genetically Modified Crops". *PLOS ONE*, 9(11), e111629. <https://doi.org/10.1371/journal.pone.0111629>
- Knott, Garvin J., Doudna, Jennifer A. (2018). "CRISPR-Cas guides the future of genetic engineering". *Science (New York, N.Y.)*, 361(6405), 866–869. <https://doi.org/10.1126/science.aat5011>
- Kønig, Nicolas, Børsen Tom, and Emmeche Claus (2017). "The Ethos of Post-Normal Science". *Futures, Post-Normal science in practice*, 91 (August): 12–24. <https://doi.org/10.1016/j.futures.2016.12.004>.
- Krimsky, Sheldon (2015). "An Illusory Consensus behind GMO Health Assessment". *Science, Technology & Human Values*, 40. <https://doi.org/10.1177/0162243915598381>
- Kunz, Josef L. (1961). "Natural-Law Thinking in the Modern Science of International Law". *American Journal of International Law*, 55(4), 951–958. <https://doi.org/10.2307/2196276>
- Lagi, Sara (2020). *Democracy in Its Essence: Hans Kelsen as a Political Thinker*. Lanham Lexington Books.
- Lamy, Jérôme (2018). "Dire-vrai, aveu et discipline: Michel Foucault et les techniques de vérité". *Revue philosophique de la France et de l'étranger*, 143(2), 201–218.

- Langford, Peter, Bryan Ian, and McGarry John (2019). *Hans Kelsen and the Natural Law Tradition*. Leyde: Brill.
- Langlinais, Alex, and Brian Leiter (2013a). "The Methodology of Legal Philosophy". *Social Science Research Network*. Scholarly Paper ID 2167498. Rochester: NY.
- Latour, Bruno (1993). *We have never been modern*. Cambridge: Harvard University Press.
- Latour, Bruno (2004). *Politics of nature: How to bring the sciences into democracy*. Cambridge: Harvard University Press.
- Latour, Bruno (2005). *Reassembling the social: An introduction to actor-network-theory*. Oxford: Oxford University Press.
- Latour, Bruno (2009). *The Making of Law: An Ethnography of the Conseil d'Etat*. Cambridge: Polity Press.
- Latour, Bruno (2013). *An inquiry into modes of existence: An anthropology of the moderns*. Cambridge: Harvard University Press.
- Latour, Bruno (2015). *Science in action: How to follow scientists and engineers through society*. Cambridge: Harvard University Press.
- Latour, Bruno (2015a). *Science in action: How to follow scientists and engineers through society*. Cambridge: Harvard University Press.
- Latour, Bruno (2015b). *Face à Gaïa. Huit conférences sur le nouveau régime climatique*. Paris: Les empêcheurs de penser rond.
- Latour, Bruno (2021). "How to Remain Human in the Wrong Space? A Comment on a Dialogue by Carl Schmitt". *Critical Inquiry*, 47(4), 699–718. <https://doi.org/10.1086/714513>
- Latour, Bruno, Woolgar, Steve (1986). *Laboratory life: The construction of scientific facts*. Princeton: Princeton University Press.
- Lenaerts, Koen, Gutierrez-Fons, José A. (2020). *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*. Brussels: Bruylant.
- Lenglet, Marc (2009). "Isabelle Stengers, Au temps des catastrophes. Résister à la barbarie qui vient". *Lectures*. <http://journals.openedition.org/lectures/786>
- Leonelli, Giulia Claudia (2021). "Judicial Review of Compliance with the Precautionary Principle from Paraquat to Blaise: 'Quantitative Thresholds,' Risk Assessment, and the Gap Between Regulation and Regulatory Implementation". *German Law Journal* 22 (2): 184–215. <https://doi.org/10.1017/glj.2021.3>.
- Liu, Rongming, Liang Liya, Habib Margaret, Freed Emily F., and Eckert Carrie A. (2022). "Advances and Application of CRISPR-Cas Systems". *New Frontiers and Applications of Synthetic Biology*, 331–48. <https://doi.org/10.1016/B978-0-12-824469-2.00029-4>
- Long, John C. (1992). "Foucault's clinic". *The Journal of Medical Humanities*, 13(3), 119–138. <https://doi.org/10.1007/BF01127371>
- Lusignan, Francine (1971). "Traité de l'Argumentation: La nouvelle rhétorique. Par Chaïm Perelman et Lucie Olbrechts-Tyteca. Collection de sociologie générale et de philosophie sociale. Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1970734 Pages". *Dialogue: Canadian Philosophical Review/Revue canadienne de philosophie*, 10(3), 617–620. <https://doi.org/10.1017/S0012217300033114>

- Magalhães, Pedro T. (2021). *The Legitimacy of Modern Democracy: A Study on the Political Thought of Max Weber, Carl Schmitt and Hans Kelsen*. Abingdon-on-Thames: Taylor & Francis. <https://doi.org/10.4324/9781315157566>
- Martin, Emily (1991). "The Egg and the Sperm: How Science Has Constructed a Romance Based on Stereotypical Male-Female Roles". *Signs: Journal of Women in Culture and Society*, 16(3), 485–501. <https://doi.org/10.1086/494680>
- McGee, Kyle (2015). *Latour and the Passage of Law*. Edinburgh: Edinburgh University Press.
- McGee, Kyle, de Sutter, Laurent (2012). *Deleuze and Law*. Edinburgh: Edinburgh University Press.
- Menz, Jochen, Modrzejewski Dominik, Hartung Frank, Wilhelm Ralf, and Sprink Thorben (2020). "Genome Edited Crops Touch the Market: A View on the Global Development and Regulatory Environment." *Frontiers in Plant Science* 11. <https://www.frontiersin.org/articles/10.3389/fpls.2020.586027>.
- Mérand, Frédéric (2021). *Un sociologue à la Commission européenne*. Paris: Les Presses de Sciences Po.
- Merton, Robert K (1938). "Science and the Social Order." *Philosophy of Science* 5 (3): 321–37.
- Millstone, Erik, Brunner Eric and Mayer Sue (1999). "Beyond 'Substantial Equivalence.'" *Nature* 401 (6753): 525–26. <https://doi.org/10.1038/44006>.
- Modrzejewski, Dominik, Hartung Frank, Sprink Thorben, Krause Dörthe, Kohl Christian, and Wilhelm Ralf (2019). "What Is the Available Evidence for the Range of Applications of Genome-Editing as a New Tool for Plant Trait Modification and the Potential Occurrence of Associated off-Target Effects: A Systematic Map." *Environmental Evidence* 8 (1): 27. <https://doi.org/10.1186/s13750-019-0171-5>.
- Morange, Michel (2017). L'édition du génome. *Études*, (10), 61–72. <https://doi.org/10.3917/etu.4242.0061>
- Neframi, Eleftheria (1972). *Les objectifs de la Communauté comme principes d'interprétation dans la jurisprudence de la Cour de justice*. Bruxelles: Bruylant.
- Nicolia, Alessandro, Manzo Alberto, Veronesi Fabio, and Rosellini Daniele (2014). "An Overview of the Last 10 Years of Genetically Engineered Crop Safety Research." *Critical Reviews in Biotechnology* 34 (1): 77–88. <https://doi.org/10.3109/07388551.2013.823595>.
- Noiville, Christine (1998). "Ressources génétiques et droit. Essai sur les régimes juridiques des ressources génétiques marines". *Revue internationale de droit comparé*, 50(4), 1186–1188.
- Oreskes, Naomi, Conway, Eric. (2010). *Merchants of doubt*. Bloomsbury: Bloomsbury Press.
- Ost, François (2007). "Sources et systèmes de droit". In: Yann Aguila (eds). *Quelles perspectives pour la recherche juridique*. Paris: Presses Universitaires de France.
- Ost, François, Van de Kerchove, Michel (2019). "Science et droit: Les paradoxes de la création". In: Libois, Boris, Stow, Alain (eds). *Profils de la création*. Brussel: Presses de l'Université Saint-Louis.
- Papaux, Alain (2009). "Un droit sans émotions. Iram non novit jus: Esquisse des rapports entre sciences et droit". *Revue européenne des sciences sociales. European Journal of Social Sciences*, XLVII–144, 105–119. <https://doi.org/10.4000/ress.70>
- Papon, Pierre (2020). *La démocratie a-t-elle besoin de la science ?* Paris: CNRS Éditions.

- Perelman, Chaïm, Olbrechts-Tyteca, Lucie (2008). *Traité de l'argumentation: La nouvelle rhétorique* (6e édition). Brussel: Université de Bruxelles.
- Picard, Bastien (2012). "Bruno Latour, Enquête sur les modes d'existence. Une anthropologie des Modernes". *Lectures*. <http://journals.openedition.org/lectures/10133>
- Pichot, André (2000). *La Société pure. De Darwin à Hitler*. Paris: Flammarion.
- Pignataro, Laura (2011). "La politique de l'Union européenne en matière d'OGM". *Revue du Droit de l'Union Européenne*, 3, 361–380.
- Poper, Karl (1993). *La logique de la découverte scientifique*. Paris: Payot.
- Prigogine, Ilya, Stengers, Isabelle (1979). *La nouvelle alliance. Métamorphose de la science*. Paris: Gallimard.
- Purnhagen, Kai. (2019). "How To Manage The Union'S Diversity: The Regulation Of New Plant Breeding Technologies In Confédération Paysanne And Others". *Common Market Law Review*, 56, 1379–1396. <https://doi.org/10.54648/COLA2019106>
- Quinchon-Caudal, Anne (2013). *Hitler et les races: l'anthropologie nationale-socialiste*. Paris: Berg.
- Rath, Johannes (2018). "Safety and Security Risks of CRISPR/Cas9." In: Doris Schroeder, Julie Cook, François Hirsch, Solveig Fenet, and Vasantha Muthuswamy (eds). *Ethics Dumping: Case Studies from North-South Research Collaborations*. New York: Springer International Publishing.
- Robert, Céline (2001). "La Commission européenne dans son rapport au politique: Pourquoi et comment faire de la politique sans en avoir l'air?". *Pôle Sud*, 15(1), 61–75.
- Schaart, Jan G., van de Wiel Clemens C. M., Lotz Lambertus A. P., and Smulders Marinus J. M. (2016). "Opportunities for Products of New Plant Breeding Techniques." *Trends in Plant Science* 21 (5): 438–49. <https://doi.org/10.1016/j.tplants.2015.11.006>.
- Schaffer, Steven, and Schaffer Simon (2011). *Leviathan And the Air-Pump – Hobbes, Boyle, and the Experimental Life*. Princeton: Princeton University Press.
- Schumacher, Ernst Friedrich (2015). *A Guide for the Perplexed*. New York: Harper Perennial.
- Servigne, Pablo, Stevens, Raphaël, Chapelle, Gauthier (2018). *Une autre fin du monde est possible*. Paris: Le Seuil.
- Shan, Yafeng (2020). *Doing Integrated History and Philosophy of Science: A Case Study of the Origin of Genetics*. New York: Springer Nature.
- Sikora, Per, Chawade Aakash, Larsson Mikael, Olsson Johanna, and Olsson Olof (2012). "Mutagenesis as a Tool in Plant Genetics, Functional Genomics, and Breeding." *International Journal of Plant Genomics* 2011 (January): e314829. <https://doi.org/10.1155/2011/314829>.
- Somsen, Hans (2018). "Scientists Edit Genes, Courts Edit Directives. Is the Court of Justice Fighting Uncertain Scientific Risk with Certain Constitutional Risk?". *European Journal of Risk Regulation*, 9(4), 701–718. <https://doi.org/10.1017/err.2018.61>
- Souriau, Etienne, Stengers, Isabelle, Latour, Bruno. (2009). *Les différents modes d'existence*. Paris: Presses Universitaires de France.
- Sprink, Thorben, Eriksson Dennis, Schiemann Joachim, and Hartung Frank (2016). "Regulatory Hurdles for Genome Editing: Process- vs. Product-Based Approaches in Different Regulatory Contexts." *Plant Cell Reports* 35 (7): 1493–1506. <https://doi.org/10.1007/s00299-016-1990-2>.

- Stengers, Isabelle, Bruce Braun Sarah, Whatmore, Isabelle J. (2010). *Political Matter: Technoscience, Democracy, and Public Life*. Minneapolis: University of Minnesota Press.
- Stengers, Isabelle (1993). *L'invention des sciences modernes*. Paris: La Découverte.
- Stengers, Isabelle (2005). "Le défi de la production d'intelligence collective". *Multitudes*, no 20(1), 117–124.
- Stengers, Isabelle (2018). *Another Science Is Possible. A Manifesto for Slow Science*. Cambridge: Polity Press.
- Stengers, Isabelle Bensaude-Vincent, Bernadette (1993). *Histoire de la chimie*. Paris: La Découverte.
- Stengers, Isabelle Bensaude-Vincent, Bernadette (2003). *100 mots pour commencer à penser les sciences*. Paris: Les Empêcheurs de Penser en Rond.
- Stengers, Isabelle (2015). *In Catastrophic Times: Resisting the Coming Barbarism*. London: Open Humanities Press. <https://doi.org/10.14619/016>
- Supiot Alain (2017). *Homo Juridicus: On the Anthropological Function of the Law*. London: Verso.
- Thirion, Nicolas. (2013). "Des rapports entre droit et vérité selon Foucault: Une illustration des interactions entre les pratiques juridiques et leur environnement". *Revue interdisciplinaire d'études juridiques*, Volume 70(1), 180–188.
- Tiercelin, Claudine (1993). *C.S. Peirce et le pragmatisme*. Paris: Presses Universitaires de France.
- Tiercelin, Claudine. (2019). "Métaphysique et philosophie de la connaissance". *L'annuaire du Collège de France. Cours et travaux*, 117, 415–422. <https://doi.org/10.4000/annuaire-cdf.14294>
- Tremblay, Benjamin (2020). "Isabelle Stengers, Réactiver le sens commun. Lecture de Whitehead en temps de débacle". *Lectures*. <http://journals.openedition.org/lectures/45551>
- Urnov, Fyodor D., Ronald Pamela C., and Carroll Dana. (2018). "A Call for Science-Based Review of the European Court's Decision on Gene-Edited Crops." *Nature Biotechnology* 36 (9): 800–802. <https://doi.org/10.1038/nbt.4252>.
- Viala, Alexandre (2010). *Philosophie du droit*. Paris: Ellipses.
- Vlaams Instituut voor Biotechnologie (VIB) (2018). "Regulating genome edited organisms as GMOs has negative consequences for agriculture, society and economy". Leuven: Vlaams Instituut voor Biotechnologie. <http://www.kbiotech.pan.pl/images/pdfy/give_CRISPR_a_chance/Position_paper_on_the_ECJ_ruling_on_CRISPR.pdf> accessed 18 April 2022.
- Vives-Vallés, Juan Antonio, Collonnier, Cécile (2020). "The Judgment of the CJEU of 25 July 2018 on Mutagenesis: Interpretation and Interim Legislative Proposal". *Frontiers in Plant Science*, 10. <https://www.frontiersin.org/articles/10.3389/fpls.2019.01813>
- Wanner, Bettina, Monconduit Hervé, Mertens Andrea, and Thomaier Jörg (2019). "CJEU Renders Decision on the Interpretation of the GMO Directive." *Journal of Intellectual Property Law & Practice* 14 (2): 90–92. <https://doi.org/10.1093/jiplp/jpy184>.
- Weir, Lorna (2008). "The Concept of Truth Regime". *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie*, 33(2), 367–389.
- Wetherell, Margaret, Taylor Stephanie, and Yates Simeon J. (2001). *Discourse Theory and Practice: A Reader*. New York: SAGE.

Whelan, Agustina I., and Lema Martin A. (2015). "Regulatory Framework for Gene Editing and Other New Breeding Techniques (NBTs) in Argentina." *GM Crops & Food* 6 (4): 253–65. <https://doi.org/10.1080/21645698.2015.1114698>.

Zimny, Tomasz, Sowa Sławomir, Tyczewska Agata, and Twardowski Tomasz (2019). "Certain New Plant Breeding Techniques and Their Marketability in the Context of EU GMO Legislation – Recent Developments." *New Biotechnology* 51 (July): 49–56. <https://doi.org/10.1016/j.nbt.2019.02.003>.

The trial of the prophet: the problematic relationship between Hegel and Nazism

Lorenzo Cornettone

“We have made the European Union,
now we must make the Europeans”
Bronisław Geremek

Introduction

In the aftermath of a difficult territorial reunification of Italy in 1861, Massimo D’Azeglio, politician, writer, and faithful patriot, well aware of the limits of this new-born historical project, both from a political standpoint and a social one, had to say: “We have made Italy, now we must make Italians” (Killinger 2002: 1). A new sovereign country was born in the peninsula stretching from the Alps to Sicily, from the Tyrrhenian to the Adriatic, and yet its people, its inhabitants, knew little if nothing at all about this entity. Their lives were still very much oblivious of what Italy meant to them given that their cultures, languages, and habits were still strongly attached to their regional origins while any national bond was a feeble tie at best.

Looking at the history of the European Union (EU), one could argue that we are facing a very similar phase to the point that, with a small adjustment, we could borrow D’Azeglio’s motto and change it into: “We have made the European Union, now we must make the Europeans”¹. Just like for the Italian case, in fact, the European Union, from its first inception in 1951 with the establishment of the European Coal and Steel Community (ECSC), despite an ever more increasing integration process, seems to have a hard time trying to convey to its citizens a sense of belonging.

Despite deep economic and bureaucratic bonds, most European citizens do not really feel attached to this entity (as shown by the lack of knowledge and a growing disinterest spreading among the population). That’s why today the political experiment of the EU finds itself at a crossroad: either it will collapse shredded by centrifugal forces attracted by the easy promises of nationalisms, or it will rediscover the transnational bonds of our communities that tie us to a shared destiny of peace and

Lorenzo Cornettone, College of Europe in Natolin, lorenzo.cornettone@coleurope.eu

¹ Bronisław Geremek (Member of the European Parliament and first holder of the European History and Civilization Chair at the College of Europe) used to say the same expression, as remembered by the President of the European Commission José Barroso, in his speech at the opening ceremony of the Academic Year 2011-2012 here at the College of Europe in Natolin on 29 September 2011. Cf. José Manuel Durão Barroso, Speech by President Barroso at the opening of the Academic Year 2011-2012 at the College of Europe (Natolin campus). https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_617 (consulted on 10.09.2022).

prosperity. However, if we want to guarantee the security of the Union, we need to rethink how we live together, correcting for the distortions of liberalism that has been deteriorating our social daily interactions.

This is why I decided to go in search of a new philosophical basis for our political theory, surprisingly discovering an effective ally in Hegel's theoretical framework. Yet, before adopting his positions I had to amend his notions, for a long time misunderstood as a forerunner of the most ruthless totalitarianism in history, namely Nazi Germany, because of Karl Popper's interpretation.

From this problem, two main research questions logically followed: how much of Hegel's political theory can we really find in Nazis' propaganda? And related to the first one, a second one: was he really the prophet of the swastika, or have we rather misunderstood his concepts in a naïve attempt to find a mind behind all of this? To find a convincing answer to these two questions, I developed the hypothesis that, through the lens of a neutral revision that takes into account the true value of these notions, Hegel's political theory is far from imposing a closed society, and on the contrary can still teach us a lot to this day. Hence the objective of my thesis and the structural organization of its chapters.

In the first chapter I analyze, first and foremost, the crucial pages and paragraphs of the second volume of *The Open Society and its Enemies* by Popper entitled "The High Tide of Prophecy: Hegel, Marx and the Aftermath" arguing, how, in fact it rife with holes and assumptions that led the author to mystify Hegel's social construction. Building upon this conclusion, I then proceed to demonstrate the real meaning and the true scope of Hegel's political notion as they emerge from a neutral reading of his *Encyclopedia, Elements of the Philosophy of Right* and the *Phenomenology of the Spirit*. Finally in the last chapter I show how not only the relationship between Hegel and Nazism is unjustified from a historical perspective but that his ideas can help us build a stronger democratic society and tighter communitarian bonds inside the European Union.

It was of vital importance for me to write a Master Thesis on a theme related to the European history and civilization (the major I am enrolled in), declining my background in philosophy and at the same time taking advantage of the new precious knowledge acquired at the College of Europe. The final outcome, which grounds itself on many enlightening courses attended in Natolin both in history and European studies, is the result of months of research and hardworking which will hopefully present a possible alternative to the way we think and imagine the European Union, a new philosophical compass to orientate its promises and dreams, so vital for each and every one of us in times like these.

1. Popper's Prosecution

1.1 Totalitarian Ideologies

Human beings are meant to live together, to join forces and overcome the hurdles and challenges that they face, whatever they might be². This was already

²"Man is by nature a political animal" (Aristotle 2009: 320).

clear to our primate ancestors, and many technological advancements later we still depend on one another. However, our animal spirits have not provided us with a specific form of government to arrange our social relationships leaving us, in the end, with the compelling task to find one to suit our needs. Monarchies, oligarchies, democracies, and everything in between have therefore been succeeding each other in different times and in different places showing to their peoples their strengths and flaws. And, after all, democracy is no exception.

In fact, the closer one studies democracy and its many historical incarnations the clearer its fragile nature becomes. Throughout the centuries, philosophers, political scientists, and historians alike have tried to present an ultimate formula for the correct arrangement of its institutions without really succeeding in their persistent efforts. Every time a new idea came along to correct for its weaknesses a new turn of events proved it yet again to be unsteady, limited, if not compromised. No matter how hard they try to define a harmonious society, a just and equitable social order always seems to fade away in front of reality (*cf.* Ateeq 2020: 344-356).

But one thing is for sure. If it is true that democracies recognize a sacred dignity to its people elevating them to the status of citizens, it is also true that the darkest of centuries and its notorious intolerant regimes have somehow degenerated from them as well. Indeed, it would be foolish to pretend that the XX-century-totalitarian regimes came out of nowhere, set the world on fire and eventually disappeared into nothing. This view, which is often hastily thought in schools, in addition to be misleading it is also historically inaccurate.

Specifically, Nazism in Germany and Fascism in Italy came to be during a turbulent crisis of European democracy (*cf.* Bonn 1999: 1-39), whose institutions, by the 1930s, appeared, to the eyes of most citizens, to be unworkable with in the real world. Amid the chaos of post-war central Europe, liberalism's failure pushed people to distrust democratic institutions, first and foremost, parliaments, perceived as lenses magnifying social tensions on a larger scale (*cf.* Bonn 1999: 1-39). Instead of unifying countries, democracy, with its political organs and social bodies, seemed to have divided them, unable to preserve the common good of the nation (*cf.* Bonn 1999: 1-39).

In this regard, despite the many differences between them, both Fascism's and Nazism's ideologies flourished thanks to the democratic decay of civil society, both stressing, in their own respect, how liberal egotism and self-interest undermined the social bonds inside a community. Their attack on democracy was rooted on the "ethical grounds" (Bonn 1999: 24)³ of the State and appealed to the masses of people who felt abandoned and lost, tossed by the high tide of a century which washed away all their certainties and points of reference⁴.

What is the role of the State? And, on the other side, what is the citizen called upon? Totalitarian ideologies took advantage of the ever-more-aggravating distance

³"They were prone to attack democracy on ethical grounds too" (Bonn 1999: 24).

⁴ In less than 20 years from 1900 to 1920 every aspect of human life was turned upside down: by the end of World War I, century-long empires had fell ruinously; in 1900 the publication of *The Interpretation of Dreams* by Freud opened the doors to the unconscious and its secret desires; in 1905, Einstein's special relativity swept away the old notions of space and time.

between the two ends of the social fabric, which could not be kept together by liberalism, offering themselves as the only possible solution. For them, liberalism did not place enough stress on duties, failing to induce a civic consciousness in these communities (cf. Bonn 1999: 24).

All in all, those remarks grasped an intrinsic weakness at the very heart of Western democracies, a contradiction handed down by the forefathers of liberal political theory which cripples the idea of modern citizenship. While reflecting upon the idea, Hobbes, and Locke, in fact, identified the notion of individualism as the core concept of it: to mutually acknowledge one other, first, we must grant each other the recognition of individual rights, conferred to the person by the law.

However, as later pointed out by both Benjamin Constant and by Alexander Tocqueville, modern mass individualism, favored by capitalism, paved the way for a new process of socialization of people which, albeit breaking free from the feudalism stalemate, threatened to factorize social interactions to single atoms. Constant and Tocqueville warned us in their studies against the potential risks inherent to this approach: loss of sense of belonging, disinterest in the common good, and, finally, scorn of the public life.

As we have seen, those fears, disregarded for a long time, eventually materialized in the XX century around the world opening the doors to totalitarian ideologies. And yet instead of amending the old model, most scholars and thinkers glossed over its weaknesses. Once averted the threat posed by totalitarianisms to the free world, Western democracies, either upset by the old enemies or frightened by the new evil coming from the East in the form of Communism, reverted to the old liberal framework of social life. In this context, philosophers, and social scientists, including Popper himself, hunted down those ideas – and their proponents – considered to be “enemies” of the open society.

According to these interpretations, some philosophers’ works, prophesied the forthcoming of an absolute social order. Among others – including none the less than Plato and Aristotle – Hegel’s political theory of the State, since the publication of Karl Popper’s book *The Open Society and Its Enemies*, has been regarded as the philosophical ideology behind Nazis’ totalitarian project. In fact, as claimed by Popper, the German philosopher’s notion of nation state, nourished by the illusion of an historical fate, promoted nothing less than totalitarianism, justifying in so doing the institution of a closed society in which the democratic process has been torn down and personal freedoms have been upended with it.

When in 1815, defeated Napoleon once and for all, the Restoration was in need of an ideology, Hegel met its desires and he did so, according to Popper, by reviving those ideas, like tribalism and teleological historicism, always opposed to the notion of open society (tribalism discouraging any dialogical encounter with the other and teleological historicism prohibiting any form of dissent with the view of the authority)⁵. Not only his ideas were wrong, for Popper, but they inspired – directly or indir-

⁵“When in 1815 the reactionary party began to resume its power in Prussia, it found itself in dire need of an ideology. Hegel was appointed to meet this demand, and he did so by reviving the ideas of the great enemies of the open society, Heraclitus, Plato, and Aristotle” (Popper 2013: 245).

ectly – a renaissance of State authoritarianism, fostering the modern form of totalitarianism represented by Nazism and Fascism⁶.

At this point it is easy to understand why, in my eyes, this quarrel is more than a long-distance dispute between two philosophers: as a matter of fact, the clash between Popper and Hegel is, in my own opinion, the conflict of two different ideas of the State, of how we should think about a community, and – by extension – how we should organize it. On the one hand, Popper champions the liberal approach, the preeminence of the individual over the community, of personal freedom over common goods, while on the other hand, Hegel presents us with an alternative⁷, centered on the holistic union of the civic society, on mutual recognition rather than atomistic disintegration of the social life, a possibility never really embraced nor explored.

Nowadays, the limits of the liberal approach, once again oblivious of the common good, are eroding the democratic coexistence of our lives putting us in front of an Hamletic crossroad: to reduce the State to the role of the jailer who administers punishments according to the infractions of fundamental rights or rethink its position and its relationship with citizens. It seems urgent, today, the need to rebuild new foundations for democracies, unless we want to give up to populisms and authoritarianisms, but to do so we must redefine the idea of community and, more in general, how we intend to live together.

I strongly believe – as I will show in the next paragraphs and chapters – that Hegel, freed of any bias, can truly help us reshape our societies.

1.2 Enemies of the open society

In addition to having been a great philosopher of science, Karl Popper, Austrian by birth but British by naturalization, has been one of the most influential intellectuals of the XX century. In search for a clear demarcation criterion to distinguish sciences and pseudo-sciences, Popper, in fact, formalized the falsification principle, whose postulate, consecrating to science only those forms of knowledge susceptible to be disproven, has been for long time at the center of epistemological debates in the academic world. Books like *The Two Fundamental Problems of the Theory of Knowledge* and *The Logic of Scientific Discovery* certainly contributed to make Popper one of the main voices in the international scene of philosophy, cementing his legacy inside and outside the academic sphere.

Although, the study and the analysis of the falsification principle fall out of the scope of this Master Thesis, it is rather important for the reader to always keep in mind, when approaching a philosopher, the undeclared assumptions implicitly driving his or her thought process. In our case, Popper extends his thesis – *i.e.* falsifica-

⁶ “Hegelianism is the renaissance of tribalism. The historical significance of Hegel may be seen in the fact that he represents the «missing link», as it were between Plato and the modern form of totalitarianism” (Ibidem).

⁷ It is not by chance that communitarian thinkers such as Charles Taylor, Michael Sandel, Michael Walzer, and Alasdair MacIntyre draw their insights from Hegel (see § 3.2 and § 3.3 of this Master Thesis). In an attempt to reconsider the validity and soundness of liberal assumptions, communitarianism has presented an alternative which tries to contrast the model described by classical liberalism.

tionism – from one field to another, leaving to the reader to decide whether or not to allow this overlap. In this regard, I am of the conviction that this is precisely a logical fallacy, overlooked by scholars and that has led Popper – and later the academic word – to mystify Hegel's social construction.

Indeed, Popper, shifting from the study of scientific theories to political philosophy, applies the exact same strategy from one field to the other. While examining the forms of twentieth-century totalitarian ideologies, Popper develops a critique of illiberal regimes, identifying those thinkers whose theoretical construction, in some way or another, denied – according to him – any form of cross-examination or, by the same token, any form of falsification.

Plato, Marx, and Hegel himself, all fell under indictment as public enemies of the open society. For Popper, the three of them⁸, in fact, presented perfect societies from a "scientific" point of view, *i.e.* what is desirable for every man and women on earth regardless of their culture and their social condition. The main issue, opposed by Popper to these projects, is the imposition of a set of values presented as absolute and irrefutable, a universal law to be taken for granted anytime, anywhere.

On the contrary, Popper claims several times that an open society must be forthcoming to multitude values, to different philosophical interpretations of the word, to many solutions of concrete problems and to the greatest possible amount of criticism (*cf.* Antiseri 2018: 4). This is the underlying principle of the open society somehow linked, as mentioned before, to the idea of falsification. Immunized against the most sensational refutations of its predictions, today Marxism is not a science any more precisely because it violated the falsification principle (*cf.* Antiseri 2018: 4).

Neither the Republic desired by Plato, nor the State wanted by Hegel, and not even Marx's Communism fulfill the requirements of an open society, promoting, on the opposite, authoritarianisms and dictatorships. All three of them intended society in a tribal – or collectivist – fashion, a place where personal decisions are denied for the well-being of the entire social body. Popper's dichotomy is quite clearly defined in his book:

The magical or tribal or collectivist society will also be called the closed society, and the society in which individuals are confronted with personal decision, the open society (Popper 2013: 165).

As clearly mentioned, the distinction between the two types of society is strictly connected with the fact that in open societies class struggle allows members to rise socially, to take places of other members, or to be replaced themselves, while, on the other hand, closed societies, Popper avers, are organic unit in which every social class contributes to the correct functioning of the body by carrying out its duties carefully assigned *a priori* (*cf.* Popper 2013: 165). Such is the tripartition of the ideal society for Plato, where workers, warriors, and guardians must stick to their role; the same goes

⁸ Plato presented the perfect society in his famous *Republic*; Marx's idea of Communism is exposed in works such as *The Communist Manifesto*, *Das Capital* and the *Economic and Philosophic Manuscript of 1844*; finally, Hegel's Nation State can be found in the *Elements of the Philosophy of Right*, and in the *Phenomenology of the Spirit*.

for Hegel's Nation State with its monolithic institutions; and the same applies for Marx as well, whose utopian society without classes finds itself paralyzed just like the other two cases.

Popper insists that these thinkers' disdain for democracies led them "to defend lying, political miracles, tabooistic superstition, the suppression of truth, and ultimately, brutal violence" (Popper 2013: 189). They transfigured their hatred of individualism and freedom into a dream of unity and collectivism whose holism was the heritage of the spirit of tribalism⁹. Once reached the final Utopia, all sorts of change must be arrested and its sources quenched forever.

Popper is of the idea that the only lesson to be learned from those authors is the opposite of what they tried to teach us¹⁰; a lesson that Popper wishes to pass on over to the reader: the recommended remedy proposed by those authors was worse than the evil they strived to combat¹¹. Arresting social and political change will never be the remedy to create a better future, nor will help us bring happiness to our lives¹². As much as this is true and shareable, question remains if those theories previously cited really promote what Popper ascribes them.

Actually, with rare exceptions, Popper, rather than criticizing them directly on the merits, charges them from the side, more specifically holding them responsible for the historical distortions of their utopian dreams. Otherwise said, instead of focusing on their totalitarianism, Popper pays close attention to those historicist elements which, in Hegel's case for example, had an influence on 20th century fascisms. By and large, Popper's critique raises an objection to Hegel's idea of holism, historicism and evolution contending the fact that this position cannot be philosophically defended and, in the end, can only promote totalitarianism (*cf.* Ateeq 2020: 351-352).

In the following paragraph I want to argue that historicism is, in fact, one of the main weapons used by totalitarian propaganda, but this does not really affect the soundness of Hegel's ideas of civil society, freedom and *Sittlichkeit*. Yes, it is true that historicism often degenerates into irrationalism, however those notions have their own lives, and (as I will show in Chapter 2) can stand even without any reference to historical plans. Once disconnected the two issues, it will be easier for us to move forward and deal with Hegel's theory of Nation State.

1.3 Historicism and its faults

Trying to find a meaning out of all the things that we live through is perhaps one of our most distinctive traits as human beings. Surely one could question how legitimate this is, if it is proper or not, but the fact remains: when we experience unexpected sorrow, we ask what that is for, when we are crushed by a sudden tragedy, we

⁹"This dream of unity and beauty and perfection, this aestheticisms and holism and collectivism, is the product as well as the symptom of the lost group spirit of tribalism" (Popper 2013: 188).

¹⁰"The lesson which we thus should learn from Plato is the exact opposite to what he tries to teach us" (Ivi, p. 189).

¹¹"Excellent as Plato's sociological diagnosis was, his own development proves that the therapy he recommended is worse than the evil he tried to combat" (Ibidem).

¹²"Arresting political change is not the remedy; it cannot bring happiness" (Ibidem).

wonder why. Looking back at our lives we cannot help ourselves but seek for a higher scope, a bigger plan to make sense of us, from our first breath after birth until the very last one before death. It is in our ontological DNA, whether we like it or not.

To tell the truth this disposition is not only limited to our lives but goes well beyond it and can be easily recognized in many other circumstances. In fact, this atavistic instinct has inspired many philosophers, scientists and more in general all our strives to understand our peculiar condition of human beings. Although this sentiment is genuine most of the times, sometimes it can be used to impose on others some sort of destiny to abide by, or even claim a special task for oneself. In other words, history, and all the events which take place in it, are said to be programmed for a specific purpose.

This is the case of historicism which defines a necessary development of human history whose last end is presented as the crowning achievement of everything that came before. The end of time and the universal judgment foreseen in the Christian Bible is probably the most famous interpretation given to history. Unlike the old cyclical view of time favored by Greek philosophers, Christianity, breaking with the old traditions, gave a direction and an end to the arrow of time, whose development corresponded to the glory of God, the punishment of sinners and the final redemption of the righteous.

It did not take long to see this same exegesis applied to more mundane events, to the succession of kings and queens, to the wars between kingdoms and empires. Thereby history became for many the background of a bigger plan, one that could be seen and understood only when studying it from the distance¹³.

In this regard, Karl Popper, first in *The Poverty of Historicism* and later in *The Open Society and Its Enemies*, argues that Hegel's philosophy of history, alongside the dialectic of historical materialism in Marx, have provided a theoretical justification to the two major political totalitarian ideologies of the XX century, respectively National Socialism of the Third Reich and Communism in the Soviet Union. From Popper's own point of view the eschatological determinism of Hegel's philosophy and Marx's prophecy of a society free of classes, in fact, abrogated any responsibility of citizens, effectively leaving them powerless in the face of an implacable destiny.

When society is presented to have one unavoidable fate, men and women are left with no role and as a consequence civil society itself is enervated, so much so that the only political actor left in charge is the State with its institutions. For this reason, Popper, who personally saw the effect of these political schemes, warned against the desire of identifying "inexorable laws of historical destiny" (Popper 2002: 1).

In these works, Popper, clearly guided by his falsifiable approach to scientific theories¹⁴, is afraid of such pseudo-prophecies drawn with the sole purpose of legitimizing administrative authorities otherwise questionable from a political standpoint. To avoid any form of dissent, totalitarian ideologies pushed forward – among other plots – the idea of their messianic task, decisive not only for their citizens but for the wellbeing of the entire world. Their duty – whatever it was – appeared to be inscribed in the course of history itself.

¹⁴ See §1.2.

This can be found in many ideas presented by the leaders of totalitarian regimes. For example, Benito Mussolini in his *Doctrine of Fascism*, wrote down “To the Fascist, everything is found within the State, and nothing can or may be found outside the State. In this sense, Fascism is totalitarian” (Mussolini 1935: 13); and, moving on, he added: “Everything within the state, nothing outside the state, nothing against the state” (Mussolini 1935: 13) as if to say that the Fascist government came to encompass every aspect of public and private life within it (cf. Carlini 2013: 100). All state organs became one thing under Fascism: a single party appointed to interpret the people’s will¹⁵. Under such conditions, there was no need for anything else.

National Socialism had similar ambitions, in this sense (cf. Martins 2021: 78). The State, for Adolf Hitler, was called to realize a eugenic selection of the “Arian race” at any cost.

The fundamental principle – Hitler writes – is that the State is not an end in itself but the means to an end. It is the preliminary condition under which alone a higher form of human civilization can be developed, but it is not the source of that development. That is to be found in the race (Hitler 1939: 305)¹⁶.

Only once ensured the superiority of the “Arian race” over the rest of humanity, could society have thrived in a “higher form” of civilization (cf. Hitler 1939: 305).

Curious how history, on the other hand, was meant to bring about the end of the State for Lenin, quite the opposite when compared to the idea prompted by Nazism. For Lenin, conversely, following Marx’s teachings, the State itself, as a manifestation of the bourgeois, had to be dismantled:

The State is a special organization of force; it is an organization of violence for the suppression of some class. What class must the proletariat suppress? Naturally, only the exploiting class, i.e. the bourgeoisie. [...] The exploiting classes need political rule in order to maintain exploitation, i.e. in the selfish interest of an insignificant minority against the vast majority of the people (Lenin 2009: 23).

In a nutshell: history would lead to the socialist revolution, the socialist revolution to the dismantle of the bourgeois State.

To sum up, the three totalitarian ideologies here discussed weaponized history manipulating its events in order to present their projects – and therefore their leaders – as the fulfilment of its promises. They were the only one able to realize these ideas, and whoever opposed had to be eliminated. The relationship between history and politics appealed to these regimes, justifying their acts, glorifying their leaders. Alongside their cult of personalities and their monopoly of ideological discourses (cf. Friedrich and Brzezinski 1956), the self-attributed historical messianism is certainly one of the most prominent features of their propaganda.

It is certainly clear, at this point, the fallacy – rightfully pointed out by Popper – of any form of historicism: by taking things for granted, its tenet, claiming an unchanging

¹⁵ Lelio Basso (Italian socialist) was one of the first to understand this logic. Also in Roger Moorhouse, “Introduction,” *Totalitarian Ideologies and Dictatorship in Twentieth-Century Europe*, slide no. 9, College of Europe (Natolin), January 31, 2022.

¹⁶ Also in Roger Moorhouse, “Introduction,” *Totalitarian Ideologies and Dictatorship in Twentieth-Century Europe*, slide no. 10, College of Europe (Natolin), January 31, 2022.

essence of social reality, is not founded on rational grounds (cf. Ateeq 2020: 352). This view, paired with holism, deprives social groups of their spirit, reducing society to a mere aggregate of single atoms (cf. Arendt 1973). It's true: Hegel's historicism and holism are problematic. The predetermined movement of the Spirit (or *Geist*) follows such a strict logic in Hegel's works that is impossible to break free from its chains¹⁷. The worst consequence of this manifest itself in his metaphysical interpretation of reality, where every scar in history, every injustice, and, ultimately, evil itself, no matter how cruel or ruthless, will be atoned in the synthesis of the Absolute Spirit. A rather naïve view of human vicissitudes and a disappointing answer to our ethical dilemmas.

Nevertheless, we should not get rid of Hegel so quickly. Let me illustrate my point with a couple of examples, familiar to Popper and his scientific knowledge. Pythagoras had bizarre ideas about the universe and yet we did not erase his theorem for this reason; same for Copernicus: he still believed that planets' orbit around the sun was circular, but, once proved wrong, we did not decide to trash his successful achievement with the old preconception. We did not decide to go back to geocentrism due to the fact that the father of the heliocentric theory was proved wrong. In other words, the mistakes made by thinkers presenting their general view do not necessarily compromise the cogency of their ideas and their results if those same insights can somehow be successfully transferred to solve other issues.

In this respect, I am of the conviction that, albeit his view of the historical course, the ideas and concepts presented by Hegel in his works – especially those concerning society and fundamental ethics – can still tell us how to live together in a community, such as the European Union, many years after their first inception.

My purpose is to delve deeper into this subject in the following chapter.

2. Hegel's defense

2.1 Dialectic triads in Hegel's Absolute Idealism

In the entire history of philosophy – but more in general in the entire history of every discipline – there are only few thinkers who have left their names imprinted in the collective memory of mankind, so much so to be respected and venerated by laymen as much as by scholars. You do not need to know physics to come across Einstein, nor a literate to know Shakespeare. In this regard Georg Wilhelm Friedrich Hegel is perhaps one of the most renowned – and sometimes even feared – names in philosophy, alongside Kant and Plato, Aristotle and Descartes to name a few.

Just like in the case of those men, Hegel changed the trajectory of the discipline to such an extent that he represents, with his major works, a veritable watershed mo-

¹⁷"But the other side of spirit's becoming, history, is a knowing, self-mediating becoming – spirit estranged into time; but this estrangement is equally an estrangement of itself; the negative is the negative of itself. This becoming presents a slow movement and succession of spirits, a gallery of images, each of which, endowed with all the riches of spirit, moves so slowly just because the Self has to penetrate and digest this entire wealth of its substance. As the fulfilment of spirit consists in perfectly knowing what it is, in knowing its substance, this knowing is its withdrawal-into-itself in which it abandons its Being-there and hands its shape over to recollection" (Hegel 2018: § 808).

ment in the history of philosophy. One could properly say – without fear of being proven wrong – that there is an era of philosophy before the publication of the *Phenomenology of the Spirit* and an era after its publication in 1807. From that point onward, in fact, Hegel became a decisive point of reference for every other philosopher, who could not help but to study his logic, ethics and political thought.

However, despite his monumental legacy, Hegel has been widely attacked because of the rigidity of some of his ideas and notions, deaf to any sort of criticism and extremely hard to simplify for the public¹⁸. His systematic philosophy, whose pieces fit together like a complicated puzzle, leaves no room for easy interpretations, and forces the reader to go through the same passage over and over again just to familiarize with his ideas, sometimes clouded behind an intricate phrasing.

To pierce through his reasoning – at times obscure and hermetic – one has to learn how to handle some philosophical “tools”, a set of instruments required to open, one after the other, the doors of his mind. Hence the importance of the dialectic¹⁹, the logic behind reality itself, or, we could say, the movement of the Absolute Spirit. Keeping in mind the Hegelian equivalence of rational and real²⁰, the dialectic manifest itself as the ontological law of the development of reality, and, at the same time, the logical law of its true understanding. Reality is dialectic precisely because of its internal rationality.

Beyond its philosophical technicalities, upon which a lot has been said in one sense or another, the main aspect of the Hegelian dialectic, necessary to move forward in this work (as it will play a role in his political philosophy), is its well-known three-step structure which identify three major moments (or stages) in the evolution of reality, or of any type of progress for that matter, whether it may be philosophical or practical:

- the first stage is the “abstract” moment (improperly known as “thesis”) when we conceive the existing in the form of a multiplicity of static determinations separated from each other. It is the lowest degree of understanding of reality as we cannot see through the “abstract” lie of finite entities. Conversely, Hegelian idealism is founded on the ideality of the finite and its ultimate peaceful resolution in the infinite, or the Absolute, which is the same (hence Absolute Idealism) (cf. Abbagnano and Fornero 2009: 913).
- the second stage is the “negatively rational” moment (also improperly known as “antithesis”) which shows how those determinations are one-sided and they must be set in motion. After all, every affirmation (if we think about it) implies a negation. It is indispensable to proceed beyond the principle of identity ($A = A$) and to relate the various determinations with their respective opposite (cf. Abbagnano and Fornero 2009: 913).

¹⁸ For example, Arthur Schopenhauer said about Hegelism that it was: “a school of dullness, [a] center of stupidity and ignorance, [a] mind-destroying, spurious wisdom” (Schopenhauer 1966: 842).

¹⁹ Hegel is certainly not the first philosopher to resort to this notion, already used by Heraclito, Plato, Aristotle, and Kant, just to name few. The true originality was in the way Hegel employed this concept to explain reality itself.

²⁰ “The rational is real, and the real is rational” As it was pointed out in the previous pages, this renowned passage, taken by the Preface to the *Phenomenology of the Spirit*, reconcile reality with its own faults, underplaying the greater ethical problem of evil.

- finally, the third and last moment is the “speculative” or “positively rational” (or improperly known as “synthesis”) in which we are finally able to capture the unity of the opposite determinations. Now it emerges that they are aspects of a reality which encompasses (or synthesizes) both of them (cf. Abbagnano and Fornero 2009: 914).

Everything is dialectic in the Hegel’s conception. Thus, to think dialectically is to see reality as a procedural totality, always progressing from one stage to the next one, up until the final reconciliation of the Absolute Spirit (or *Geist*). The dynamic making of the Absolute takes place in three different stages, they themselves reflection of the dialectic triad:

- the idea in itself (*an sich*) which is the idea considered separately from anything else, unreflective and merely potential. This is the logical-rational backbone of reality, or, to put it in Hegel’s way, God before creation²¹.
- the idea for itself (*für sich*) which is nature, as the alienation of the idea in the space-time coordinates.
- the idea in and for itself (*an and für sich*) which is the return of the Spirit to itself through human beings’ knowledge.

The task of knowledge will be, for that reason, to uncover the intricacies of these three aspects of reality, in the effort to describe the internal process of its progress. To Philosophy the most important duty: to manifest the intrinsic rationality of all of this, to find the providential necessity at each step, in short to reconcile the oppositions in a perfectly ordered picture. To do so Philosophy is organized in three different disciplines in Hegel:

- Logic, *i.e.* the science of the idea in itself. This stage is described by Hegel as the study of God’s mind before creation.
- Philosophy of Nature, *i.e.* the science which studies the idea in its alienation from itself.
- Philosophy of the Spirit, *i.e.* the science consecrated to the study of the idea while coming back to itself.

Once again it is easy to spot those three recurring stages, which outline the dialectic structure of our world in Hegel’s view. Once posit an assertion, here comes the contradiction, finally reunified in a positive synthesis. It should be clear by now that the dialectic, for Hegel, is not just a philosophical shenanigan but, instead, the very mechanism of reality, its true form, its most intimate definition, not just on a large scale, but in every single aspect of its making, from logic to nature, from morality to social life.

In a spiral motion we can therefore deepen our comprehension of the world focusing, for example, on the last stage represented by the Philosophy of the Spirit, which in turn is divided into the following three specialist branches:

- Philosophy of the Subjective Spirit where Hegel analyzes human beings in their effort to master the naturalness of passions.

²¹ “It can therefore be said that this content is the exposition of God as he is in his eternal essence before the creation of nature and a finite mind” (Hegel 1969: § 50-53).

- Philosophy of the Objective Spirit where Hegel studies the social stage of this peculiar evolution, focusing on right, freedom, and political institutions.
- Philosophy of the Absolute Spirit, the final moment when the Spirit, through the highest expressions of human knowledge (namely: art, religion, philosophy), becomes aware of its true absolute nature.

In light of these reasons, it's easy to understand why reading the *Phenomenology of the Spirit* is just like reading the *Odyssey*, in a sense (more convoluted, sure, but not less engaging): a long-lasting journey back home, where instead of the legendary king of Ithaca, the main character is the Spirit, which finds itself at the end of a quest full of hurdles to overcome.

This view, certainly conciliar and peaceful in its own way, leaves room for serious critics, some of which were met quite quickly by the German philosopher. Marx himself, together with Engels, for example, despite being influenced by the Hegelian idealism, never really forgave the canonization and sanctification of reality carried out, in their opinion, in the *Elements of the Philosophy of Right* (cf. Abbagnano and Fornero 2009: 910). All in all, Popper's disown of Hegel's idea follows this very long tradition, additionally exacerbated by the horrors of the Second World War, somehow linked in the author's mind to this set of philosophical precepts.

Eventually, the merciless portrait of Hegel spread by Popper's work was shattered in the 1970s by MacIntyre's collection of essays, simply entitled *Hegel*, and by Avineri's *Hegel's Theory of Modern State*, which together proposed a new image of the Hegelian thought, one which I will heavily rely on for this second chapter (cf. Avineri 1972). Yet again, to see why Hegel's political theory is still significant to this day we have to rise up to a new dialectic level (the one of the Objective Spirit and social interactions), a vantage point from where to look out at his philosophical topology.

2.2 The Objective Spirit and the problem of freedom in modern societies

As mentioned in the previous chapter, the Objective Spirit for Hegel is the collective stage of the development of the *Geist* in which human beings, freeing themselves from the immediacy of the will, enter a world governed by laws and duties, which discipline their social interactions, thus drawing a well-defined limit to their personal freedoms. Out of the state of nature, people do not indulge in an absolute freedom anymore (what Kant called "free will" in the negative sense of a freedom without any sort of constraints) (cf. Kant 2015), and they start recognizing each other as members of a shared community, where their actions find a limit in the dignity of the other person.

Only at this point human beings become truly free (in a positive way), and people rise to the higher status of citizens. Left behind primal animal spirits and irrational sentiments, their actions are now governed by the practical reason, and they find a coherent context in the intersubjective reality of social institutions. For the purposes of this thesis, the Objective Spirit (given what we just said about it) is the center of gravity of our political analysis of Hegelian thought, a fact that requires us to study in

dept its arguments, which cannot be severed from the dialectic structure of the Absolute Idealism, in spite of Popper's conclusions.

Precisely in these passages Hegel impeaches modern society with its potentially disruptive aspirations to an absolute freedom, directly produced by the same atomism we talked about in the previous chapter²². When looking around to the social construction of his time, Hegel sees a pre-social coexistence among people who claim the right to an absolute freedom, on the contrary, regarded by the German philosopher as an oppressive form of homogenization perpetrated by Enlightenment in general, and more specifically by the French Revolution in 1789²³. Indeed, when freedom is reduced to a simple choice between competing desires, it corrupts into a sterile and empty notion, dangerous for society as well as for its inhabitants, for whom no moral rule stands out.

Instead, freedom, in its fullest meaning, requires a thoughtful choice inscribed in a moral space where the "I" meets the "Other" in a relationship of mutual respect. Therefore, our choices and our actions are not completely unrestricted, as the person in front of us presents us with the moral obligation of respecting his or her dignity, what can be considered the ethical duty founding any cohesive social construction. At this point, we understand that for freedom to cease being an abstract dream and become a stable stance of our lives, it must become a relational concept, according to Hegel.

However, this ethical inclination towards formal universality remains empty, incapable of substantiate the real world, before taking the shape of political and social institutions in our communities. In other words, moral obligations even when interiorized by people, still require taking on the physical form of the State, without which all the good intentions would remain *flatus vocis* in Hegel's opinion. The State, therefore, becomes a connection between the individual and the community on the level of a constitutional structure (cf. Speight 2008: 83).

Then and only then, freedom – a "situated" type of freedom, Hegel would say – becomes the bedrock of social interactions, channeling a dialogic encounter in which we are not overcome by personal interests or utilitarian relations, but instead we are recognized for what we truly are: citizens of a common society, where members, despite the differences among them, know to be part of something bigger than their own ego. Even though we will return on this in the next chapter, I want to take this opportunity to stress this point: here Hegel is not just putting forth a philosophical syllogism, he is rethinking the idea of community behind our societies, taking the old individualistic approach advanced by Locke and Hobbes (as we saw in the first chapter) replacing it with a new understanding of how to live with one another in a social space centered on a more authentic interpretation of freedom.

²² "Disentangled from Hegel's particular theory of social differentiation, the basic point of this critique is this: absolute freedom requires homogeneity" (Taylor 1979: 111).

²³ "This development reaches its culmination in the Enlightenment and in its belief in the almost unlimited capacity of human reason [...]" "Hegel thus sees the French Revolution as the culminating attempt to realize the dictates of human reason in the world [...]. Hegel saw it as an attempt to remake society entirely according to the prescription of human reason, without any reliance on authority or on the shape of things evolved by tradition". (Ivi, pp. 98-100).

As it clearly emerges from what we have been saying so far, freedom – just like anything else in Hegel’s philosophy – is not a static, unchanging notion, but it flows and transforms, undergoing an important process of dialectic evolution in the steps of the Objective Spirit²⁴. Just like the previous stages, the Objective Spirit is articulated in three progressive steps, starting from an incomplete and partial abstraction, going all the way up to a more significant one, a moment of full awareness and self-presence of the Spirit, now mature enough to grasp its true being (cf. Boldyrev and Herrmann-Pillath 2012: 177-202). It is not difficult to see how this evolution mirrors, in Hegel’s idea, the progress of history itself, hence the close interconnection between his historicism and his dialectic so violently criticized by Popper.

Nevertheless, as we said many times, the teleological messianism of history in Hegel’s idealism does not take away the merits of his political theory. Indeed, the progression articulated by the dialectic triad of the Objective Spirit present us, by and large, with an alternative to the liberal approach founded on egotism and absolute freedom, a type of coexistence that cannot be pursued anymore at a personal level. Instead of just being pleased by the liberal arrangement of individuals, internal contradiction of modern democracies, Hegel goes three steps further giving societies a truly communitarian asset.

He manages to do so by connecting three different moments:

- Abstract right²⁵ which is to be considered as an external constraint to people and citizens, followed only to the extent that is enforced by punishment in case of infringement. Its explicit and implicit norms are nothing more than a set of tenets, not really understood by the collectivity, and yet irrefutable in order to have social interactions. However, freedom is still perverted by a blind personalism²⁶.
- Morality²⁷, the stage at which laws, in view of their rationality, are interiorized by the person. Here freedom, abandoned the arrogant ambitions of the absolute individualism, becomes a situated type of freedom, fully aware of the Other.
- Ethical life²⁸ (*Sittlichkeit*), the final synthesis where social institutions such as families, civil society and States allow for the complete signification of citizens’ lives. Now their actions are inscribed in the bigger picture of a social context, and their existences acquire a higher scope irreducible to that of animals and the natural world.

²⁴“The basis [*Boden*] of right is the *realm of spirit* in general and its precise location and point of departure is the *will*; the will is *free*, so that freedom constitutes its substance and destiny [*Bestimmung*] and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature” (Hegel 1991: 195).

²⁵“Personality begins only at that point where the subject has not merely a consciousness of itself in general as concrete and in some way determined, but a consciousness of itself as a completely abstract “I” in which all concrete limitation and validity are negated and invalidated” (Ivi, p. 68).

²⁶ Cf. Thom Brooks, *The Stanford Encyclopedia of Philosophy*, online ed., “Hegel’s Social and Political Philosophy,” 2021, <https://plato.stanford.edu/archives/sum2021/entries/hegel-social-political/> (consulted on 10.09.2022).

²⁷“The second sphere, i.e. morality, thus represents in its entirety the real aspect of the concept of freedom. The process within this sphere is such that the will which at first has being only for itself [...] is superseded. This movement is accordingly the cultivation of the ground on which freedom is now established, i.e. subjectivity” (Hegel 1991: 135).

²⁸“Ethical life is the *Idea of freedom* as the living good which has its knowledge and volition in self-consciousness, and its actuality through self-conscious action. [...] Ethical life is accordingly the *concept of freedom which has become the existing [vorhandenen] world and the nature of self-consciousness*” (Ivi, p. 189).

When the reader puts these notions together (alongside with a more general understanding of Hegelian Idealism) it clearly emerges the complexity and depth of Hegel's political theory, especially when comparing it with the liberal approach prevailing nowadays. Disappointed by the turn of events prompted by the Enlightenment, and most of everything by the reign of terror which followed the French Revolution²⁹, Hegel's project appears clear when put into context: overcome the atomistic individualism and present us with an alternative to the liberal interpretation of civilization.

Let's see how he manages to do so.

2.3 *Sittlichkeit*: Family, Civil Society, State

Freedom, community, democracy and State: behind these notions we can find the most significant challenges of our times, whose most recent events, since the turn of the millennium, have shaken the very grounds of how we live together in society. Globalization and multiculturalism, accelerated by an ever more interconnected world (both physically and virtually), put us, in fact, in front of the uncomfortable truth that certain old ideas we took for granted are more uncertain and nuanced than we thought in the first place.

This is precisely the reason why, nowadays, probably more than ever before, Hegel's political theory proves to be more useful – and urgent in a sense – than it was imagined in the past. Long gone are Popper's days when we could have easily dumped his thoughts on the basis of a summary trial; today, democracy's weaknesses, due to which it finds itself in a perpetual state of crisis, cannot be settled down by a limited narrow-minded approach. The risk is too dangerous, the price to pay too high: for the sake of what we hold most sacred to our hearts – i.e. freedom – we are called upon a more serious analysis, one not tarnished by witless biases.

The picture painted by Hegel becomes more detailed and clearer once reached the level of the Ethical Life (what he refers to with the German word *Sittlichkeit*)³⁰. As mentioned in the previous paragraph, this is the dialectic stage where certain social institutions – namely: families, civil society, States – form the context within which citizens can enjoy the coveted autonomy brought forth by a situated freedom. As a matter of fact, in Hegel's theoretical framework the authentic expression of a person can only take place within the legislative limits of a state which takes on the ethical task to establish the normative source of rights and duties³¹.

It is important to recognize it: in the history of modern philosophy, Hegel is the first great thinker to have shifted the political discourse from the single person (from

³⁰ "The doctrine of *Sittlichkeit* is that morality reaches its completion in a community" (Taylor 1984: 178); and again "The doctrine which puts *Sittlichkeit* at the apex of social life requires a notion of society as a larger community life [...] in which man participates as a member" (Ivi, p. 180).

³¹ "A binding duty can appear as a limitation only in relation to indeterminate subjectivity or abstract freedom [...]. The individual, however, finds his liberation in duty. On the one hand, he is liberated from his dependence on mere natural drives [...]; and on the other hand, he is liberated from that indeterminate subjectivity which [...] remains within itself and has no actuality. In duty, the individual liberates himself so as to attain substantive freedom" (Hegel 1991: 192).

the “I”) to the community, redefining identity in the new social sense of the *Sittlichkeit*. People find an important dimension of their lives only as members belonging to a particular community, and when they are – for whatever reason – rooted out of those relationships they lose the most important point of reference in their lives³².

Finally, western philosophy reckoned the importance of a relational paradigm in social theory and fundamental ethics, breaking down the claustrophobic walls of a subjectivistic interpretation of human beings. The idea, initially proposed by the Cartesian revolution of the *cogito* (cf. Descartes 1990), centered on the rationalistic discovery of the *ego*, and that later informed the Lockian and Hobbesian liberal approach to politics, eventually found a valid alternative, one in which the single person perceives her true meaning in the dialogic encounter with the stranger.

In this sense, contrary to what Popper had to say about it, Hegel’s philosophy of right, enlightened by the notion of *Sittlichkeit*, can help us understand the discomfort of modern democracy, and once identified its illness, the same theory can give us a new language through which rethink public ethics in a communitarian way. Obviously, if we approached this theory with our preconceived notions, then we would not get much out of it; we would only be annoyed by ideas and notions perceived in direct contrast with liberal democracy, which is what Popper did.

For example, when Popper laments (in chapter 12 of the second Volume) that in Hegel’s doctrine “the State is everything and the individual is nothing, for he owes everything to the State” (Popper 2013: 246) he clearly exhibits a superficial misunderstanding of Hegel’s philosophy for never in his pages can be found such an utterance, which is a manifest distortion of his authentic view. In fact, individual citizens’ lives, although having a dignity of their own, absorb a higher meaning only when elevated to the social context of a community. Using the dialectic triad, we could say that to preserve their humanity, people (thesis) have to meet the other (their antithesis) establishing with the other a sort of compromise or reconciliation (synthesis) superseded by the State (and its institutions).

The physical and spiritual existences of people find their completion at this last stage, but this does not authorize for any form of totalitarianism in Hegel’s political theory. When Popper writes that Hegel’s theory “may suffice to show [...] the absolute moral authority of the State, which overrules all personal morality, all conscience” (Popper 2013: 246) he misreads once again the role of this institution *vis-à-vis* its citizens and the civil society: the State, in fact, does not crash the moral personality of the people but it rather gives them a social context in which their conscience – otherwise left to the mercy of perverted desires – can achieve a worthwhile accomplishment. Outside the State people are a shapeless multitude not because their lives

³²“What Hegel is searching for is something not much different from that which, in his theological writings, he had found in the ancient polis: the consciousness of belonging to a community, that feeling which would not view the community in merely instrumental terms. Belonging to such a community, to a people, is for Hegel ‘absolute ethical life’ (*absolute Sittlichkeit*) not because the people represent as such any absolute ethical idea, but because this membership is absolute rather than relative, it is its own end rather than a mere means” (Avineri 1972: 84).

mean nothing, but primarily because the individual's true fulfilment can only take place inside these borders³³.

To posit the "I" as a static thesis – just like liberalism does in its classical view – concretely means to isolate the person from any possible social relationship, a sort of *in vitro* study that is good for nothing but theoretical speculations. The democratic arrangement that comes out of this presents us with a chronically weak society, worn out by egoism and atomism. Why would I get involved in civil society debates – or political movements, for that matter – if my personal horizon barely stretches to include my dears? Civil society – if there is one left in our time – is sadly the sphere of what we could call "universal egoism" where everybody treats the others as a mean for their own ends (cf. Avineri 1972: 134).

While studying the topography of social environments, Hegel was one of the first philosopher to conceptualize the idea of civil society as a space cut out in the hiatus between families and the State. In the civil society citizens, now out of the unity of the family³⁴, engage in a dialectic relationship with one other in the attempt to realize personal interests through inter-actions in the context of market mechanisms (cf. Avineri 1972: 147). Civil society, whose "creation [...] belongs to the modern world, which for the first time allows all determination of the Idea to attain their rights" (Hegel 1991: 220), thus becomes the arena where citizens pursue their self-interest learning at the same time "the value of group action, social solidarity and the dependence of [their] welfare on others" (Pelczynski 1988: 364).

The resulting system of social interdependences, in which the wellbeing and subsistence of people are interwoven with the wellbeing and subsistence of everybody else (cf. Hegel 1991: 221), educate and prepare individuals to active citizenship in the political fora of the society (cf. Pelczynski 1988: 364). From here the dialectic evolution of the Objective Spirit must find the ultimate synthesis capable of subsuming the two moments of family and civil society: this is where the State, together with its institutions, comes into play.

Contrary to the classical liberal approach³⁵, which sees the State as the arrangement to safeguard people's self-interest, Hegel rethinks the State as a mode of relating to each other grounded on solidarity, instead of a fruitless utilitarian arithmetic (cf. Avineri 1972: 134). This "universal altruism", in a sense analogous to the bonds among the members of a family, is not limited by biological determination and yet it tightens citizens in a solid community, where we care for one another, aware that our well-being is closely linked to the overall health state of our collectivity (cf. Avineri 1972: 134).

³³"The all-powerful State in which the individual counts for nothing [...] would, in his view, be just an analogue of Schelling's Absolute – «the night in which cows are black»" (Popper 2013: 61).

³⁴ Cf. Brooks, op. cit.

³⁵ The fundamental principles of classical liberalism as a political theory were enounced by John Locke in *The Two Treaties of Government*. His theory of social association, despite being influenced by Thomas Hobbes' social contract, does not contemplate the possibility of an absolute power like the one suggested in the *Leviathan*, whose author presents a rather monistic view of the State. In *The Two Treaties of Government*, often conceived as the herald of modern constitutionalism, John Locke, very much affected by the events of the Stuart dynasty in England, claims that the task of the State is the preservation of citizens' interests and rights, otherwise very much at risk in the absence of laws. Cf. Hobbes 1996, and Locke 1988.

Of course, if these ideas were to be taken to the extremes they would degenerate into forms of authoritarianism if not totalitarianism but, in the sincere intentions of their author, they were meant for the very opposite. Indeed, those notions, as we sadly know, have been unfairly reclaimed by – or associated with – totalitarian ideologies, but, as I will show in the next chapter, they crippled Hegel's purpose, which, conversely, could be used nowadays to rethink a tighter European citizenship.

3. Acquittal verdict

3.1 Hegel: between Prussianism and Nazism

At this point, having presented both Hegel's political theory and Popper's own interpretation of it, it should appear at least problematic the overly simplistic affinity perceived between Hegel's Absolute Idealism and Nazi ideology. Not only this is ruled out by a simple temporal succession impossible to reverse, but also because the core of what became Nazism stemmed from a very different political and ideological soil. I want to be straightforward: Hegel's conceptualization of the State, despite the judgment of posterity, does not directly imply an authoritarian government, neither a totalitarian ideology like the one imposed by Adolf Hitler and the Nazis.

On the contrary, I believe that Hegel's understanding of the State and the relationships between its institutions and its citizens are very much different from what we have been told by Popper and his followers, those, in short, who wanted – maybe blinded by stubborn biases – to erase the German philosopher's legacy. As I proved in the previous chapter, Hegel's books and works do not provide a rationale for this kind of reading. Nonetheless, it remains to be seen where this sentiment came from, and what historical proves or evidences have been presented to support it.

First and foremost, one of the main sources of this misunderstanding is the author's association with Prussia, where he lived in the capital, Berlin from 1818 until he passed away in 1831. When Germany was unified thanks to the role played by Prussia, Hegel suddenly became, according to most, the champion of German nationalism (cf. Avineri 1972: 115). Hegel's political theory then quickly became synonymous of Prussian notorious assertive values of combative Teutonic pragmatism, embodied by Frederick II the Great (1712 – 1786) (cf. Johnson 1996: 74). Discipline, order, duty³⁶: those were the cardinal virtues of the Prussian military organization which extended to both the State and society (cf. Johnson 1996: 111).

The German unification of 1871 realized – as we said – under the auspice of Prussia, led to what has been denoted as the Prussification of Germany, often recognized as the root of the aggressive temperament of German nationalism propagated by the authoritarian structure of a State in which obedience was elevated to moral commandment of private and public life (cf. Johnson 1996: 112). For the "subordinative mentality", doing one's own duty in Prussia was elevated to the point that the execution of commands was performed even before the orders were explicitly stated (cf. Johnson 1996: 113).

³⁶ *Zucht, Ordnung, und Pflicht.*

A very interesting and thought-provoking interpretation, except for one detail: that Hegel himself dismissed the model presented by the old unreformed Prussia pre-1806 (cf. Avineri 1972: 116). To him that construction was a depersonalized mechanism, a lifeless form of despotism (cf. Hegel 1964) as opposed, on the other hand instead, to the post-1815 Prussia which represented the promise of a cohesive social life in a modern and efficient State. Yet, Hegel, in spite of what have been said by many of his gullible scholars, was not a blind toady of the Prussian monarchy.

That is why during Bismarck's German unification, Hegel himself was used to justify Prussian state's nationalism, and – at the very same time – the liberal political movement, igniting what can be referred to as an "Hegelian tradition of German liberalism" (Megay 1958: 298-317). Two otherwise different political approach met under the shadow of this monumental philosopher giving us a sense of how complex and diverse the reception of his theory was, especially in his motherland.

Knowing Hegel's philosophical understanding of the idea of the State – which we studied in the previous chapter – it should by now be clear how the affinity, often taken for granted, between the rational State presented in his work and the Prussian experiment of the XIX century is nonsense, and also – I would say – unjustified for biographical reasons (cf. Avineri 1972: 116). In fact, Hegel did not present Prussia as the apotheosis of social and political institutions just to please the reactionary and conservative monarchy of that country, but instead often remarked how bureaucratically deaf this system was before its citizens.

If this relationship now appears more loosen than at first glance, it will be easier to unhinge Hegel from Hitler's Nazism – or National-Socialism in general, for that matter – being this ideology even further away from his positions than Prussianism was at his time, both from a philosophical point of view and a chronological one. In fact, the teachings and political ideas presented in the *Elements of the Philosophy of Right*, when compared with the totalitarian ideologies of the XX century, are dangerously reminiscent of their proposals (cf. Knox 1940: 62-63), if and only if they are estranged from the rest of his systematic idealism.

No reader, no matter how biased or myopic, has ever been able to pinpoint Hegel's apologia for the most characterizing – and most terrifying – aspects of Nazi ideology. Totalitarian States, as in the Third Reich case, were never really conceived to host "subjective freedom" nor to safeguard social interactions in the civil society (cf. Knox 1940: 62-63), which instead was drained and erased from the political debate between institutions and citizens. If anything, totalitarianisms, and Nazism in this particular case, led to the atomization of structureless masses³⁷ in which individuals were isolated "without any other social ties to family, friend, comrades or even mere acquaintances" (Arendt 1973: 323).

Nowhere in his books can we find the crave for the suppression of individuality nor the wish for secret police to censure personal conscience, while it is asserted

³⁷"Hitler's as well as Stalin's dictatorship point clearly to the fact that isolation of atomized individuals provides not only the mass basis for totalitarian rule, but it is carried through to the very top of the whole structure" (Arendt 1973: 407).

many different times that “The State is the actuality of concrete freedom” (Hegel 1991: 282) where for the author “*concrete freedom* requires that personal individuality [*Einzelheit*] and its particular interests should reach their full *development* and gain *recognition of their right* for itself [...]” (Hegel 1991: 282). Any such criticism according to which individuals do not have any sort of dimension in Hegel’s political theory are evidently out of the philosophical tracks laid down by the author.

Ergo, Hegel would have never tolerated any of those totalitarian apparatuses and mechanisms which were put in place in Germany, for example. All the more, he would have abhorred the antisemitism that poisoned both politics and civil society with racial discriminations so vile and so inhumane to have affected the very understanding of humanity forever. Hegel, instead, calls for tolerance exhibiting a rare awareness regarding Jews emancipation for his time, as shown by this paragraph taken from the *Elements of Philosophy of Right*:

It is part of education, of *thinking* as consciousness of the individual [*des Einzelnen*] in the form of universality, that I am apprehended as a *universal* person, in which [respect] *all* are identical. *A human being counts as such because he is a human being*, not because he is a Jew, Catholic, Protestant, German, Italian, etc. (Hegel 1991: 240).

And he goes on to say that:

Jews are primarily *human beings*; this is not just a neutral and abstract quality [...], for its consequence is that the granting of civil rights gives those who receive them a “*self-awareness*” as recognized *legal* [*rechtliche*] persons in civil society (Hegel 1991: 295-296).

No, Hegel was no prophet of the swastika, and he never wished for the advent of such a totalitarian state in his writings. His ideas, shareable or not, do not advoke for an autocratic state, nor for personal repression, let alone for racial discrimination. Instead, we could try to follow his path, now that we know his main ideas, and see what kind of society we can build upon them. In the next two paragraphs I will precisely do so.

3.2 Hegel and contemporary political theories

At this point, taking into account what has been presented so far, we can assume Hegel to be exonerated from any possible collusion – direct or indirect – with those infamous accusations that pledged his political theory, closely linking his ideas to the totalitarian ideologies of the XX century, and among them to German National-Socialism. Sure, Hegel’s conceptualization is far from being perfect or immune to criticism, for his uncompromising stance on some issues ends up being an insurmountable wall, not to mention his historicism, a fictitious narrative altogether. And yet, I have all the same the confidence that we freed him from every allegation.

After having carefully considered Popper’s interpretation of Hegel’s political philosophy as presented in the second volume of *The Open Society and Its Enemies*, we denoted how this analyses actually do not hold the water having no grounds on Hegel’s veritable judgements. Popper instead of finding faults in his philosophical

ideas, attacks a more general approach of the German thinker, leaving *de facto* intact his main notions (like the Objective Spirit and the role of the State).

From there, we then proceeded in the second chapter to probe and investigate Hegel's Absolute Idealism uncovering its most salient inferences on political philosophy and theories of justice; what Hegel means when he talks about the State or civil society, what he has in mind while thinking about the Objective Spirit. In those paragraphs it emerged a much more complex position of the author, whose notions of community and State are at the hearth of our modern understanding of social life.

Finally, in the first paragraph of this last chapter, we saw how the connection between Hegel and Nazism was deduced from his closeness to the Prussian monarchy of the XIX century. However, even that relationship was much more nuanced than at first glance and Hegel was never really a fierce advocate of a pure Prussian approach to political theory, as it was shown in the previous pages. Yet, his alleged Prussianism was the indirect cause why he later would have become the prophet of the swastika and why, up until recently, his political theory was still largely compromised in front of the public.

To study Hegel is certainly not an easy task, to study how his political philosophy is inscribed in his general Absolute Idealism is even less so, but one thing is for sure: due to this very long tradition of misinterpreting Hegel's philosophy we have rarely used his notions and concepts to rethink our social coexistence or at least the way we organize our social dimension. This cultural loss has prevented us from coming up with an alternative to classical liberalism and its more up-to-date variations, curtailing the options at our disposal. Only relatively recently political philosophers such as Michael Sandell and Michael Walzer, alongside the already mentioned Alasdair MacIntyre and Charles Taylor, have disputed the dogmatic pretenses of liberalism, primarily drawing from thinkers like Aristotle and Hegel³⁸.

The resulting philosophical theory is now called "communitarianism" and to this day – although questionable under many regards – provides us with a more sustainable social option to liberalism, or at least gives us those philosophical hints that we need in order to correct its most problematic distortions. In fact, despite never really calling themselves as such, these communitarian authors, so labeled by others, all share the critics to the liberal belittlement of the role of the State, reduced to a minimum³⁹, having no other task than leave the market be, at most sanctioning infringements and violations.

The big bet of communitarianism is precisely this one: to show how the common good of society and the community come before the individual with his or her personal desires and egoistic demands; it's not for nothing, after all, if they have reintroduced Hegel in the public debate and social theory. All in all, we could say that the philosophical underpinning of communitarianism overturns the basic theses of liberalism defended by his most famous champions⁴⁰: i.e. the neutrality of the State and its reduction to its simplest form, lowest possible term in the social equation of society.

³⁸ Cf. Daniel Bell, *The Stanford Encyclopedia of Philosophy*, online ed., "Communitarianism." 2001, <https://plato.stanford.edu/entries/communitarianism/> (consulted on 10.09.2022).

³⁹ Ibidem.

⁴⁰ Among them it is worth mentioning John Rawls and his most famous work *A Theory of Justice* in which he presents his idea of neutrality of the State. Cf. Rawls 1971.

In such a “deontological republic” (cf. Sandel 1982) (the one presented by liberal authors), people, without necessarily being selfish, are nonetheless linked to one another by a mere “abstract morality” (to use Hegel’s terminology), in the end becoming stranger to each other. With no State to frame our common identity and to embody our view, we end up being isolated by bureaucratic techno-systems so strong to the point of colonizing the symbolic world of our lives, leaving us with no culture, no values, and no history (cf. Habermas 2008).

Communitarians (following Hegel) show us how there is no possible alternative than revert to the social ties within the civil society by strengthening those obligations and responsibilities towards the community that have been neglected by libertarian bureaucratic blindness⁴¹. When there is no psychological attachment and participate membership in the social and political life of a community, atomistic tendencies start to erode relationships among citizens promoting an increasingly fragmented society⁴².

Just by looking around one has the feeling that today’s keywords can be summed up in a short list: absolute freedom, individuality, social detachment, and disregard of communal life. A set of moral principles and standards of behavior precisely on the other side of the spectrum as the ones proposed and wished by Hegel’s political theory. In this sense the philosophical affinity between communitarians and Hegel catches the eye, both sides stressing the importance of belonging as opposed to a cold universal individual freedom.

Beyond philosophical discussions, one thing is unquestionably clear nowadays: there is no future for democracy as long as we stay on this path. As populisms have shown in recent times the risk of a demagogic drift – appealing to a bewildered electoral base – is too high to continue to play this game. Unfortunately, this is manifestly true not only at a State level pretty much everywhere in Western societies (where politicians like Matteo Salvini, Marine Le Pen, and Viktor Orbán are met by increasing favor), but it is also true at a supranational level, like in the case of the European Union and its institutions (where Eurosceptics groups are threatening to shake the very foundations of our Union). If we want our democratic societies to get out of this social impasse, we need to formulate a new paradigm, not only for the good of single countries but also for more broad political experiments such as the EU.

One way to resist the rise of these movements is, from my judgement, to use some of the ideas presented in this Master Thesis and implement them in a way that they could serve as a basis for stronger communitarian bonds. Specifically, in the next paragraph (the last one of this work) I will show how Hegel’s understanding of society and the relationship between its institutions and its citizens can help us shape a better European society more capable of facing the challenges that lie ahead of us.

3.3 How Hegel’s political philosophy can help us today

When studying the European Union and the functioning of its institutions, it is very common for scholars to come across the notion of “democratic deficit”, the idea

⁴¹ Bell, op. cit.

⁴² Ibidem.

according to which the decision-making process in political fora suffers from a lack of democratic legitimation. In fact, these institutions end up being perceived by the ordinary European citizen as inaccessible due to their complexity and bureaucratic coldness⁴³, a fact proved by the decreasing turnout during European elections perceived of second order importance when compared to national politics (Reif and Schmitt 1980: 3-44).

Furthermore, on top of this democratic deficit, I would argue – as many have done before me – that the fully-fledged fiscal union we have reached in the EU has been built without taking into account the necessary basis of a communitarian sense of belonging. In other words, alongside the democratic deficit, the EU seems weakened by a “communitarian deficit” (cf. Etzioni 2013: 312-330), due to which its practices and promises fall short in building a shared post-national community (cf. Etzioni 2013: 312-330).

I would argue that any further integration of the EU – very much required by the combination of the two most recent crisis of the Covid-19 pandemic and the war in Ukraine⁴⁴ – will not be achievable without building at the same time a stronger idea of community, centered around shared values and bonds of affinity (cf. Etzioni 2013: 312), so vital to drive us all towards the common good. After all, we shall never forget that we were able to stop the bloody fights that raged over our continent precisely because we recognized ourselves to be part of a single community. For these reasons we cannot have just a bureaucratic union, but instead we need to strengthen our common identity. But how can we do this? Following the ideas advanced by the Hegelian political philosophy, there are three stages we need to work on: education, civil society, and institutional politics, all of them clearly related to one another.

First and foremost, we must seek to strengthen citizens education and develop democratic competences in schools and other educational institutions (cf. Pausch 2021: 8). Only by fostering a European holistic approach to history and civil education we will be able to empower young people to actively participate in the democratic life of our societies (cf. Pausch 2021: 8). If we want the two sides – citizens and institutions – to get closer we must start by sowing competences of democracy, dialogues, and citizenship at the level of education⁴⁵. It is very alarming to note how little citizens know about the history of the European Union and the functioning of its institutions. I am not saying that everybody should have a degree in European Studies, but at least a general understanding of this political experience – its origins and achievements – would make it feel less distant, less impenetrable. How can I trust decisions taken by institutions that I do not know and are so far away from me, closed in on themselves in the Brussels bubble?

If civil society is where ideas are conceived and debated by people (as it was interpreted by Hegel) than we need to promote shared values as a catalyst for

⁴³ *EUR-Lex*, “Democratic deficit”. <https://eur-lex.europa.eu/EN/legal-content/glossary/democratic-deficit.html> (consulted on 10.09.2022).

⁴⁴ It is no coincidence that Mario Draghi, Emmanuel Macron and Ursula Von Der Leyen are all demanding for Treaty revision in these days (May 2022).

⁴⁵ *Directorate-General for Education, Youth, Sport and Culture (DG EAC)*, “Strategic Plan 2020-2024”. https://ec.europa.eu/info/system/files/eac_sp_2020_2024_en.pdf (consulted on 10.09.2022).

European culture. Hegel teaches us that every community needs a prolific and fruitful civil society to thrive (see § 2.3), one in which the dialogic encounter of citizens encourages and stimulates the deliberative process of inclusion (*cf.* Habermas 2015). Direct actions as well as nonviolent initiatives and citizens bottom-up political mobilization could be channeled at this level in pan-European movements, unfortunately very rare and barely accounted by EU institutions⁴⁶. Citizens' initiatives and civic engagement should not be limited to the election days, but they should find a way to be expressed on a daily basis to protect rule of law and defend human rights whenever they are endangered no matter where inside the European borders.

On a more political level, perhaps it's time to strengthen the political power of the European Parliament, whose role has been enhanced through the extension of the ordinary legislative procedure (also known as codecision) to a number of policy areas, and yet, at the same time, its responsibilities are still restricted when it comes to the Common Foreign and Security Policy (CFSP) (*cf.* Hix and Høyland 2011: 11). Not to mention the election procedure of the President of the European Commission, who is appointed by the European Council, which, as stated by Article 17 (7) Treaty of the European Union (TEU), can choose the so-called *Spitzenkandidat* (German for "lead candidate") of the majority party, but has no legal obligation to do so⁴⁷.

Concerning the composition of the European Parliament itself, its institutional organization around national parties assembled into groups, looks decentralized and outdated whereas transnational ideological parties carrying on propositions of European policies of broad and general interest could have more significant impact on our political environment. This shift, made difficult by language barriers and cultural differences, could nevertheless give a meaningful contribution in the arduous task of spreading a true European political consciousness. Those transnational parties could, in principle, reinforce the perception of a European political environment, with its own goals and objectives separated from the individualistic interests of single countries, worried by their own wellbeing.

At the same time Hegel warns us against impairing or hindering the role of the State. When imagining the future of European integration, we should not dream of a federalist union where Member States – with their traditions and cultures – are completely overshadowed by a central bureaucratic authority, as this would actually harm the democratic integrity of the EU. Supranational institutions (like the European Commission to name one) intrinsically need a mechanism of national supervision to be legitimized in the eyes of the people (*cf.* Lindseth 2010: 3). Yes, we do need to reassess the role of the European Council (composed by the Heads of State and Governments of Member States), but we probably do not want to get completely rid of a second legislative body – such as the Council of the European Union – as a national check and balance to a transnational Parliament.

⁴⁶ One of the few examples I can think of is EUMANS, pan-European movement launched in 2019 by the Italian activist and former Member of the European Parliament Marco Cappato. *Cf.* EUMANS, "EUMANS Statute". <https://www.eumans.eu/eumans-statute> (consulted on 10.09.2022).

⁴⁷ "Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission" Article 17 (7) TEU.

These are just some ideas, but they show the power to rethink our union on the basis of a Hegelian understanding of political philosophy, an alternative regrettably disqualified by Popper, but too relevant nowadays to ignore. The dialectic triad of the Objective Spirit, in fact, could be mirrored here by a political one. Just like the family in Hegel attains completion in the upbringing of children (*cf.* Hegel 1991: 200), in the same way society – and in our case the European society – teaches the basic values to live by in the education system; these values can then inspire civil society movements and social identification in the common good in the name of which citizens could approach politics through democratic deliberation and active participation, eventually shaping the political agenda of parties and institutions across the EU.

In the end one thing is certainly clear: if we want the EU to survive these crisis – and the next ones that we will most likely face in the near future – we need a new theoretical framework to strengthen social relationships and build stronger political institutions. As shown in this paragraph, even just adopting the Hegelian dialectical triad could significantly improve the general quality of our communities. If the EU suffers of a “communitarian deficit” than there is no other solution than to change the philosophical approach behind it: for too long we have developed an economic union, neglecting the human factor of this political adventure; it is now time to perform a Copernican revolution putting people – not bureaucracy – in the center of this project.

Conclusion

Philosophy truly lives up to its highest calls only when making a real contribution to our societies and the way we live together, when it helps to build a better world for the ones to come instead of locking itself in an academic ivory tower to discuss raw philological riddles. One of the reasons why I chose to study at the College was precisely to complement my background with the indispensable historical and technical knowledge of the EU required to understand this political adventure, so that one day my ideas could have maybe a small impact on citizens’ lives.

In particular, this Master Thesis was my attempt to decline my understanding of political philosophy with the many things learned in the past academic year, spanning from history of European civilization to EU institutions and decision-making process. I believe that the final result – in which European promises and nightmares manifest themselves – is the outcome of the versatile program in European Interdisciplinary Studies carried out at the College of Europe in Natolin. Being a student of this track, and specifically a Geremek student of the major in European History and Civilization, I wanted to probe these fields, namely the history and the civilization of our Union, in search of a new theoretical framework useful for the challenges of the future. Hopefully, the reader will consider my efforts adequate for the ambitious task.

Today, anyone who studies political philosophy, political science or international relations can no longer take for granted the idea of democracy, its institutions, and its social interactions. Because of classical liberalism we are in a dead end: hence the ur-

gent need to rethink the way we live together both at a national level and a supranational one. In this sense, Hegel's political theory presents us with a set of alternative tools to modern solipsistic atomism, to which we have relied for too long to the point that, even outside the political arenas, social life is thought and imagined according to a strictly individualistic scheme between point-like singularities, without any ethical depth.

In conclusion, I believe that my research questions finally have an answer: Hegel was never an enemy of the open society and if his ideas have been used fraudulently, it is definitely not his fault, but the consequence of a rather biased and naïve misinterpretation proposed by Karl Popper in the first place. Sure enough, instead, the initial hypothesis proved to be beneficial and generative from a political standpoint. The Hegelian dialectic scheme can help us in the difficult task of reimagining the coexistence of our societies, one that is not doomed to egoism and individualism.

Hegel, in fact, shows us that it is possible to follow another path, that another way of relating to the other-than-oneself is conceivable. In conclusion, I believe that for all those who have not yet resigned themselves to the atomistic disintegration of social relations, Hegel represents a valid alternative, a voice to appeal in order to rebuild a stronger democratic coexistence among people and nations.

References

- Abbagnano Nicola, Fornero Giovanni (2009). *Itinerari di Filosofia: Protagonisti, Testi, Temi e Laboratori*, vol. 2B, *Dall'Illuminismo a Hegel*. Torino: Paravia.
- Abbagnano Nicola, Fornero Giovanni (2009). *Itinerari di Filosofia: Protagonisti, Testi, Temi e Laboratori*, vol. 3A, *Da Schopenhauer alle teorie novecentesche sulla politica*. Torino: Paravia.
- Antiseri Dario (2018). "Premessa alla Seconda Edizione Italiana". In: Karl Popper (ed.). *La Società Aperta e i Suoi Nemici*. Milano: Armando Editore, 3-9.
- Arendt Hannah (1973). *The Origins of Totalitarianism*. New York: Harcourt Brace Jovanovich.
- Aristotle (2009). *Politics*. Translated by Ernst Baker. Oxford: Oxford University Press.
- Ateeq Muhammad (2020). "Hegel's Idea of Nation State and Its Totalitarian Character: Focus on Karl Popper Critique of Hegel". *Journal of Research of Humanities* LVI/22, 344-356.
- Avineri Shlomo (1972). *Hegel's Theory of the Modern State*. Cambridge: Cambridge University Press.
- Bendersky Joseph (2016). *Carl Schmitt: Theorist For The Reich*. Princeton, New Jersey: Princeton University Press.
- Boldyrev Ivan A., Herrmann-Pillath Carsten (2012). "Hegel's «Objective Spirit», extended mind, and the institutional nature of economic action". *Mind and Society* XII/2, 177-202.
- Bonn Moritz (1999). *Dark Continent: Europe's Twentieth Century*. London: Penguin Books.
- Carlini Armando (2013). *Saggio sul pensiero filosofico e religioso del Fascismo*. Roma: lulu.com.
- Consolidated Version of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) OJ C306/01.
- Etzioni Amitai (2013). "The EU: the communitarian deficit." *European Societies* XV/3, 312-330.
- Flores Marcello, Bauman Zygmunt (1998). *Nazismo, fascismo, comunismo. Totalitarismi a confronto*. Milano: Bruno Mondadori.
- Friedrich Carl J., Brzezinski Zbigniew K. (1956). *Totalitarian Dictatorship and Autocracy*. Cambridge, Mass.: Harvard University Press.
- Habermas Jürgen (2015). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. Cambridge: Polity Press.
- Habermas Jürgen (2008). *Between Naturalism and Religion: Philosophical Essays*. Translated by Ciaran Cronin. Cambridge: Polity Press.
- Hegel Georg Wilhelm Fredrich (1964). *Political writings*. Translated by Thomas Malcom Knox. Oxford: Clarendon Press.
- Hegel Georg Wilhelm Fredrich (1991). *Elements of the Philosophy of Right*. Edited by Allen W. Wood. Translated by Hugh B. Nisbet. Cambridge: Cambridge University Press.
- Hegel Georg Wilhelm Fredrich (1979). *Phenomenology of Spirit*. Translated by A. V. Miller. New York, NY: Oxford University Press.
- Hegel Georg Wilhelm Friedrich (1969). *Science of Logic*. Translated by A. V. Miller. New York: Humanities Press.
- Hitler Adolf (1939). *Mein Kampf*. Translated by Ralph Manheim. London: Hurst & Blackett LTD.
- Hix Simon, Høyland Bjørn (2011). *The Political System of the European Union*. New York: Palgrave Macmillan.

- Hobbes Thomas (1996). *Leviathan*. Edited by Richard Tuck. Cambridge and New York: Cambridge University Press.
- Johnson Lonnie R. (1996). *Central Europe. Enemies, Neighbors, Friends*. New York-Oxford: Oxford University Press.
- Kant Immanuel (2015). *Critique of Practical Reason*. Translated by Mary Gregor. Cambridge: Cambridge University Press.
- Killinger Charles L. (2002). *The History of Italy*. Westport, Conn.: Greenwood Press.
- Knox Thomas Malcom (1940). "Hegel and Prussianism". *Philosophy* XV/57, 62-63.
- Lenin Vladimir (2009). *The State and Revolution*. Translated by Robert Service. London: Penguin books.
- Lindseth Peter L. (2010). *Power and Legitimacy*. New York: Oxford University Press.
- Locke John (1988). *Two Treatises of Government*. Edited by Peter Laslett. Cambridge and New York: Cambridge University Press.
- Martins Carlos Manuel (2021). *From Hitler to Codreanu: The Ideology of Fascist Leaders*. Abingdon: Routledge.
- Megay Edward N. (1958). "Treitschke Reconsidered: The Hegelian Tradition of German Liberalism". *Midwest Journal of Political Science* II/3, 298-317.
- Mussolini Benito (1935). *Doctrine of Fascism*. Florence: Vallecchi Editore.
- Pausch Markus (2021). "The future of polarization in Europe: relative cosmopolitanism and democracy". *European Journal of Futures Research* IX/12. <https://doi.org/10.1186/s40309-021-00183-2>.
- Pelczynski Zbigniew A. (1988). "Solidarity and «The rebirth of Civil Society» in Poland, 1976-81". In: John Keane (ed.). *Civil Society and the State*. London: Verso, 361-380.
- Pelczynski Zbigniew A. (ed.) (1971). *Hegel's Political Philosophy: Problems and Perspectives*. London: Cambridge University Press.
- Popper Karl (2018). *La Società Aperta e i Suoi Nemici*. Milano: Armando Editore.
- Popper Karl (2013). *The Open Society and Its Enemies: New One-Volume Edition*. Princeton and Oxford: Princeton University Press.
- Popper Karl (2002). *The Poverty of Historicism*. London: Rutledge.
- Rawls John (1971). *A Theory of Justice*. Cambridge, Mass.: Belknap.
- Reif Karlheinz, Schmitt Hermann (1980). "Nine Second-Order National Elections - A Conceptual Framework for the Analysis of European Election Results". *European Journal of Political Research* VIII/1, 3-44.
- Riedel Manfred (1984). *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*. Cambridge: Cambridge University Press.
- Sandel Michael (1982). *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press.
- Schopenhauer Arthur (1966). *The World as Will and Representation*. Translated by Eric F. J. Payne. New York: Dover Publications.
- Speight Allen (2008). *The Philosophy of Hegel*. Montreal: McGill-Queen's University Press.

Taylor Charles (1984). "Hegel. History and Politics". In: Michael J. Sandel (ed.). *Liberalism and Its Critics*. Oxford: Basil Blackwell, 177-199.

Taylor Charles (1979). *Hegel and Modern Society*. New York and London: Cambridge University Press.

Tunick Mark (1992). *Hegel's Political Philosophy*. Princeton University Press.

Weil Eric (1950). *Hegel et L'Etat : Cinq Conférences*. Paris: Libraire Philosophique J. Vrin.

Sitography

Barroso José Manuel Durão (2011). "Speech by President Barroso at the opening of the Academic Year 2011-2012 at the College of Europe (Natolin campus)". https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_617 (consulted on 10.09.2022).

Bell Daniel (2001). "Communitarianism". *The Stanford Encyclopedia of Philosophy*, online ed. <https://plato.stanford.edu/entries/communitarianism/> (consulted on 10.09.2022).

Brooks Thom (2021). "Hegel's Social and Political Philosophy". *The Stanford Encyclopedia of Philosophy*, online ed. [https://plato.stanford.edu/entries/hegel-social-political/#:~:text=Hegel's%20civil%20society%20is%20primarily,needs%20\(PR%20%C2%A7182\)](https://plato.stanford.edu/entries/hegel-social-political/#:~:text=Hegel's%20civil%20society%20is%20primarily,needs%20(PR%20%C2%A7182)) (consulted on 10.09.2022).

Directorate-General for Education, Youth, Sport and Culture (DG EAC) (2020). "Strategic Plan 2020-2024". https://ec.europa.eu/info/system/files/eac_sp_2020_2024_en.pdf (consulted on 10.09.2022).

EUMANS (2022). "EUMANS Statute". <https://www.eumans.eu/eumans-statute> (consulted on 10.09.2022).

EUR-Lex. "Democratic deficit". <https://eur-lex.europa.eu/EN/legal-content/glossary/democratic-deficit.html> (consulted on 10.09.2022).

EDITOR

Umberto Morelli (Università di Torino)

ASSOCIATE EDITORS

Marinella Belluati (Università di Torino)

Paolo Caraffini (Università di Torino)

Lara Piccardo (Università di Genova)

Rachele Raus (Università di Torino)

MANAGING EDITOR

Filippo Maria Giordano (Link Campus University, Roma)

SCIENTIFIC BOARD

María del Rosío Barajas Escamilla

(El Colegio de la Frontera Norte)

Marco Brunazzo

(Università di Trento)

Olga Butorina

(Institute of Europe, Russian Academy of Sciences)

Michelangelo Conoscenti

(Università di Torino)

Niccolò Conti

(Università di Roma Unitelma Sapienza)

Matthew D'Auria

(University of East Anglia)

Jean-Michel De Waele

(Université libre de Bruxelles)

Michel Dumoulin

(Université catholique de Louvain)

Corinne Gobin

(Université libre de Bruxelles)

Aylin Güney Gevrek

(Yaşar Üniversitesi)

Faizel Ismail

(University of Cape Town, School of Economics)

Herman J. Kraft

(University of the Philippines Diliman)

Thomas Kroll

(Friedrich-Schiller-Universität Jena)

Francisco Lara-Valencia

(Arizona St. University, School of Transborder Studies)

Garth Le Pere

(University of Pretoria)

Jacqueline Lo

(ANU, College of Arts and Social Sciences)

Corrado Malandrino

(Università del Piemonte Orientale "Amedeo Avogadro")

Antonio Moreno Juste

(Universidad Complutense de Madrid)

Luciano Morganti

(Vrije Universiteit Brussel)

Edoardo Novelli

(Università Roma Tre)

Joanna Nowicki

(Université de Cergy-Pontoise)

José Paradiso

(Universidad Nacional de Tres de Febrero)

Massimo Pendenza

(Università di Salerno)

Laura Polverari

(Università degli studi di Padova)

Daniela Preda

(Università di Genova)

Vivien Ann Schmidt

(Boston University)

Mario Telò

(Royal Academy of Sciences, Brussels)

Jovan Teokarević

(University of Belgrade)

Pier Domenico Tortola

(University of Groningen)

Francesco Tuccari

(Università di Torino)

Enrique José Varela Álvarez

(Universidade de Vigo)

Pascaline Winand

(Director of Studies, College of Europe, Natolin)

Ruth Wodak

(Lancaster University)

EDITORIAL BOARD

Luca Barbaini, Andrea Becherucci, Tiziana Bertaccini, Francesca Bisiani, Andrea Cofelice, Angela Condello, Federico Donelli,

Giovanni Finizio, Giuseppe Gabusi, Giorgio Grimaldi, Guido Levi, Anna Mastromarino, Marzia Ponso, Stefano Quirico, Stefano Saluzzo, Giuseppe Sciarra, Marco Stolfo, Federico Trocini, Lorenzo Vai

SPECIAL ISSUE - COLLEGE OF EUROPE 2022

Publisher: Dipartimento di Culture, Politica e Società (Università di Torino)

Review of manuscripts: double-blind review process

Contacts: redazione.deeuropa@unito.it

Website: www.deeuropa.unito.it

Book design: Silvio Ortolani, SISHO - Fotografia & Archivi

Six selected Master's theses by College of Europe students

Guest Editor

Georges Mink, *Titulaire de la Chaire de Civilisation européenne*
Collège d'Europe à Natolin, Directeur de Recherche émérite au C.N.R.S. (ISP)

De Europa et le Collège d'Europe à Natolin se lancent pour la quatrième fois dans la publication des meilleurs mémoires de fin d'études réalisés par les étudiants, cette fois-ci de la promotion 2021-2022 ayant eu pour patronne la juriste « Éliane Vogel-Polsky ».

À chaque fois, il s'agit d'un échantillon de travaux qui se démarquent par leur qualité intrinsèque et par la diversité de leurs centres d'intérêt, avec un point commun : celui d'être réalisés dans le cadre du programme interdisciplinaire d'études européennes du Collège d'Europe à Natolin.



Ce dernier, en offrant aux étudiants de chaque promotion l'occasion d'exprimer leurs talents, leur savoir, et enfin, leur engagement européen, joue un rôle incontournable dans la formation sur l'UE et pour l'UE.