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Submissions

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 21st Edition. All submissions should be on a legal topic and be between 3,000 and 9,000 words in length. Articles are welcome in English, Irish or French. All interested parties should submit their articles and enquiries to:

The Editor-in-Chief
editor@corkonlinelawreview.com

Submissions are also invited for the Roundtable blogs section. Submissions should be on a topic of current legal relevance, whether domestic or international, and be between 800 and 1,500 words in length. All interested parties should submit their blogs and enquiries to:

The Blogs Editor
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On behalf of the Cork Online Law Review, I would like to extend our sincere gratitude to Professor Maria Cahill for her support of COLR throughout the year. Her advice and expertise have been essential to the successful production of this year's edition. I would also like to acknowledge and thank the members of the UCC School of Law faculty who generously assisted us with the reviewing process.

On behalf of the Editorial Board, I would like to extend our gratitude to the Chief Justice, the Hon. Mr Justice Frank Clarke, for doing us the great honour of launching the 20th Edition.

The Editorial Board would like to thank the Dean of the Law School, Professor Mark Poustie, for all of his help and support. I would also like to thank the Executive Committee of the UCC Law Society who have been an invaluable source of support and advice over the past year.

We would also like to express our sincerest gratitude to our sponsors, Arthur Cox. Without their generous sponsorship and support, COLR would not be where it is today. In particular, I would like to thank Eimear Power for the help and assistance she has provided.

I would like to recognise the hard work and dedication of the Editorial Board members throughout the year. In particular, I wish to thank our Deputy Editor-in-Chief, Elisha Carey. The quality of this publication is a testament to their diligence, work ethic and fortitude, which never faltered, notwithstanding the challenging pervasive circumstances that we have found ourselves in this past year.

Finally, we would like to congratulate the authors of the exemplary contributions to the 20th Edition of COLR. Their interesting and varied contributions, exploring areas as diverse as financial law, EU law and clinical research regulation, are a welcome addition to the academic scholarship of COLR. My hope is that each of these articles will act as a vehicle for the further discussion and development of our laws and legal theory. We would also like to thank those who contributed to our newly-introduced Roundtable blogs section and Case Notes Competition.

Is mise le meas,
Denis Clancy
Editor-in-Chief of the 20th Edition

FOREWORD TO THE TWENTIETH EDITION

On behalf of the School of Law at University College Cork, I would like to congratulate Denis Clancy and the members of the Editorial Board who have prepared this 20th Edition of the Cork Online Law Review, bringing it to publication amidst the very challenging circumstances of the ongoing global pandemic. Their efforts deserve to be acknowledged and applauded. It is through their dedication and hard work that this significant vehicle for scholarly legal academic debate continues and that rigorous academic standards are upheld.

The academic contribution that COLR makes is dependent on the intellectual ambition of the authors who submit their work to be considered for publication. This year, the articles which appear in the online journal are of a really high quality and reflect a great level of intellectual ambition and excellent engagement with the editorial process. For their evident quality and significant contribution to legal academic debate, all submissions are to be commended. There is no doubt that the quality of the 20th Edition of COLR reflects well both on the School and our students. It contributes to the School's reputation and that of our students. COLR also provides a great opportunity for students to develop and showcase their research and writing skills in a meaningful way as well as making a valuable contribution to academic legal debate.

The multilingual nature of the journal which provides the opportunity to publish in both French and Irish as well as English is to be strongly commended. Facility with French and Irish in addition to English is a real advantage for Irish graduates particularly in the EU context following Brexit. The innovations introduced in this edition – the Case Notes Competition and the blog series, The Roundtable – are also to be commended.

The 20th Edition of the Cork Online Law Review is something which the School of Law can rightly be very proud of. Well done to the authors, members of the Editorial Board and to my colleagues who have provided support and assistance for the online journal! Thanks also to Arthur Cox for their continuing sponsorship of COLR which is much appreciated.

Professor Mark Poustie
12th April 2021

EDITORIAL BOARD OF THE TWENTIETH EDITION OF THE CORK ONLINE LAW REVIEW

PREGNANT WOMEN AS A 'VULNERABLE' POPULATION IN THE NEW EU CLINICAL TRIALS REGULATION: DOES THIS CLASSIFICATION ADEQUATELY CONSIDER THE HARMS ASSOCIATED WITH THE EXCLUSION OF PREGNANT WOMEN FROM CLINICAL RESEARCH?

Niamh O'Leary McNeice*

A INTRODUCTION

On 2 April 2014, the European Parliament approved the new EU Clinical Trials Regulation.[1] Though initially expected to enter into application during 2019, this has been repeatedly postponed, and the timeframe for the application of the Regulation is, at present, unclear. The Regulation classifies pregnant women as a 'vulnerable population' for the purposes of clinical research and restricts the conduct of such research on this population unless certain conditions are met.[2]

This article seeks to analyse the tension between the harms associated with the inclusion and exclusion of pregnant women from clinical research, and to assess the extent to which this classification strikes an appropriate balance between protecting against these harms. There is now a widely acknowledged need for greater clinical research during pregnancy, so as to produce evidence-based knowledge on medications for pregnant women and ensure high quality care.[3] This necessity has recently been brought into sharp focus by the COVID-19 pandemic, the response to which calls attention to the need to examine the regulatory approach to the inclusion of this population in clinical research.[4] This tension is founded on the question of how to balance this need with the need to protect pregnant women and their foetuses from possible harm during clinical research. It will ultimately be argued that while the harms on both sides of this question are legitimate and deserving of consideration, the Regulation does not

* BCL (Law and Irish), University College Cork; LLM, University of Edinburgh. I am grateful to Ms Annie Sorby of the Medical Law and Ethics faculty at Edinburgh Law School for her guidance in respect of this article, and in relation to this subject area generally. Further thanks to Mairead, Conor, Jack, Aoife and the Editorial Board for their helpful contributions.

[1] Parliament and Council Regulation (EU) 536/2014 of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC [2014] OJ L158/1 (the Regulation).

[2] ibid articles 10.3, 33.

[3] Verina Wild and Nikola Biller-Andorno, 'Pregnant Women's Views about Participation in Clinical Research' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 122; Indira van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (2017) 43(10) Journal of Medical Ethics 657, 657.

[4] Ruth Farrell, Marsha Michie and Rachel Pope, 'Pregnant Women in Clinical Trials of COVID-19: A Critical Time to Consider Ethical Frameworks of Inclusion in Clinical Trials' (2020) 42(4) Ethics and Human Research 17, 19.

strike an appropriate balance, because it focuses too much on what are arguably lesser harms associated with the inclusion of pregnant women in clinical research.

To illustrate the inadequacy of the Regulation's classification of pregnant women, the current approach to the inclusion of this population in clinical research will be briefly outlined. Its effect on the provision of medical treatment to this population will be assessed, and the position of pregnant women in the context of the COVID-19 pandemic will be examined as an example of this. The classification of pregnant women in the Regulation will be considered, as well as the extent to which this is influenced by the current approach. In order to assess the possible intended definition of 'vulnerability' for the purposes of the Regulation, a number of conceptions of vulnerability and their application to pregnant women will then be examined. The harms associated with the inclusion of pregnant women in clinical research will be analysed, and their magnitude will be compared to that of the corresponding harms associated with the exclusion of pregnant women from clinical research. Following this, the extent to which the classification does not conform to the shift in the international regulatory framework on clinical research, away from a narrative that perpetuates the exclusion of pregnant women, will be discussed. The limitations of the practical influence of regulatory language on the inclusion or exclusion of pregnant women in clinical research will then be assessed. Finally, this analysis will be built on in order to propose some steps that could be adopted moving forward, so as to move towards a regulatory classification that strikes a more appropriate balance between these harms.

The aim of this article is not to suggest that pregnant women should be mandated for inclusion in all clinical trials. There are undoubtedly situations in which clinical research involving pregnant women is inappropriate. However, it is suggested that it would be possible for the Regulation to classify pregnant women in a way that recognises the potential harms associated with their inclusion in clinical research, without perpetuating an approach that results in their blanket exclusion.

B THE CURRENT APPROACH

I Approach to Pregnant Women in Clinical Research and Medical Treatment

The Thalidomide and DES (diethylstilboestrol) Tragedies of the 20th century led to an increased understanding of the physiological interconnectedness of pregnant women and

foetuses.[5] The facts of these events will be expanded in greater detail below. For now, it is necessary to note that they also acted as a catalyst for the widespread adoption of an approach to pregnancy care and advice heavily influenced by the precautionary principle.[6] This principle advocates for action (or, as in the case of clinical research, inaction) to reduce threats of potentially serious, irreversible harm, before there is strong evidence of such harm.[7] The influence of this principle informs essentially all aspects of a pregnant woman's life, for example, limitations on dietary intake and a cautious approach to exercise.[8]

The current protectionist approach to the inclusion of pregnant women in clinical research, in which pregnancy constitutes 'a near automatic cause for exclusion', is likely motivated by this principle.[9] Pregnant women are rarely included in clinical trials, and the pharmaceutical industry routinely requires the use of contraception in female trial participants of reproductive age.[10] Women who become pregnant unintentionally are typically removed from trial participation.[11] This appears to be the approach taken in the vast majority of clinical trials, even if the clinical research in question is not expected to pose any risks to pregnant women, or where risks are negligible.[12]

The effects of this approach on the provision of medical treatment to pregnant women are significant. It is estimated that over half, and maybe even as high as 64-90%, of pregnant women take medication during pregnancy.[13] This is to treat both obstetric and non-obstetric conditions, such as asthma, diabetes, hypertension, epilepsy, depression, anxiety, and lupus.[14]

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[5] Lucy Langston, 'Better Safe than Sorry: Risk, Stigma, and Research During Pregnancy' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 40.
[6] Françoise Baylis and Angela Ballantyne, 'Missed Trials, Future Opportunities' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 2.
[7] ibid 1.
[8] ibid 3.
[9] Anne Drapkin Lyerly, Margaret Olivia Little and Ruth Faden, 'The Second Wave: Toward Responsible Inclusion of Pregnant Women in Research' (2008) 1(2) International Journal of Feminist Approaches to Bioethics 5, 6; Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 1.
[10] Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 660; Angela Ballantyne and Wendy Rogers, 'Pregnancy, Vulnerability and the Risk of Exploitation in Clinical Research' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 154.
[11] ibid 154.
[12] Indira van der Zande and others, 'Fair Inclusion of Pregnant Women in Clinical Research: A Systematic Review of Reported Reasons for Exclusion' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 73.
[13] J Scaffidi, BW Mol and JA Keelan, 'The Pregnant Women as a Drug Orphan: A Global Survey of Registered Clinical Trials of Pharmacological Interventions in Pregnancy' (2017) 124(1) An International Journal of Obstetrics and Gynaecology 132, 132; Rieke van der Graaf and others, 'Fair Inclusion of Pregnant Women in Clinical Trials: An Integrated Scientific and Ethical Approach' (2018) 19(1) Trials 78, 79.
[14] Françoise Baylis and Robyn MacQuarrie, 'Why Physicians and Women Should Want Pregnant Women Included in Clinical Trials' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving*

The major effects of this research-exclusionary approach is that these women are prescribed this medication on an 'off-label' basis, in the absence of robust clinical research data confirming the potential benefits and harms of these medications for use during pregnancy.[15] In addition, innovative medicines for this population are rarely developed.[16] Off-label prescription refers to the prescribing of an approved medication, but for unapproved conditions, or an approved condition, but in an unapproved patient population.[17] In this case, pregnant women are the unapproved patient population. As an alternative to off-label prescription for women who become pregnant while on a medication regimen for an existing condition, some pregnant women and their physicians will choose to forego medication that they would otherwise use, until they are no longer pregnant.[18]

A current prominent example of the influence of this protectionist approach on the provision of medical treatment to this population is the extent to which pregnant women have been considered in the development of a COVID-19 vaccine. The advent of the COVID-19 pandemic saw a global effort by the scientific community to develop preventative and curative measures to reduce the transmission of the virus. Enrolment of participants for clinical trials of a COVID-19 vaccination had already begun by the time the World Health Organisation declared the novel coronavirus a pandemic.[19] With this came calls for the inclusion of pregnant women in such clinical trials.[20] The rationale for this appeal is as follows; pregnant women are at a greater risk of severe COVID-19 compared with women of childbearing age who are not pregnant, and thus should be considered as candidates for preventative measures.[21] The immune response of pregnant women to the vaccination cannot be assumed from that of the general population.[22] Therefore, in order to produce evidence-based knowledge on the efficacy and safety of any vaccination in pregnant women, this population must be included in

Pregnant Women (Springer 2016) 19; Carolyn Ells and Caroline Lyster, 'Research Ethics Review of Drug Trials Targeting Medical Conditions of Pregnant Women' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 96; Van der Graaf and others (n 13) 79.

[15] Scaffidi, Mol and Keelan (n 13) 132; Baylis and MacQuarrie (n 14) 19.

[16] Van der Graaf and others (n 13) 79.

[17] Baylis and MacQuarrie (n 14) 21.

[18] Ells and Lyster (n 14) 102.

[19] American Journal of Managed Care Staff, 'A Timeline of COVID-19 Developments in 2020' (*American Journal of Managed Care*, 1 January 2021) <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> accessed 20 March 2021.

[20] Richard H Beigi and others, 'The Need for Inclusion of Pregnant Women in COVID-19 Vaccine Trials' (2021) 39(6) Vaccine 868, 868.

[21] 'Interim Recommendations for Use of the Pfizer-BioNTech COVID-19 Vaccine, BNT162b2, under Emergency Use Listing' (*World Health Organisation*, 8 January 2021) <https://www.who.int/publications/i/item/WHO-2019-nCoV-vaccines-SAGE_recommendation-BNT162b2-2021.1> accessed 20 March 2021.

[22] Beigi and others (n 20) 868.

appropriately designed clinical trials.[23] When pregnant women are not included in the development of pharmaceuticals, this regularly results in their exclusion from the delivery program of such pharmaceuticals.[24]

However, trends in the efforts to develop a vaccine indicate that pregnant women were excluded as participants in early vaccine trials and, in some cases, trial participants were required to be on 'effective contraceptives' for the entirety of the research.[25] The result of this is a dearth of evidence-based data on the safety and efficacy of available COVID-19 vaccines on the pregnant population, which has led to a hesitancy to offer vaccination to pregnant women and, in certain cases, a direct recommendation against vaccination in pregnancy, except in those at high risk of exposure.[26]

In a more general sense, it should be noted that there is a certain volume of safety data relating to the interaction of pharmaceuticals and the pregnant female anatomy. However, much of the data that is available on the effect of medications during pregnancy comes from adverse event registries, which track the use of certain medications in pregnant women. [27] It is thought that analysis of this data by physicians could be useful in guiding treatment decisions.[28] In some instances this approach is sufficient, such as when a drug is clearly registered as causing harm.[29] However, a weakness in this approach is that it requires patients and their physicians to firstly sign up to these registries, and then report results or adverse events themselves. It therefore lacks the formal regulations and controls designed to produce accuracy in clinical trials.[30] In addition, some physicians rely on extrapolation of dosing and safety data from clinical trials conducted on men and non-pregnant women.[31] However, the accuracy of this approach is limited, as pregnancy is known to alter the way that drugs are metabolised by the body.[32] During pregnancy, women experience increases in plasma volume, body weight, body

[23] Paul T Heath, Kirsty Le Doare and Asma Khalil, 'Inclusion of Pregnant Women in COVID-19 Vaccine Development' (2020) 20(9) The Lancet 1007, 1008.
[24] Beigi and others (n 20) 869.
[25] Farrell, Michie and Pope (n 4) 19.
[26] WHO (n 21); 'Interim Recommendations for Use of the Moderna mRNA-1273 Vaccine against COVID-19' (*World Health Organisation*, 25 January 2021) <https://www.who.int/publications/i/item/interim-recommendations-for-use-of-the-moderna-mrna-1273-vaccine-against-covid-19> accessed 20 March 2021.
[27] Baylis and MacQuarrie (n 14) 20; Langston (n 5) at 38.
[28] Ells and Lyster (n 14) 107.
[29] Baylis and MacQuarrie (n 14) 23.
[30] Ells and Lyster (n 14) 107.
[31] Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 661.
[32] Van der Graaf and others (n 13) 79.

fat, and hormone levels.[33] These changes are thought to make it very difficult to extrapolate therapeutic dosage for pregnant women from studies on men and non-pregnant women.[34]

In sum, the result of the current protectionist research-exclusion approach to pregnant women is that there is very little formal data on how to treat illnesses when they occur in the pregnant body, which has a significant influence on the way medical treatment is provided to pregnant women.[35]

II Classification of Pregnant Women in the New EU Clinical Trials Regulation

The classification of pregnant women in the Regulation is also likely influenced by this precautionary approach. The Regulation will replace the Clinical Trials Directive, which did not explicitly refer to pregnant women.[36] It is beneficial that the Regulation does give consideration to this population, but the manner in which it does so is problematic. The Regulation classifies pregnant women as a 'vulnerable population', and outlines certain additional conditions, which must be met before this population can participate in clinical research.[37] The Regulation draws a distinction between clinical research, which is intended to directly benefit the pregnant trial participant, and that which is designed to advance medical treatment for pregnant women generally.[38] There is now a broadly recognised need for greater clinical research for this latter purpose.[39] As discussed above, the scarcity of such research has resulted in a practice of prescribing medication to pregnant women on an off-label basis, or with broad reliance of safety data which is extrapolated from research involving non-pregnant participants.[40] Despite this, the Regulation mandates for even further prerequisites for the conduct of research for this purpose, and fails to outline a clear path for satisfaction of these conditions. While the aim of these conditions, to protect this population from potential harm, is defensible, the manner in which they are set out is somewhat vague.

The interpretation of these conditions thus constitutes a further burdensome step to be undertaken prior to the inclusion of pregnant women in clinical research designed to advance

[33] Baylis and MacQuarrie (n 14) 21.
[34] ibid.
[35] Drapkin Lyerly, Little and Faden (n 9) 7.
[36] Parliament and Council Directive 2001/20/EC of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use [2001] OJ L121/34.
[37] The Regulation (n 1) articles 10.3, 33.
[38] The Regulation (n 1) article 33(b).
[39] Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3).
[40] Scaffidi, Mol and Keelan (n 13) 132; Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 661.

medical treatment for this population. For example, such clinical research can only be conducted if it poses no more than a 'minimal risk to, and imposes minimal burden on' the pregnant woman concerned.[41] The Regulation does not provide a definition of 'minimal' risk or burden. In addition, although the manner of assessment for the authorisation of clinical research is a matter for each individual Member State to determine, the Regulation does mandate for the assessment of clinical research including pregnant women to include the consideration of additional 'specific expertise'.[42] The Regulation does not provide any greater detail on the content of such expertise, nor the body or individual from whom it must be sought. Yet, it prescribes an undefined yet more onerous deliberation to be carried out prior to the authorisation of clinical research involving this population for this purpose, as compared to that which is required prior to clinical research involving the non-pregnant population. The Regulation does not specifically mandate for the exclusion of pregnant women in clinical research. Yet, the requisite additional conditions that it does call for, in the absence of fiscal or legislative incentives, are likely to make the inclusion of pregnant women in clinical trials a more laborious task as compared to the enrolment of non-pregnant participants.[43]

In addition, the classification of this population as 'vulnerable' in such a weighty piece of legislation has the potential to perpetuate the precautionary approach outlined above, which encourages the exclusion of pregnant women from clinical research. As such, while the classification of pregnant women in the Regulation does not prohibit their involvement in clinical research, it certainly does not constitute an approach that facilitates their inclusion.

C VULNERABILITY OF PREGNANT WOMEN

The concept of vulnerability in clinical research is often referred to in national and international regulations and guidelines, but, as noted by Sheppard, a clear and widely adopted definition has yet to be established.[44] Before assessing the proficiency of the classification in striking an appropriate balance between the potential harms resulting from inclusion and exclusion of pregnant women in clinical research, it is useful to consider what is meant by the term 'vulnerability' in this context, and to assess its intended function.

[41] The Regulation (n 1) article 33(b)(ii).
[42] ibid s 19.
[43] Scaffidi, Mol and Keelan (n 13) 138.
[44] Maria Kreszentia Sheppard, 'Vulnerability, Therapeutic Misconception and Informed Consent: Is There a Need for Special Treatment of Pregnant Women in Fetus-Regarding Clinical Trials?' (2016) 42(2) Journal of Medical Ethics 127, 127.

It will be asserted that in relation to pregnant women in clinical research, vulnerability can be conceptualised in two key ways; inherent vulnerability of pregnant women to harms which can be suffered by everyone, and vulnerability of pregnant women by virtue of harms which are specific to this population. This analysis will then be applied to the wording of the Regulation.

I Inherent Vulnerability

The first conception is an inherent vulnerability, whereby pregnant women are at greater risk of suffering harm, by virtue of some particular characteristics, than other research participants. In this conception of vulnerability, the harms in question are constant; that is, they could be incurred by all individuals. The varying degrees of risk to suffering this harm is what determines vulnerability. This conception of vulnerability is that which is often discussed in relation to pregnant women. The purported limited capacity of pregnant women to provide informed consent, or a presumed increased likelihood of their being exploited, are often raised as factors that are thought to put them at greater risk of suffering general harms in clinical research than non-pregnant individuals.[45] While it is arguably inappropriate to classify pregnant women as vulnerable in any sense, it is particularly inappropriate to do so in relation to this conception of vulnerability. To illustrate this, the characteristics that supposedly render pregnant women vulnerable in this context will be examined. Namely, the veracity of the contention that the decision-making capacity of pregnant women is in some way limited will be discussed, as well as the assertion that pregnant women are more likely to be exploited.

(a) Capacity

The doctrine of informed consent has long held a position of significance in biomedical ethics.[46] Its purpose is to vindicate an individual's right to self-determination with regard to their own body.[47] As it applies to clinical research, this doctrine focuses on the rights of individuals to decide whether or not to take part in research and the right to information on which to base this decision.[48] There is a general presumption that adults who possess decision-making capacity are competent to provide voluntary, informed consent for participation in

[45] Rebecca J Helmreich and others, 'Research in Pregnant Women: The Challenges of Informed Consent' (2007) 11(6) Nursing for Women's Health 576, 578 and 580.
[46] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11th edn, Oxford University Press 2019) 64.
[47] ibid.
[48] Helmreich and others (n 45) 578.

clinical research.[49] So too are there a number of circumstances in which an individual is considered to lack this capacity, and is thus not in a position to provide this requisite informed consent.[50] Included among these is where an individual's state of mind is such as to render an apparent consent (or refusal) invalid.[51]

There is a body of academic opinion that considers pregnancy to be a circumstance that alters the state of mind of women, so as to challenge their capacity to provide informed consent to participate in clinical research.[52] Van der Zande and others highlight six authors in particular who argue that the decision-making capacity of this population is particularly impaired in periods of increased stress.[53] It has been asserted that pregnant women in such circumstances vary in both their ability to receive information, and to comprehend this information in order to make an informed decision.[54] An example regularly given of one such period is in the event of proposed enrolment into a clinical trial following the diagnosis of a foetal condition for which there is no alternative treatment option.[55] In a relatively recent paper, Sheppard comments that the emotions of a pregnant woman in such a scenario 'block' her decision-making capacity.[56] She further asserts that this emotional stress precipitated by the information regarding limited treatment options renders pregnant women less likely to comprehend the information being provided to them, thus undermining their decision-making capacity, invalidating their informed consent, and amplifying their vulnerability.[57]

However, while a highly stressful situation may have the potential to inhibit one's decision-making capacity, this is true for all people, not only pregnant women. Pregnant adult women, like all adult women, should be presumed to generally have the capacity to make decisions about their involvement in research. There is significant support for the contention that pregnancy itself does not challenge the decision-making capacity of women.[58] Women do not

[49] L Syd M Johnson, 'When Hypothetical Vulnerability Becomes Actual: Research Participation and the Autonomy of Pregnant Women' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 166.
[50] Laurie, Harmon and Dove (n 46) 65.
[51] ibid.
[52] Verina Wild, 'How Are Pregnant Women Vulnerable Research Participants?' (2012) 5(2) International Journal of Feminist Approaches to Bioethics 82, 86-87; Greer Donley, 'Encouraging Maternal Sacrifice: How Regulations Governing the Consumption of Pharmaceuticals During Pregnancy Prioritize Fetal Safety over Maternal Health and Autonomy' (2015) 39(1) NYU Review of Law and Social Change 45, 51; Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3); Van der Graaf and others (n 13).
[53] Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 659-660.
[54] Helmreich and others (n 45) 582.
[55] Sheppard (n 44) 128.
[56] ibid 129.
[57] ibid 130.
[58] Johnson (n 49) 170.

automatically lose their capacities when they become pregnant.[59] This is not to say that they, like everyone else, cannot encounter a particularly stressful situation in which their capacity is tested, but this does not justify labelling the entire population of pregnant women as vulnerable by virtue of limited decision-making capacity. Dealing with acutely stressful circumstances such as being in labour or making a decision regarding research participation shortly after receiving emotionally stressful news is not specific to pregnant women.[60] Their decision-making capacity in this sense has been compared to that of acute patients in the emergency room, or parents caring for a child with cancer.[61] The capacity of neither of these groups is broadly or generally questioned. It is submitted that there is no reason to assume that the decision-making capacity of competent adult pregnant women is at fault, and that such an assumption is not a valid justification for classifying pregnant women as inherently vulnerable.

(b) Exploitation

There is also a concern held by some that a woman's pregnancy renders her more likely to be exploited or coerced in clinical research, thus making her more vulnerable to the general harms associated with participation.[62] This perceived increased risk of exploitation is primarily considered to be as a result of the supposed lack of or limited decision-making capacity of pregnant women discussed above, which is thought to place this population in a situation whereby others could take unfair advantage of them, to their detriment.[63] As previously outlined, there is no logical reason to question the decision-making capacity of the entire population of pregnant women, and thus no cause for concern that they would be more vulnerable to coercion or exploitation than other research participants in this context. This author agrees with the assertion that being pregnant does not create any special or unique susceptibility to exploitation in research, and indeed, with the further assertion that pregnancy is likely to have the opposite effect.[64] The inclusion of pregnant women in clinical research does not make the research any easier, quicker or cheaper.[65] There are few (if any) fiscal or legislative incentives for pharmaceutical companies to include pregnant women in clinical

[59] ibid.
[60] S Fröhlich and others, 'Epidural Analgesia for Labour: Maternal Knowledge, Preferences and Informed Consent' (2011) 104(10) Irish Medical Journal 300; Rachel Reid and others, 'The Ethics of Obtaining Consent in Labour for Research' (2011) 51(6) Australian and New Zealand Journal of Obstetrics and Gynaecology 485, 491; Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 659.
[61] Van der Zande and others 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 660.
[62] Wild and Biller-Andorno (n 3) 133.
[63] Sheppard (n 44) 127.
[64] Johnson (n 49) 175.
[65] Ballantyne and Rogers (n 10) 151.

trials, but numerous deterrents.[66] Indeed, rather than being a circumstance that presents an opportunity for exploitation by researchers, pregnancy is more likely to be a factor that would lead to the exclusion of a subject by researchers from clinical research altogether.

On this basis, it is submitted that neither limited decision-making capacity, nor increased susceptibility to exploitation are characteristics that apply universally to pregnant women, and thus that it is inappropriate to class them as inherently vulnerable on the basis of these factors.

II Vulnerability by Virtue of Harms Specific to Pregnant Women

The second conception of vulnerability is the idea that pregnant women are vulnerable by virtue of being at risk of greater harms than non-pregnant research participants. This conception of vulnerability relates to specific, additional harms that can be incurred only by pregnant women. Pregnant women have a more complicated range of potentially more severe harms related to their participation in research, due mainly to the existence of the foetus, and the potential for harm not only to the pregnant woman, but also to the foetus, by virtue of the physiological interconnectedness of the two.[67]

Therefore, as outlined above, while pregnant women are not any more vulnerable per se to general harms associated with clinical research, this is not to say that they are not vulnerable to these specific harms in clinical research that simply do not apply to other participants. Accordingly, it is understandable that pregnant women could be conceived as being vulnerable in this more limited sense, and that the Regulation thus classes them as a vulnerable population so as to highlight the need to consider these harms and take all necessary precautions to protect pregnant women from them.

However, given that a vulnerability classification is so widely considered to be analogous to the first conception of vulnerability outlined above, a preferable manner of classification of pregnant women would be one which captures this vulnerability, or susceptibility to these specific harms, without calling into question the mental capacity of all pregnant women as a population, as the first conception does. An alternative classification, that would address the medical, or scientific vulnerability or complexity of pregnant women without making assertions about cognitive vulnerability, will be considered in greater detail below.

[66] Scaffidi, Mol and Keelan (n 13) 138.
[67] Langston (n 5) 37; Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 8.

In addition, the classification does not strike an appropriate balance between the harms associated with the inclusion and exclusion of pregnant women in clinical research, even if it is interpreted as the second conception of vulnerability outlined above. The purpose of classifying pregnant women as vulnerable in the Regulation is to restrict the conduct of clinical trials involving pregnant women unless certain conditions are met.[68] These are likely to make the inclusion of pregnant women in clinical research a more laborious task, thus acting as a barrier to inclusion. These specifications are likely intended to protect against the specific harms that are faced by pregnant women as clinical trial participants. Therefore, it is reasonable to consider the vulnerability classification in the Regulation to be associated with pregnant women's vulnerability to the harms related to their inclusion in clinical research only. What this classification does not consider is the vulnerability of pregnant women to the harms they could incur by virtue of being excluded from clinical research.

D HARMS

The classification of pregnant women in the Regulation follows a precautionary approach, which impedes the inclusion of pregnant women in clinical research, as a means of protecting them from the harms associated with their inclusion. Certainly, it is not difficult to understand the concern surrounding this risk of harm, and the hesitancy to conduct clinical research that includes pregnant women. However, it will be argued that the harms that pregnant women are put at risk of by virtue of their exclusion from clinical research are even greater. The Regulation does not address these parallel harms, and arguably adopts an approach, which furthers their materialisation.

I Cultural Legacy of Thalidomide and DES Tragedies

The Thalidomide and DES Tragedies of the mid-twentieth century have been described as 'a wakeup call regarding the dangers of pharmaceutical use during pregnancy'.[69] These events led to a heightened collective awareness, among both health care professionals and lay people, of the physiological interconnectedness of pregnant women and their foetuses.[70] Prior to these events, it was widely assumed that the placenta, and thus the foetus, were impervious to pharmaceuticals ingested by the pregnant women unless the pharmaceutical was a known

[68] The Regulation (n 1) ss 27, 34, articles 10.3, 33; Sheppard (n 44) 127.
[69] Langston (n 5) 33.
[70] ibid 39.

abortifacient.[71] Following these events, it is well understood that pharmaceuticals can cross the placental barrier, and have a profound effect on the development of the foetus.[72]

Thalidomide was widely prescribed from the late 1950s to the early 1960s for the treatment of nausea in pregnant women.[73] Although first developed and marketed as a sedative, it was increasingly prescribed on an off-label basis for the treatment of morning sickness.[74] This practice ended in 1962, following the identification of a causal link between the ingestion of Thalidomide by pregnant women, and the increase in cases of phocomelia (severe limb malformation) in the children born to them.[75] It is estimated that between 8,000 and 12,000 children were prenatally affected by exposure to Thalidomide in this period.[76]

From 1938 until 1971, DES, a synthetic oestrogen, was prescribed to an estimated 1.5 million to 3 million women to prevent miscarriage.[77] Evidence later emerged to suggest that it did not prevent miscarriage and, moreover, it was linked to several adverse effects in the daughters of women treated with the drug, including vaginal and cervical cancer.[78] A forty-fold increase in the risk of cancer has now been identified in women exposed to DES during foetal development.[79] Many of these women also suffer from other problems associated with this exposure including: changes in vaginal tissue, deformed or altered reproductive organs, and a higher than normal incidence of premature births.[80]

The collective memory of the significant harm caused by these tragedies plays a fundamental role in the reluctance to include pregnant women in clinical research.[81] In their immediate aftermath, the regulatory response, particularly in the US, was to prohibit the inclusion of pregnant women and, in some cases, all women of childbearing potential in clinical research.[82]

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[71] ibid 40.
[72] Ells and Lyster (n 14) 101.
[73] James Kim and Anthony Scialli, 'Thalidomide: The Tragedy of Birth Defects and the Effective Treatment of Disease' (2011) 122(1) Toxicological Sciences 1, 1.
[74] ibid.
[75] Langston (n 5) 34.
[76] ibid.
[77] Richard Gillam and Barton J Bernstein, 'Doing Harm: The DES Tragedy and Modern American Medicine' (1987) 9(1) The Public Historian 57, 58; Lori Allesee and Colleen M Gallagher, 'Pregnancy and Protection: The Ethics of Limiting a Pregnant Woman's Participation in Clinical Trials' (2011) 2(108) Journal of Clinical Research and Bioethics 1, 2; Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 5.
[78] S H Swan, 'Intrauterine Exposure to Diethylstilbestrol: Long-Term Effects in Humans' (2000) 108(12) APMIS 793, 794-795; Allesee and Gallagher (n 77) at 2.
[79] Langston (n 5) 33.
[80] Gillam and Bernstein (n 77) 59.
[81] Van der Graaf and others (n 13) 79-80.
[82] Food and Drug Administration Bureau of Drugs, 'General Considerations for the Clinical Evaluation of Drugs' (*US Department of Health, Education and Welfare*, September 1977) 10

Although the regulatory approach to this population is generally no longer to mandate for their exclusion, as will be explored below, such was the magnitude and far-reaching awareness of the harms caused by these events, that their broader cultural legacy is still persuasive. This comes in the form of an enduring belief that exposure to pharmaceuticals during pregnancy is an inherently risky endeavour, and that the most prudent option is to avoid this exposure wherever possible.[83] The newfound awareness triggered by these events of the physiological interconnectedness of the pregnant body and the foetus was a central precipitating factor in the adoption of the precautionary approach to pharmaceutical use during pregnancy.[84] The influence of this approach can still be identified in the classification of pregnant women in the Regulation, and in the low rates of inclusion of pregnant women in clinical research generally.

However, in as much as these tragedies were instructive as to the physiological connectedness of pregnant women and foetuses, and the potential harms associated with the exposure of pregnant women to pharmaceuticals, so too did they highlight the importance of comprehensive clinical research.[85] They brought into sharp focus the harms which can result from omitting to include pregnant women in this research. This is particularly true for the Thalidomide Tragedy. It was not inclusion in clinical research, but rather the failure to conduct clinical research of Thalidomide on pregnant women, prior to its prescription to this population, that explains the widespread birth defects associated with its use.[86] This drug was prescribed to pregnant women on an off-label basis.[87] They were not participating in clinical research.[88] Had its effects on this population been the subject of careful and responsible clinical research, it is likely that such research would have stopped after the identification of an adverse reaction, and the drug would not have been marketed to pregnant women.[89] The most important cultural legacy of this tragedy is, arguably, to highlight the importance of rigorous testing of pharmaceuticals on all relevant populations prior to their introduction into the marketplace.[90]

<https://www.fda.gov/media/71495/download> accessed 20 March 2021; Ruth B Merkatz, 'Inclusion of Women in Clinical Trials: A Historical Overview of Scientific, Ethical, and Legal Issues' (1998) 27(1) Journal of Obstetric, Gynaecologic, & Neonatal Nursing 78, 78.

[83] Langston (n 5) 39.

[84] ibid 46.

[85] Kim and Scialli (n 73) 1.

[86] Ells and Lyster (n 14) 110; Drapkin Lyerly, Little and Faden (n 9) 9.

[87] Ells and Lyster (n 14) 110.

[88] ibid.

[89] Drapkin Lyerly, Little and Faden (n 9) 9; Baylis and MacQuarrie (n 14) 25.

[90] Kim and Scialli (n 73) 1.

Such a practice could have prevented the harm caused by the congenital abnormalities resulting from decades of off-label use.[91]

Despite this, the response of legislators was, and based on the classification of pregnant women in the Regulation, still is, to adopt a precautionary approach, which limits the inclusion of pregnant women in clinical research.[92] This approach is precautionary only about one aspect of this tragedy, and ignores what is arguably the more valuable lesson. This approach serves to protect pregnant women from the harm associated with exposure to pharmaceuticals, but fails to consider the harm caused by the failure to include pregnant women in clinical testing of Thalidomide prior to its use on this population.

On the basis of the current approach to the medical treatment of pregnant women outlined above, where pregnant women are regularly prescribed medication on an off-label basis, it is possible that a similar outcome to these tragedies could materialise in the future. This is particularly the case in consideration of the DES Tragedy where, in some cases, the adverse effects of gestational exposure to DES did not become evident until affected children had reached puberty.[93]

The Thalidomide and DES Tragedies left a strong legacy, firstly, in the form of an expanded awareness of the permeability of the placenta, the susceptibility of foetuses to pharmaceuticals ingested by pregnant women, and the significant harm that can result from this. Secondly, they were hugely informative events in that they highlighted the harm that can result from prescribing medication to a population excluded from clinical testing of that medication. The subsequent precautionary approach to the inclusion of pregnant women in clinical research has been heavily influenced by this legacy. An example of this can be seen in the classification of pregnant women in the Regulation, which takes a very cautious approach, and by no means facilitates the inclusion of this population in clinical research.

In adopting this approach, it is submitted that the Regulation does not strike an appropriate balance between the harms associated with the inclusion and exclusion of pregnant women in clinical research. An approach devised in consideration of this second lesson, focusing on the importance of including pregnant women in clinical research and acknowledging the potential

[91] Ells and Lyster (n 14) 110.
[92] Drapkin Lyerly, Little and Faden (n 9) 9.
[93] Gillam and Bernstein (n 77) 59.

harms resulting from their exclusion, could have greater capacity to limit pregnant women's exposure to harm similar to that which was encountered in these events.

II Risk to Foetus in Clinical Research – Physiological Interconnectedness and the Risk of Ingesting Untested Pharmaceuticals

These tragedies marked the advent of a new understanding of the foetus as an operating part of the pregnant woman's physiology, and of a new awareness that pharmaceuticals ingested by the pregnant woman can have a profound effect on the development of the foetus.[94] As outlined above, the adverse outcome of the Thalidomide Tragedy in particular was the result of failing to include pregnant women in clinical trials of the drug, and thus, subsequently exposing them to untested pharmaceuticals each time it was prescribed to this population.[95] However, it must be acknowledged that exposure to untested pharmaceuticals is essentially what is involved in a clinical trial. It is therefore understandable that the awareness of the physiological interconnectedness of pregnant women and foetuses hastened by this tragedy precipitated a reluctance to include pregnant women in clinical research, where foetuses would be knowingly subjected to this risk of exposure to untested pharmaceuticals.

The reluctance to expose foetuses to potential harm from exposure to untested pharmaceuticals in the course of clinical research is defensible given that uncertainty and risk is inherent in all clinical research, and such research would not necessarily be directly beneficial to the pregnant participant and the foetus. This is by virtue of the fact that clinical research is primarily designed to benefit future generations, who may gain access to safe and effective treatments stemming from research, rather than the participants themselves.[96] This risk associated with ingesting untested pharmaceuticals is always present in clinical research, and all clinical research involves a 'trade-off' between risk of harm to the research participant and potential benefits to future generations.[97] This risk is accepted or justified on the basis of a risk-benefit analysis, but it is more difficult to justify this risk in clinical research involving pregnant women.[98]

[94] Ells and Lyster (n 14) 101.
[95] ibid 110.
[96] Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 4.
[97] ibid.
[98] ibid.

Zero risk cannot be unconditionally guaranteed for foetuses in clinical research.[99] Although there is ambiguity as to what constitutes an acceptable level of risk in clinical research in pregnant women, recent research conducted by Van der Graaf and others indicates that stakeholders (Research Ethics Committee members, healthcare professionals, pregnant women, researchers) generally deem clinical research in pregnant women to be acceptable only when the risks to the foetus are zero, or 'very close to zero'.[100] This, combined with the absence of direct benefit to the pregnant participant, makes the risk-benefit analysis of including pregnant women in clinical research particularly complex.[101] Given that there is always some risk inherent in clinical research, the only definite way to achieve zero risk, and to protect pregnant women and foetuses from the potential harm caused by ingesting untested pharmaceuticals in the course of clinical research, is to exclude them from such research altogether. Some stakeholders indicated that they would advise this course of action as it is the 'easiest way' to protect this population from these harms.[102]

However, such an approach overlooks the harms encountered by pregnant women when they are excluded from clinical research. While it is understandable that there is reluctance to expose pregnant women to anything other than a very low degree of risk in clinical research, it must be acknowledged that this exclusionary practice has the consequence of exposing pregnant women to a high degree of risk outside the context of clinical research. In adopting a precautionary approach to the inclusion of pregnant women in clinical research, the Regulation fails to recognise that one benefit of the inclusion of this population in clinical research is the avoidance of the harms associated with their exclusion.

As noted above, there appears to be a lower threshold for acceptable risk in clinical research involving pregnant women than there is in clinical research involving non-pregnant participants.[103] The existence of the foetus and its susceptibility to substances ingested by the pregnant woman seems to have the effect of magnifying the perceived risk of harm of ingesting untested pharmaceuticals in clinical research.[104] Indeed, it seems to amplify this risk of harm to such a degree that it is much more difficult to justify the inclusion of pregnant women in clinical research on the basis of a risk-benefit analysis than it is the non-pregnant population.

[99] Indira van der Zande and others, 'A Qualitative Study on Acceptable Levels of Risk for Pregnant Women in Clinical Research' (2017) 18 BMC Medical Ethics 35, 38.
[100] Van der Zande and others, 'Fair Inclusion of Pregnant Women in Clinical Research' (n 12) 73; ibid 43.
[101] Ells and Lyster (n 14) 100.
[102] Van der Zande and others, 'A Qualitative Study' (n 99) 39.
[103] ibid 38.
[104] ibid.

However, such an approach, which considers only the risk of harm borne by pregnant women when they are included in clinical research by ingesting untested pharmaceuticals and fails to recognise the risk of this harm borne by this population when they are excluded from clinical research, does not strike an appropriate balance between these parallel harms. In order to strike an appropriate balance, these harms of exclusion need to be considered, and the inclusion of this population in clinical research facilitated.

Pregnant women regularly ingest untested pharmaceuticals outside the context of clinical research.[105] As discussed above, the majority of medications prescribed to pregnant women have not been subject to clinical research in this population, and are prescribed on an off-label basis. [106] The dearth of robust clinical data about the safety and effectiveness of pharmaceuticals in pregnancy is a direct consequence of the exclusion of pregnant women from clinical research.[107] It is not contested that the risk of harm encountered by pregnant women when they ingest untested pharmaceuticals is severe. However, this potential harm exists whether the pharmaceutical is ingested within or outside the context of clinical research, and there is, arguably, a greater risk of pregnant women encountering this harm when they are excluded from clinical research than there would be if they were included.[108] Indeed, Kaposy asserts that risk of this harm could be better managed within clinical research than outside of clinical research.[109] In the course of clinical research, this ingestion and exposure to untested pharmaceuticals would be done on a strictly regulated basis. The medication would be formally assessed for safety and effectiveness, the pregnant woman and developing foetus would be carefully monitored for adverse events, and there would be clear safety parameters and stopping rules, in the event that these adverse events did materialise.[110] This is not the case when pregnant women are excluded from clinical research, and the risk of this exposure to untested pharmaceuticals is shifted from the context of carefully controlled and monitored research, to the context of the 'trial and error' of off-label prescription of medication.[111]

Therefore, pregnant women are subject to a greater risk of encountering harm from exposure to untested pharmaceuticals when they are excluded from clinical research, than they would be

[105] Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 657.
[106] Baylis and MacQuarrie (n 14) 19.
[107] ibid 20.
[108] ibid 27.
[109] Chris Kaposy, 'Presumptive Inclusion and Legitimate Exclusion Criteria' in Françoise Baylis and Angela Ballantyne (eds), *Clinical Research Involving Pregnant Women* (Springer 2016) 52.
[110] Baylis and MacQuarrie (n 14) 24.
[111] ibid.

by virtue of being included in clinical research. In its adoption of a precautionary approach to the inclusion of pregnant women in clinical research, the Regulation's classification considers only this risk of harm from exposure to pharmaceuticals as it applies to the inclusion of this population in clinical trials and overlooks the potential for this harm to be intensified if pregnant women are excluded from clinical research.

On a more general basis, in relation to the risk of harm to the foetus stemming from physiological interconnectedness with the pregnant woman, it is proffered that there is greater potential for harm associated with this when pregnant women are excluded from clinical research than there is in association with their inclusion. Up until this point this interconnectedness has been discussed in relation to the permeability of the placenta, and the susceptibility of the foetus to that which is ingested by the pregnant woman. However, its relevance to the potential for harm to the foetus stretches beyond this.

The foetus is a physiological, functional part of the pregnant woman's body, which means that its health is largely dependent on the health of the pregnant woman.[112] As discussed above, the exclusion of pregnant women from clinical research has resulted in a lack of safe and effective treatment options for pregnant women. This has the capacity to have a detrimental effect on the health of this population, which can, in turn, have a detrimental effect on the health of the foetus.[113]

As examined above, as a result of the absence of clinical research on the safety and effectiveness of medications during pregnancy, many women who become pregnant while on a medication regimen for a pre-existing condition will modify the dosage or discontinue use of these prescription medications until they are no longer pregnant.[114] Omitting to treat these sometimes serious medical conditions, including asthma, diabetes, hypertension, epilepsy, depression, anxiety and lupus, can pose a significant risk to the health of both the pregnant woman and the foetus.[115] For example, a study conducted by Zetstra-van der Woude and others suggests that approximately 30% of women with asthma will reduce or discontinue treatment when they become pregnant.[116] The result of this is a significant worsening of the asthma of these women and, consequently, a deprivation of oxygen to the developing foetus.[117] This has

[112] Johnson (n 49) 172.
[113] Ells and Lyster (n 14) 110.
[114] ibid 102.
[115] Baylis and MacQuarrie (n 14) 19; Ells and Lyster (n 14) 96.
[116] Priscilla A Zetstra-van der Woude and others, 'A Population Analysis of Prescriptions for Asthma Medications During Pregnancy' (2013) 131(3) Journal of Allergy and Clinical Immunology 711.
[117] ibid 716; Baylis and MacQuarrie (n 14) 41.

been associated with foetal growth restriction, premature birth and low birth weights.[118] In attempting to avoid the potential risk of harm to the foetus caused by untested asthma medications, the developing foetus is subjected to a known risk of harm in the form of oxygen deprivation.

The classification of pregnant women in the Regulation embraces a precautionary approach to this population and fails to facilitate their inclusion in clinical research. In doing this, it overlooks what are arguably the greater harms to which pregnant women are exposed when they are excluded from clinical research. Consequently, it does not strike an appropriate balance between these harms.

III Interests of Justice Perspective

It has been argued that while it is defensible to seek to avoid the exposure of pregnant women to harm in clinical research, the harms associated with their exclusion from this research are equally onerous, if not more so, and that these harms are not being given sufficient legislative attention in the Regulation. Finally, it is worthwhile to view the exclusion of pregnant women from clinical research through the lens of justice and fairness.

It is asserted by Drapkin Lyerly and others that 'access to research, not just protection from its risks, is a constitutive part of the ethical mandates of clinical research'.[119] It is further asserted by Baylis and Ballantyne that, as a matter of justice, pregnant women are entitled to high quality, evidence-informed medical care, at least to the standard that is provided to members of the general population.[120] The Regulation's classification adheres to a precautionary approach that does not facilitate this access to research for pregnant women. As explored above, the result of this research exclusion is that this population is precluded from accessing the standard of medical treatment provided to the general population. While the probable motivation of this approach, to protect pregnant women from harm, is comprehensible, the effect is that pregnant women are now a medically disadvantaged group, and lack the information about treatment options that is available to non-pregnant patients.[121] The general widespread reluctance to adopt a research agenda with a diverse range of subjects has resulted in a disproportionate body of clinical data on treatment options for middle-aged or young white

[118] Drapkin Lyerly, Little and Faden (n 9) 9.
[119] Drapkin Lyerly, Little and Faden (n 9) 11.
[120] Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 5.
[121] Van der Zande and others, 'Vulnerability of Pregnant Women in Clinical Research' (n 3) 660; Ballantyne and Rogers (n 10) 145.

men, as a result of an almost singular reliance on this population as research subjects over the last sixty years.[122] While the range of clinical research subjects is now more representative of the general population, there continues to be a practice of research exclusion in pregnant women.[123]

Pregnancy is not a circumstance that should undermine women's entitlement to the same high quality, evidence-informed medical care as other patients. In the interests of justice and fairness, the inclusion of pregnant women should be approached in the same way as non-pregnant populations.[124] It is not the case that, in the interests of justice, pregnant women should be included in all clinical research, regardless of the risks and benefits. Rather, fairness requires that the inclusion of pregnant women in clinical research is facilitated, unless there are legitimate grounds for exclusion.

In sum, pregnant women should be entitled to the protections that are afforded to the general population. They cannot be protected to the same standard as the general population merely by omitting to include them in clinical research. To do so is to subject them to a lower standard of medical treatment than the non-pregnant population and expose them to countervailing harms associated with their exclusion from clinical research. The exclusion of pregnant women from clinical research is harmful not only to this population, but to the interests of justice and fairness generally. The Regulation's classification overlooks this aspect of harm related to this exclusion, and in doing so, fails to strike an appropriate balance between them and the harms associated with inclusion.

E LANGUAGE AND LIMITATIONS OF REGULATIONS AND GUIDELINES

The harms associated with the exclusion of pregnant women from clinical research are becoming more broadly recognised. Baylis and Ballantyne note that there is a body of academic work advocating for the fair inclusion of pregnant women in clinical research.[125] In addition, this narrative is reflected in a shift in the language of international regulations and guidelines governing clinical research.

An example of this shift can be identified in the current iteration of the Ethical Guidelines for Health-Related Research Involving Humans of the Council for International Organisations of

[122] Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 7.
[123] ibid.
[124] Van der Zande and others, 'Fair Inclusion of Pregnant Women in Clinical Research' (n 12) 73.
[125] Baylis and Ballantyne, 'Missed Trials, Future Opportunities' (n 6) 5.

Medical Sciences (CIOMS).[126] These guidelines specifically state that pregnant women should be presumed eligible for inclusion in clinical research and that research designed to obtain knowledge on the health needs of pregnant women should be promoted.[127] This represents a marked shift in narrative from previous versions. The 1993 CIOMS Guidelines took a much more precautionary approach and stated that under no circumstance should pregnant women be the subjects of clinical research unless the research carried no more than minimal risk to the foetus and the object of the research was to obtain knowledge about lactation or pregnancy.[128] Research in pregnant women for the purpose of advancing medical treatment for this population was not permissible.

Moreover, in their recent review of what they considered to be the nine major international clinical research guidelines, Ells and Lyster identified only one – the American Federal Policy for the Protection of Human Subjects – which classified pregnant women as vulnerable with respect to inclusion in clinical research.[129] This review did not include the new EU Regulation, but it does serve to highlight the incoming Regulation as something of an outlier in the international regulatory narrative surrounding pregnant women in clinical research. The position of pregnant women in clinical research was not considered in the EU Directive. With the incoming Regulation, the EU had the opportunity to remedy this omission, and to do so in a manner in line with the shift that can be identified in international regulations and guidelines. Instead, by classifying pregnant women as a vulnerable population in clinical research, the Regulation fails to adhere to this shift in narrative, and follows an approach, which is not widely adopted elsewhere in the international regulatory framework. Based on the harms which have been analysed in relation to the exclusion of pregnant women from clinical research, this can reasonably be identified as a missed opportunity.

However, it must be noted that the capacity of the language of regulations and guidelines to actually have a practical effect on the rate of inclusion of pregnant women in clinical research

[126] Council for International Organisations of Medical Sciences and the World Health Organisation, 'International Ethical Guidelines for Health-Related Research Involving Humans' (*Council for International Organisations of Medical Sciences*, 2016) <https://cioms.ch/wp-content/uploads/2017/01/WEB-CIOMS-EthicalGuidelines.pdf> accessed 20 March 2021.
[127] ibid 71.
[128] Council for International Organisations of Medical Sciences and the World Health Organisation, 'International Ethical Guidelines for Biomedical Research Involving Human Subjects' (*Council for International Organisations of Medical Sciences*, 2002) 36 <https://cioms.ch/wp-content/uploads/2016/08/International_Ethical_Guidelines_for_Biomedical_Research_Involving_Human_Subjects.pdf> accessed 20 March 2021.
[129] Ells and Lyster (n 14) 99; Protection of Human Subjects (The Common Rule), 45 CFR 46 (2017) subpart A (US); Institutional Review Boards, 21 CFR 56 (1981) subpart C (US).

is probably quite limited. The Regulation's classification of pregnant women does not strike an appropriate balance between the harms associated with their inclusion and exclusion in clinical research, but this is not to assert that a more appropriately balanced classification would automatically lead to fairer research inclusion of this population. This is due to the fact that their under-representation is unlikely due solely to any legislative measure.

While there is an identifiable regulatory shift towards a narrative facilitating the inclusion of pregnant women in clinical research, there continues to be variation in the language used among international regulations and guidelines. Despite this, under-representation of pregnant women in clinical research is relatively consistent internationally.[130] For this reason, the widespread exclusion of pregnant women from clinical research is not solely as a result of their regulatory classification. Rather, it is more likely due to a much broader cultural narrative surrounding pregnant women than it is to any regulation or guideline.[131]

However, amending the language of regulations and guidelines so that they do not reflect this narrative could be a first step in changing this perception of pregnant women, and increasing their access to clinical research. It is likely that this shift in narrative would also be necessary in order to iron out some of the practical issues with regard to actually conducting clinical trials with pregnant women, namely the engagement of research subjects. Pregnant women might be unlikely to willingly partake in clinical trials if they are relying only on the current cultural narrative. In its classification of pregnant women as a vulnerable population, the Regulation has failed to take this step towards amending this perception. Instead, it perpetuates this cultural narrative by adopting an inappropriately balanced approach, which focuses only on the harms associated with the inclusion of pregnant women in clinical research and overlooks the benefits of this practice.

F MOVING FORWARD

It is important to recognise that an approach, which focuses solely on the harms associated with the exclusion of pregnant women from clinical research, and mandates for their inclusion in all research would equally fail to strike an appropriate balance. It is accepted that there are grounds for the legitimate exclusion of pregnant women from clinical research. These include practical reasons, such as when the object of clinical research is a drug or intervention that is unlikely to

[130] Scaffidi, Mol and Keelan (n 13) 132.
[131] Kaposy (n 109) 61.

be used or needed in the population of pregnant women.[132] This may be the case with clinical research concerning diseases or conditions that are not known to affect pregnant women.[133] Similarly, a compelling reason for excluding pregnant women from clinical research could be where such research poses a particularly high risk to this population.[134] For example, where pre-clinical studies or animal studies have produced evidence of teratogenicity.[135] However, Kaposy has noted that this ground for exclusion may be dependent on the pregnant woman's choice regarding continuing or terminating the pregnancy.[136] He comments that pregnant women need not be excluded on this basis from research that poses high risks to the foetus where the pregnant woman has made a firm decision to terminate her pregnancy.[137]

As such, a balanced approach does not demand the inclusion of pregnant women in all clinical research. It merely requires the decision to exclude pregnant women from clinical research to be trial specific and is one that does not recognise pregnancy itself as an automatic ground for exclusion.[138] It pays deference to the potential harms of both including and excluding pregnant women from particular clinical research, and gives consideration to the potential magnitude of these respective harms in regard to that particular research. Some possible amendments to the classification of pregnant women in the Regulation will now be explored, that would align it with this approach and strike a more appropriate balance between these harms.

This could be achieved by amending the language of the Regulation so that it resembles more closely that used in the CIOMS Guidelines.[139] As discussed above, these guidelines state that a general policy of excluding women who are capable of becoming pregnant from clinical research is unjust, and that pregnant women should be presumed to be eligible for participation in clinical research.[140] Johnson notes that the CIOMS Guidelines, accordingly, guard against automatic and unjustified research exclusion of women who are pregnant.[141] This protects against the harms associated with their exclusion, but does not mandate for their unconditional inclusion, thus also acknowledging the potential harms associated with their inclusion. This

[132] ibid 56.
[133] ibid 56.
[134] Van der Graaf and others (n 13) 80.
[135] ibid.
[136] Kaposy (n 109) 52, 59.
[137] ibid.
[138] ibid.
[139] CIOMS, 'International Ethical Guidelines for Health-Related Research Involving Humans' (n 126).
[140] ibid Guideline 16.
[141] Johnson (n 49) 164.

strikes a much more appropriate balance between these harms than the current classification in the Regulation.

In addition, it could be of benefit to adopt the recommendation of Kaposy, and to include in the Regulation an obligation on researchers to provide written justifications for exclusion when pregnant women are not included in a research population.[142] This would provide a legislative incentive to adhere to the more balanced approach, modelled on the CIOMS Guidelines, and would elevate the inclusion of pregnant women in clinical research from an option to the default position.

Finally, in its 2018 Industry Guidance, the US Food and Drug Administration (FDA) recommends that pregnant women be reclassified as a 'scientifically complex' population rather than a vulnerable population.[143] This sentiment is echoed by Blehar and others, who recommend their reclassification as a 'medically complex' population.[144] While it has been argued above that it may not be useful to label pregnant women as one homogenous group by virtue of their reproductive status, it is suggested that a classification of medically or scientifically complex is preferable to one classifying this group as vulnerable. A reclassification of pregnant women in this way in the Regulation would reflect the reality of the current lack of scientific and medical knowledge about this population as a result of their exclusion from clinical research, and would not preclude their future inclusion, nor would it constitute an assertion as to the mental capacity of the population of pregnant women.

G CONCLUSION

The aim of this article was to examine the extent to which the classification of pregnant women in the new EU Clinical Trials Regulation strikes an appropriate balance between the harms associated with the inclusion and exclusion of this population from clinical research. In light of the foregoing analysis, it is contended that the Regulation fails to achieve this. While the harms on both sides of this question are cause for careful consideration, it is concluded that the harms associated with the exclusion of pregnant women from clinical research have the potential to expose this population to greater damage than those associated with their inclusion.

[142] Kaposy (n 109) 58, 59.
[143] Lynne P Yao, 'New Guidance for Industry on Pregnant Women and Risk Communication Advisory Committee Meeting on the Pregnancy and Lactation Labeling Rule' (*Food and Drug Administration*, 14 May 2018) <https://www.nichd.nih.gov/sites/default/files/2018-05/03-Risk_Communication_Advisory.pdf> accessed 20 March 2021.
[144] Mary C Blehar and others, 'Enrolling Pregnant Women: Issues in Clinical Research' (2013) 23(1) Women's Health Issues 39, 42.

In classifying pregnant women as a ‘vulnerable population’ and considering this population only in the context of what additional conditions must be met prior to their inclusion in clinical research, the Regulation focuses on protection only against the potential harms associated with this inclusion. In omitting to consider necessary protection against the harms precipitated by the exclusion of pregnant women from clinical research, the Regulation’s classification does not reflect the reality of these competing harms and does not adopt an appropriately balanced approach to protect against them.

The result of the Regulation’s failure to facilitate the inclusion of pregnant women in clinical research is that it has not adhered to the move towards a more inclusive approach to pregnant women in clinical research, which can be identified in much of the international regulatory framework governing clinical research. The need for this more inclusive approach is especially evident in the current climate, where pregnant women have been predominantly excluded from participating in clinical research surrounding the development of a vaccine for COVID-19. This has resulted in a deficiency in the available safety data on the effects of the available vaccines in this population, and thus, an unwillingness to include pregnant women in vaccine delivery programmes.

The inadequacy of the Regulation’s classification of this population might be remedied by a reclassification of pregnant women as medically or scientifically complex, a move towards wording modelled on the CIOMS Guidelines, and the adoption of an obligation on researchers to justify their exclusion of pregnant women from clinical research. This could allow the Regulation to strike a more appropriate balance between the harms associated with the inclusion and exclusion of pregnant women in clinical research, and facilitate this population’s access to research and thus, high quality, evidence-informed medical care.

THE STRAW THAT BROKE THE DRAGON'S BACK: A CRITICAL ANALYSIS OF THE EU REGULATION ON THE SCREENING OF FOREIGN DIRECT INVESTMENTS. HOW WILL THE REGULATION INFLUENCE CHINESE FDI IN EUROPE AND DOES A REGULATORY ALTERNATIVE EXIST WITHIN EU COMPETITION LAW?

Shane O'Hanlon*

A INTRODUCTION

Traditionally, the laws and policies of the European Union (EU) have focused on developing a commercial environment that facilitates foreign investment.[1] As such, the free movement of capital under article 63 of the Treaty on the Functioning of the European Union (TFEU) has long remained a cornerstone of EU economic law that underpinned these values.[2] This openness has translated directly in shaping the EU's economic landscape in which Third Country-Investors control 3% of EU companies and 35% of assets.[3] However, the recent geopolitical onslaught experienced at the hands of Brexit, the Trump presidency and the rise of China as a global superpower, has led to the steady erosion of the EU's liberal policy on foreign investment, giving way to rising economic nationalism. Amongst a cacophony of protectionist sentiment, no cry has been heard louder than the opposition to economic and security threats posed by Chinese investment. The growing tensions are perfectly encapsulated in the European Commission's (the Commission) recent publication, branding China a 'systemic rival' to the EU.[4] China's unique approach to economic policy brings with it a number of unprecedented legal and political challenges which, if left unaddressed, have the potential to exploit the EU's liberal investment regime.

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[1] Alison Jones and John Davies, 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) European Competition Journal 453, 458-459.

[2] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, article 63.

[3] Commission, 'Foreign Direct Investment in the EU' (Commission Staff Working Document) SWD (2019) 108 final, 67.

[4] Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'EU-China - A Strategic Outlook' (Communication) JOIN (2019) 5 final, 1.

Chinese outbound acquisitions in Europe have grown dramatically in the last 10 years, with FDI increasing by 50 times from €700 million in 2008 to €35 billion in 2016.[5] A key feature of this surge is that FDI has regularly taken the form of acquisitions by Chinese State-Owned Enterprises (SOEs) in sensitive or strategically important sectors.[6] Therefore, the tactical use of SOEs in outbound FDI transactions as a staple of Chinese economic policy is a source of concern for both European leaders and institutions. As the COVID-19 pandemic sets to further cement China's position within the global order, it has never been more important for the EU to develop safeguards against threats posed by Chinese investment, whilst maximising on this major source of external capital. The solution to this difficult balancing act has been proposed in the form of the EU Regulation on the Screening of Foreign Direct Investments (FDI Screening Regulation).[7] This EU FDI screening framework is unprecedented and became fully operational on 11 October 2020.[8] In light of these significant developments, this author seeks to: explore the unique economic and security threats posed by Chinese FDI; analyse the FDI Regulation, the impact that it will have on Chinese FDI and its overall effectiveness; investigate the potential for the FDI Regulation to develop into a system of centralised FDI screening; and determine whether a regulatory alternative exists under the EU Merger Regulation (EUMR).[9]

B AN OVERVIEW OF CHINESE FDI IN EUROPE

I The Corporate Structure of Chinese SOEs

In the case of mixed-ownership SOEs such as China's, the government state is the majority shareholder of the company which also has private-sector shareholders.[10] The Chinese government has a particularly pervasive role within the structure and governance of these enterprises. In accordance with article 19 of the Chinese Company Law, there must be a party

[5] Thilo Hanemann and Mikko Huotari, 'EU-China FDI: Working Towards More Reciprocity in Investment Relations' (*Mercator Institute for Chinese Studies*, 2018) 10 <https://merics.org/sites/default/files/2020-04/180723_MERICS-COFDI-Update_final_0.pdf> accessed 17 March 2021.
[6] Frank Bickenbach and Wan-Hsin Liu, 'Chinese Direct Investment in Europe - Challenges for EU FDI Policy' (2018) 19(4) CESifo Forum 15.
[7] Parliament and Council Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1.
[8] ibid, article 17.
[9] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.
[10] Evan B Shaver, 'Two Paths to Development: Policy Channelling and Listed State-Owned Enterprise Management in Peru and Colombia' (2019) 21(4) University of Pennsylvania Journal of Business Law 1006, 1012.

committee within each member of an SOEs corporate group.[11] Whilst these committees serve a supervisory function, their main purpose is political in ensuring that the company aligns itself with party principles and communicating campaigns issued by senior party leaders.[12] More than 50% of directors in listed SOEs tend to be appointed by the state, typically consisting of former bureaucrats and politicians.[13] This has led to the finding that many boards of directors are unable to operate independently from the controlling shareholder, and it has been suggested that they may even collude alongside the controlling shareholder in line with the view that they owe their fiduciary duty to the state.[14] A striking reform to the Chinese constitution in 2017 grants the party committee even further reaching powers to play a key leadership role and decide on major issues of their enterprises.[15] This provision essentially allows the party committee to supersede the board with regard to any material business decisions.[16] Therefore, a key feature of the governance of Chinese SOEs is that in many cases they are penetrated by heavy institutional linkages. Accordingly, a primary concern posed to the EU's liberalised investment landscape from investment by Chinese SOEs, is the potential for these companies to be used as a vessel to achieve the Chinese Communist Party's policy objectives rather than to participate in legitimate commercial activity.[17]

Typically, corporate board decisions will be driven by a singular objective, increasing the company's share value to maximise profit. However, when the government is a controlling shareholder of an SOE, they may instead use the corporate form as a tool to implement public policy objectives, which is most commonly the advancement of national industrial policy goals.[18] This is typically viewed as an effective way of shielding governmental action from the attention of the public and to avoid the longer and more costly route posed by regulation.[19] Whilst, the utilisation of state ownership to achieve policy objectives is not unique to Chinese

[11] Company Law of the People's Republic of China (中国共和国公司法) (promulgated by the Standing Committee of the National People's Congress on 29 December 1993, revised 26 October 2018, effective 26 October 2018), article 19.
[12] Jeffrey N Gordon and Curtis J Milhaupt, 'China as a "National Strategic Buyer": Towards a Multilateral Regime for Cross-Border M&A' [2019] 1 Columbia Business Law Review 192, 216.
[13] Nancy Huyghebaert and Lihong Wang, 'Expropriation of Minority Investors in Chinese Listed Firms: The Role of Internal and External Corporate Governance Mechanisms' (2012) 20(3) Corporate Governance: An International Review 308, 328.
[14] ibid.
[15] Xianchu Zhang, 'Integration of CCP Leadership with Corporate Governance: Leading Role or Dismemberment?' [2019] 1 China Perspectives 55, 58-59; Jennifer Hughes, 'China's Communist Party Writes Itself into Company Law' *Financial Times* (Hong Kong, 14 August 2017) <https://www.ft.com/content/a4b28218-80db-11e7-94e2-c5b903247afd> accessed 20 March 2021.
[16] Gordon and Milhaupt (n 12) 217.
[17] ibid.
[18] Shaver (n 10) 1011.
[19] ibid.

SOEs, it is the particular governance characteristics of Chinese SOEs and large amount of control afforded to the state, which allows them to be potent instruments of 'economic statecraft' in Europe.[20]

II The Hostile Takeover of European Technologies

A frequently voiced concern is that Chinese FDI may result in a unilateral transfer of technologies and economic activities from Europe to China, as China's outwards FDI has heavily concentrated in the acquisition of EU high-end manufacturing technology companies.[21] China is still regarded as an emerging market and it has been clear in its pursuit of an industrial policy that promotes its technological progression through the means of outward FDI.[22] This has generated concern over the potential for Chinese acquirers to submit to industrial rather than commercial logic when deciding on where to deploy the acquired company's new technologies and where it locates its research and development activities. If these activities are subsequently conducted for political reasons rather than those of market competitiveness, Europe is vulnerable to losing its technological edge and economic competitiveness to China.[23] The acquisition of research and development centres in advanced economies to acquire foreign know-how has, in fact, been promoted by China's national development planning body as part of its 'Made in China 2025' economic strategy.[24] A particularly controversial transaction was the Chinese takeover of German industrial champion Kuka, by Midea, a listed Chinese electrical appliance company.[25] It was this acquisition that acted as a catalyst in advancing the narrative for greater competence for the screening of sensitive Chinese investments in Europe.[26] This has led to a legitimate concern that coordinated Chinese state-backed investment could undermine European companies' technological leadership over time.[27] As a result, there are rising calls for European industrial policy to develop safeguards to protect domestic 'national champions' in high-end technological and manufacturing sectors from acquisitions by Chinese SOEs.

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[20] James Reilly, 'China's Economic Statecraft in Europe' (2017) 15(2) Asia Europe Journal 173.
[21] Jonathan Watson, 'Have We Reached Peak Globalisation?' (*IBA Global Insight*, 11 April 2018) <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=0f4871be-2d03-4f86-84eb-d9a995fa8096> accessed 17 March 2021.
[22] Bickenbach and Liu (n 6) 16.
[23] ibid.
[24] Jan Knoerick and Tina Miedtank, 'The Idiosyncratic Nature of Chinese Foreign Direct Investment in Europe' (2018) 19(4) CESifo Forum 3, 5.
[25] Edward Taylor and Ludwig Burger, 'China's Midea Makes $5-Billion Bid for German Robot Maker Kuka' *Reuters* (Frankfurt, 18 May 2016).
[26] Watson (n 21) 20-21.
[27] ibid.

III Chinese FDI in the European Energy Sector: National Security Concerns

A further source of concern has been the growth of Chinese investment in the European energy sector.[28] The EU is heavily reliant on third-country investment in order to achieve its planned energy infrastructure development objectives under its 2030 Framework for Climate and Energy Policies. China has more than obliged in filling this gap in investment, and has directed 28% of investment capital within the European energy sector.[29] It is recognised that Chinese investment in the energy sector is similarly conducted for both commercial and political purposes.[30] The combination of China's status as a rising superpower and of investments being almost exclusively made by SOEs, has generated significant national security concerns regarding the operation of Member States' energy infrastructure and generation of their energy supply.[31] Furthermore, as China is not a security ally of the EU, Chinese FDI in the energy sector poses the threat of facilitating commercial and state espionage, creating the possibility for dual use technologies to be transferred into the wrong hands.[32] These investment patterns of the acquisition of strategic assets by SOEs are evidenced by the Chinese acquisitions of Italy's Eni Spa and Enel(Gas), Energias de Portugal, Redes Energetics and GDF Suez of France.[33] Therefore, a key challenge facing the EU is that of capitalising on the much needed Chinese investment in the European energy sector, whilst protecting its national security interests.

IV Reciprocity in EU-China Investment Relations

The Commission's disillusionment with the strategic takeovers of key European companies by Chinese SOEs is exacerbated by the lack of reciprocity which China has demonstrated to EU outbound investment. Francois Godement, Director of the European Council on Foreign Relations, has stated that 'China is very much inside Europe while simultaneously shutting much of Europe out of China'.[34] This attitude was similarly conveyed by the Commission in

[28] Björn Conrad and Genia Kostka, 'Chinese Investments in Europe's Energy Sector: Risks and Opportunities?' (2017) 101 Energy Policy 644, 645.
[29] Marc Bungenberg and Angshuman Hazarika, 'Chinese Foreign Investments in the European Union Energy Sector: The Regulation of Security Concerns' (2019) 20(2-3) The Journal of World Investment & Trade 375, 380.
[30] ibid.
[31] ibid.
[32] Sophie Meunier, 'Divide and Conquer? China and the Cacophony of Foreign Investment Rules in the EU' (2014) 21(7) Journal of European Public Policy 996, 1009.
[33] Bungenberg and Hazarika (n 29) 380.
[34] François Godement and Abigaël Vasselier, 'China at the Gates: A New Power Audit of EU-China Relations' (*European Council on Foreign Relations*, 1 December 2017) 90 <https://ecfr.eu/wp-content/uploads/China_Power_Audit.pdf> accessed 17 March 2021.

its recent policy publication on EU-China relations.[35] The Chinese government has acknowledged that its FDI governance is a key tenet of planned economic reforms, and in 2015 the State Council announced that it would reform its inwards FDI controls so as to make the Chinese market more accessible to foreign investors.[36] Whilst these reforms are eagerly awaited, the timeline for implementation has not yet been clarified. Furthermore, the scope of application of national security and competition policy reviews has not been sufficiently defined and codified. It is, therefore, incumbent on the EU institutions to take positive actions to advance fast and efficient FDI reforms by China.[37]

V The European Response

In light of the string of high-profile acquisitions mentioned above, Germany, France and Italy issued a joint statement calling for the Commission to develop regulations that give Member States wider powers to investigate individual takeovers and to block them if applicable.[38] Within the same year the Commission proposed a Regulation that would create an EU framework for the screening of FDI (the Proposal).[39] It must be noted that these regulatory changes are not solely dedicated to screening Chinese FDI, as a number of these developments are welcome in general. However, Chinese FDI in Europe is considered largely responsible for fuelling these changes.[40] The proposal was finalised and adopted from 19 March 2019 and the FDI Screening Regulation came into force on 11 October 2020.[41]

C THE EU FDI SCREENING REGULATION: AN ANALYSIS

The ratification of the Treaty of Lisbon in 2009 successfully led to the competence to regulate FDI being moved from the responsibility of each individual Member State to that of

[35] Commission and High Representative of the Union for Foreign Affairs and Security Policy (n 4).
[36] The State Council is the highest executive and administrative organ of government in China. It is composed of the premier, vice premiers, state councillors, and the secretary general. Ministries, Commissions, and other groups are under the State Council; Foreign Investment Law of the People's Republic of China (中华人民共和国外商投资法) (promulgated by the National People's Congress on 15 March 2019, effective 1 January 2020), article 35.
[37] At the time of writing this paper, the European Commission has been engaged in negotiations for an EU-China Investment Agreement. A concluded agreement will likely advance the issue of Chinese FDI Reforms and greater market access for European Companies investing in China.
[38] Bas Hooijmaaijers, 'Blackening Skies for Chinese Investment in the EU?' (2019) 24(3) Journal of Chinese Political Science 451.
[39] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union' COM (2017) 487 final, 10.
[40] Eric Maurice, 'EU Preparing to Screen Chinese Investments' *EU Observer* (Brussels, 14 September 2017) <https://euobserver.com/economic/139015> accessed 17 March 2021: 'if a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen with transparency, with scrutiny, and debate'.
[41] FDI Screening Regulation (n 7) article 17.

the EU.[42] The regulation of FDI is now provided for in the Common Commercial Policy (CCP) pursuant to articles 3(1)(e) and 207(1) TFEU.[43] Whilst the regulation of FDI at the European level is, therefore, not a novel concept, it was not until 2017 that direct action was taken to harmonise EU FDI policy for the economic and political reasons discussed above.[44] FDI is defined within article 2 of the FDI Regulation.[45]

I The Cooperation Mechanism

Article 6(1) requires Member States to alert the Commission and other Member States of any foreign direct investment in their territory that is undergoing screening, providing relevant information such as the ownership structure of the foreign investor, the targeted company and the source of funding behind the foreign investment, the date of when the foreign investment is planned or when it is to be completed.[46] After this notification, if a Member State believes that the FDI transaction threatens the nation's security or public order, it can issue comments to the Member State where the FDI occurred or is agreed to take place.[47] The Commission also has the ability to deliver an opinion to a Member State where it believes that security and public order of one or more Member States is at risk.[48] Member States have the right to request further information pertaining to a particular FDI, in order for the requesting Member State or the Commission to ensure that its comments or opinions are sufficiently informed.[49] If an FDI in a Member State generates concern of a possible threat to the national security of public order of other Member States, and the Commission and other Member States issue an opinion and comments stating so, the Member State where the FDI is planned must give 'due consideration' to the respective opinion and comments.[50] The cooperation mechanism, therefore, provides a framework where multiple Member States and the Commission can collaborate to jointly scrutinise an FDI in a particular Member State where it appears to threaten the national security or public order of another. The Member State is required to give due consideration to the respective comments and opinions in line with their duty of sincere cooperation under article

[42] Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/1.
[43] TFEU (n 2) articles 3(1) (e), 207(1).
[44] The Proposal (n 39).
[45] FDI Screening Regulation (n 7) article 2: 'an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State'.
[46] ibid article 9(2).
[47] ibid article 6(2).
[48] ibid article 6(3).
[49] ibid article 6(6).
[50] ibid article 7(7).

4(3) of the Treaty on European Union (TEU) and must, therefore, provide an official reason outlining the reasons for not following the opinion and comments issued.[51]

However, the cooperation mechanism under articles 6 and 7 of the FDI Regulation only provides for the issue of comments and opinions regarding FDIs in Member States that have an existing FDI screening regime.[52] This is a significant oversight on the part of the Commission, as this section of the FDI Regulation will not apply to Member States that do not have FDI screening mechanisms in place.[53] It should be noted that only 16 out of 27 Member States have adopted any national screening measures as of January 2021.[54] Moreover, the FDI Regulation does not mandate the remaining Member States to adopt a screening mechanism.[55] Therefore, articles 6 and 7 create a loophole in the cooperation mechanism which has the potential to undermine the effectiveness of the joint screening of FDI. In the absence of a national screening mechanism, other Member States and the Commission will be unable to share the required information about potentially sensitive foreign investments and review them.[56]

A further by-product of this loophole is that foreign companies could be motivated to invest in EU countries that do not screen FDI, and use them as a gateway to disperse their goods across the single market.[57] China has been particularly savvy in exploiting the existing divisions between EU capital importers and capital exporters to foster a reliance on Chinese FDI by Central and Eastern European (CEE) countries.[58] It appears that the economic relationship between the CEE and China may have influenced the adoption of the FDI Regulation in the region, as neither Bulgaria, Croatia, the Czech Republic, nor Estonia have implemented the FDI Regulation. Greece also does not currently implement the FDI Regulation. On a trade visit to Greece in 2019, China's president Xi Jin Ping signed a variety of trade and co-operation agreements, documenting a number of proposed energy investments in Greece.[59] Furthermore, Greece is already in receipt of major sources of Chinese FDI, with Chinese SOE China Ocean

[51] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, article 4(2).
[52] Bungenberg and Hazarika (n 29) 387. See also FDI Screening Regulation (n 7) articles 7(1), 6(1).
[53] The Proposal (n 39) 2.
[54] 'List of screening mechanisms notified by Member States' (*Commission – DG Trade*, 2021) <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf> accessed 17 March 2021.
[55] FDI Screening Regulation (n 7) article 3(7).
[56] Nikos Lavranos, 'Some Critical Observations on the EU's Foreign Investment Screening Proposal' (*Kluwer Arbitration Blog*, 2 January 2018) <http://arbitrationblog.kluwerarbitration.com/2018/01/02/critical-observations-eus-foreign-investment-screening-proposal/> accessed 17 March 2021.
[57] Meunier (n 32) 1001.
[58] ibid 1011.
[59] 'China, Greece Agree to Push Ahead with COSCO's Piraeus Port investment' *Reuters* (Athens, 11 November 2019).

Shipping Company being projected to invest over $3 billion in developing the Greek port of Piraeus.[60] Therefore, Greece's FDI strategy in attracting Chinese investment with little resistance has led commentators to propose that the nation is one of China's most accessible gateways into the EU.[61] As long as there is no positive obligation to operate a minimum standard of FDI screening across all Member States, it appears that the FDI Regulation will only serve to undermine the more restrictive FDI controls of other Member States and augment political division within the EU.

Whilst Ireland does not yet have a screening mechanism in place, the Irish Government has recently committed to draft legislation which will give effect to the FDI Regulation in Ireland, with the Investment Screening Bill being agreed upon in July 2020.[62] However, the Bill has not yet been subject to pre-legislative scrutiny and the draft legislation has not been published. As such, it is still to be determined what form Irish FDI legislation will take.

II The Commission's Direct Screening Powers

Not only can the Commission issue opinions to Member States under the cooperation mechanism, but the Commission also has the power to directly scrutinise a particular FDI in a Member State where it believes that it would interfere with 'projects or programmes of Union interest'.[63] This function can be distinguished from that under the cooperation mechanism, where the Commission assists other Member States whose national security and public order may be threatened by a specific FDI at the national level. The direct screening mechanism is applied by the Commission to safeguard the interests of the EU as a single entity. The Annex to the FDI Regulation provides a list of projects that the Commission views to be of 'Union Interest'. These include: the European Defence Industrial Development Programme, the Trans-European Networks for Energy and Horizon 2020, concerning the development of Europe as a leader in Artificial Intelligence and Robotics.[64] Article 8 of the FDI Regulation operates similarly to article 6, and the Commission's enforcement function lies in the issuance of an

[60] John Psaropoulos, 'Greece and China Hail Strategic Partnership, as US and EU Look On' *Al Jazeera* (Athens, 11 November 2019).
[61] Dominic Thomas-James and Daniel Petersen, 'A Global Pandemic and China's Foreign Direct Investment in Europe: Examining Protectionist Regulation in Times of "Dangerous Opportunity"' (2020) 41(8) Company Lawyer 223, 228-229.
[62] 'Government Agrees EU Regulation to Screen Foreign Direct Investment' (*The Department of Enterprise, Trade and Employment*, 13 September 2020) <https://enterprise.gov.ie/en/News-And-Events/Department-News/2020/September/20200913.html> accessed 17 March 2021.
[63] FDI Screening Regulation (n 7) article 8(1).
[64] ibid Annex provisions 3, 5, 7.

advisory opinion to the relevant Member State in which the FDI took places or is planned to take place.[65]

III Grounds for Invoking the FDI Regulation

Member States and the Commission can screen an FDI where it potentially interferes with the 'security and public order' of a Member State or the Union as a whole.[66] The circumstances which may amount to a threat to security and public order are not explicitly defined within the FDI Regulation. Instead, article 4 of the FDI Regulation provides a non-exhaustive list which illustrates the wide-ranging circumstances that may trigger screening under the FDI Regulation.[67] As the list provided by article 4 is non-exhaustive it introduces the potential for a broad interpretation of 'national security and public order'. Article 4(1) states that FDIs which interfere with critical infrastructure, critical technologies or provide access to sensitive information may be held to threaten national security and public order.[68] Article 4(2) provides that an FDI may also be subject to screening where a foreign investor is controlled by the government of a third country through its ownership structure, or by virtue of being a recipient of significant funding.[69] Articles 4(1) and 4(2) appear to apply in separate events. Therefore, if an FDI does not interfere with critical sectors under article 4(1), it could still be subject to review due to the influence of a third-party government over the investor under article 4(2). This provision appears to specifically be fashioned to address concerns of policy-channelling by Chinese SOEs.[70]

(a) Screening of FDI in the Energy Sector

Since 'energy' has been referenced as a part of 'critical infrastructure', any investment within the sector will likely have to undergo screening under the FDI Regulation.[71] Moreover, as a large proportion of projects or programmes of 'Union Interest', are focused in the areas of space, transport, energy and telecommunications, any Chinese FDI in these sectors will also likely be subject to direct screening by the Commission.[72]

[65] ibid article 8(1).
[66] ibid article 1.
[67] ibid article 4.
[68] ibid article 4(1).
[69] ibid article 4(2).
[70] Chi-Chung Kao, 'The EU's FDI Screening Proposal - Can It Really Work?' (2020) 28(2) European Review 173, 177.
[71] FDI Screening Regulation (n 7) article 4(1)(a-c).
[72] Bungenberg and Hazarika (n 29) 388.

It must be noted that Energy investments are already subject to limited screening under the directives of the internal market on gas and electricity, collectively referred to as the Gazprom clause.[73] Article 11 of the Gas and Electricity Directive requires a certification process for third-country investors who seek to act as the operators of transmission systems.

The new FDI Regulation will greatly affect Chinese investment in the energy sector. Unlike the Gazprom clause, the FDI Regulation is not restricted to the 'acquisition of control requirements' to trigger the screening of an FDI. Moreover, it is not limited to 'transmission systems only' but affects a general class of 'critical infrastructure, including energy'.[74] Due to the specific inclusion of the energy sector in the FDI Regulation, the potential for overlap with projects of 'Union Interest' and the likelihood that the Chinese company has links to the Chinese government, many Chinese energy investments that would not have received scrutiny under the Gazprom Clause Directive will do so under the new FDI Regulation.[75]

(b) Screening on Industrial Policy Grounds

Provisions for the screening of investments on economic grounds were accounted for in previous iterations of the FDI Regulation, but did not ultimately find their way into the regulation in its final form. However, Snell believes that given the wide scope of 'security and public order' outlined in article 4 of the FDI Regulation, Member States may still be able to incorporate economic considerations into their assessment of an FDI transaction.[76]

A grey area in the application of the various provisions contained within the FDI Regulation is whether the grounds of 'security and public order' can similarly be invoked by a Member State to screen an FDI transaction where it pertains to a technology that is an essential part of a country's national industrial capacity or national industrial policy. The inclusion of 'critical technologies' in article 4(1)(b) suggests that this could be possible.[77] Therefore, the acquisition of key technologies that lie at the core of a Member State's industrial policy may be within the remit of the FDI Regulation. This would require a very broad interpretation of 'security and

[73] Parliament and Council Directive (EC) 2009/73/EC of 13 July 2009 concerning common rules in the internal market for natural gas and repealing directive 2003/55/EC [2009] OJ L211/94 (Gas and Electricity Directive); Kaj Hobér, 'WTO and Russia' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill-Nijhoff 2015) 250.
[74] Gas and Electricity Directive (n 73) article 11(2). See also Bungenberg and Hazarika (n 29) 388-389.
[75] ibid.
[76] Jukka Snell, 'EU Foreign Direct Investment Screening: Europe Qui Protege?' (2019) 44(2) European Law Review 137.
[77] Wolf Zwartkruis and Bas de Jong, 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' (2020) 31(3) European Business Law Review 447.

public order' and foreign investors may be able to contest such an approach based on the Court of Justice of the European Union (CJEU) jurisprudence, holding that the free movement of capital cannot be restricted on 'purely economic ends'.[78]

However, it may be contended that as a living document, the TFEU should be interpreted in light of the developing policy needs of the EU. Given the growing geopolitical tensions between China and the EU to the point where China has been branded a 'systemic rival' by the Commission, it is envisaged that the CJEU could take a more progressive approach to the application of article 63 TFEU where the FDI transaction concerns a technology that features heavily as part of a Member State's industrial policy.[79] Therefore, the FDI Regulation could pose an effective solution for the protection of European technology and high-end manufacturing companies from potential technology transfer and stagnation, resulting from strategic takeovers by Chinese SOEs.

IV The Commission's Enforcement Function

Commentators have been quick to criticise the FDI Regulation as a 'toothless' legal instrument that will have no demonstrable effect on the European investment landscape.[80] Whilst the Commission technically does not have the power to block FDIs on the grounds of security and public order, the de facto implications of a non-binding opinion could be more problematic for an investor than critics choose to acknowledge.[81] Where the Commission issues an opinion to a Member State recommending against an FDI, it can be reasonably envisaged that a Member State will still feel obliged to follow this 'non-binding' opinion.[82] The moral persuasion and public scrutiny that a Member State will be subjected to by the issuance of an opinion from the Commission is significant and should not be disregarded.[83] Whilst it would not be binding upon Member States, it would require them to publicly explain why they are rejecting the Commission's advice. Investors will likely not be willing to rely on Member States taking such unfavourable actions.

[78] Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECR I-1335 [17]-[18].
[79] Zwartkruis and de Jong (n 77).
[80] Kao (n 70) 12.
[81] ibid.
[82] Giani Pandey, Davide Rovetta and Agnieszka Smiatacz, 'How Many Barriers Should a Steeple Chase Have? Will the EU's Proposed Regulation on Screening of Foreign Direct Investments Add Yet More Delaying Barriers When Getting a Merger Deal Through the Clearance Gate, and Other Considerations' (2019) 14(2) Global Trade and Customs Journal 56, 58.
[83] Régis Bismuth, 'Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU' (2018) 3(1) European Investment Law and Arbitration Review 45, 60.

Ultimately, the FDI Regulation adds a level of uniformity and co-operation to FDI screening across the EU, building upon a previously fragmented landscape where individual Member States had varied approaches to FDI screening coordinated at the national level. It is hoped, that as more EU Member States adopt screening mechanisms, this will pressure the remaining Member States to follow suit. This will be necessary in order for the cooperation mechanism and the joint screening of FDI's to be effective. Whilst the soft-law effects of the Commission's non-binding opinions may have greater influence over Member States' investment activities than critics envisaged, the final decision on whether to allow third-country investments that compromise the security and public order of Members States and the Union lies at the national level. It seems that the only way to ensure the consistent protection of these interests would be the adoption of a centralised screening mechanism in which the Commission has the competence to issue binding rulings that would block a proposed FDI transaction in a Member State.[84] This would function similarly to the Committee on Foreign Investment in the United States (CFIUS).

D THE FDI REGULATION AS A 'STEPPING STONE' FOR A POTENTIAL EUROPEAN COUNCIL ON FOREIGN INVESTMENTS?

CFIUS is a multi-agency group consisting of the heads of each US state department involved in the economy and national security. It reviews acquisitions of US businesses by foreign companies to determine whether those transactions present a concern to national security.[85] CFIUS will decide whether these concerns can be mitigated by restructuring the transaction or by other means, and then recommend to the President to block the transaction if mitigation cannot be achieved.[86] Therefore, a distinguishing factor between the EU and US approach to foreign investment control is that the CFIUS model allows for screening to be conducted by a centralised executive body at the federal level. The Commission has historically been reluctant to entertain the notion of a European Council on Foreign Investment (ECFI) modelled on CFIUS. Despite calls for the introduction of a CFIUS-style system of review as a response to heightened European investment by sovereign wealth funds in 2008, the Commission viewed that such action would risk sending a misleading message that the EU was reneging on its

[84] Bungenberg and Hazarika (n 29) 383.
[85] Executive Order No 11858, 3 CFR 990 (1975) (US).
[86] ibid. See also Daniel C Schwarz and Jennifer K Mammen 'The Role of CFIUS in International Business Transactions' [2017] 2 International Business Law Journal 115, 115-117.

commitment to maintain an open investment regime.[87] This approach would still appear to hold true today.

Although the FDI Regulation is the furthest in which the Commission has moved towards the European harmonisation and coordination of FDI screening, it does not go as far as establishing a centralised blocking mechanism. The Commission's competence is still limited to the issuing of non-binding advisory opinions only. This limited competence has led to calls for the development of a centralised mechanism as it would be a more powerful regulatory instrument to protect the EU's strategic interests.[88] A centralised body for the screening of sensitive foreign takeovers would be more effective as it would consistently assess transactions under clearly defined grounds. This would aid the development of a transparent and more predictable regime when compared to one where the ultimate decision on whether to block an FDI takes place at the Member State level on non-exhaustive grounds.[89] A centralised mechanism would also lower the procedural burden and associated costs in the cases of multi-jurisdictional transactions conducted within the EU. In certain cross-border transactions, an investor may be required to secure clearance and engage in the FDI review process across multiple Member States. An ECFI would instead require a single filing and review procedure similar to the 'one-stop-shop' review and clearance of transactions by the Commission under the EUMR. However, the questionable legal basis that the FDI Regulation is founded upon makes it difficult to envisage it ever developing into a CFIUS-style system of investment review.

Whilst the EU has exclusive competence over FDI as part of the Common Commercial Policy (CCP), the primary feature of the FDI Regulation relates to the screening of FDI on the grounds of security or public order. Article 4(2) TEU stipulates that 'national security remains the sole

[87] Commission, 'A Common European Approach to Sovereign Wealth Funds' COM (2008) 115 final <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:mi0003&from=EN> accessed 17 March 2021.

[88] Carlos Esplugues, 'A Future European FDI Screening System: Solution or Problem?' (2019) Columbia FDI Perspectives No 245, 2 <http://ccsi.columbia.edu/files/2018/10/No-245-Esplugues-Final.pdf> accessed 17 March 2021.

[89] Timothy R W Cowen, 'Protectionism in Merger Control: Is the Process of Merger Control Adequate to Consider Wider Public Interest Issues? Is it Now Time for CFIEU' [2014] 1 CPI Antitrust Chronicle <https://www.competitionpolicyinternational.com/protectionism-in-merger-control-is-the-process-of-merger-control-adequate-to-consider-wider-public-interest-issues-is-it-now-time-for-cfieu/> accessed 17 March 2021. See also Thomas-James and Petersen (n 61) 228: '[t]here are some in the community who will place greater emphasis on services than goods, and on strategic commercial alliances in some third countries rather than others. Some will be more liberal in their approach, while others more protectionist, or even suspicious. Many are at fundamentally different stages of economic development, including legal and institutional development. Therefore, caution should be taken when considering the effectiveness of screening regulations which may not carry universal application across the continent.'

responsibility of each member state'.[90] This 'sole responsibility' is also acknowledged under article 1 and article 18, as well the recitals to the FDI Regulation, which state that the FDI Regulation operates without prejudice to the sole responsibility of the Member States for maintenance of national security.[91] Clearly, different Member States will have varying interpretations of what constitutes a national security threat and these varying positions will reflect each Member State's individual economic and geopolitical interests. In the face of these fragmented individual interests, integration is difficult.[92] Although Member States have the freedom to facilitate security cooperation at a European level, each Member State retains a veto with regards to national security.[93] Ultimately, since a Member State's national security will remain a staple of its sovereignty under EU law, it would not appear feasible to have a regime in which the Commission will block FDI's on what it perceives to be a threat to a Member State's national security.

Opinion 2/15 of the CJEU regarding the EU-Singapore Free Trade Agreement ignited a glimmer of hope for proponents of a centralised ECFI.[94] In the opinion, the CJEU considered how far the EU's exclusive competence over the CCP could be viewed to stretch under article 207(1) TFEU, as well as the role of individual Member States in international trade and investment agreements. Overall, the CJEU's opinion was viewed as suggesting an expansive view of the exclusive competence under the CCP, with it only finding that provisions on non-direct investment and the Investor-State Dispute settlement (ISDS) mechanism were not covered by the EU's exclusive competence.[95] This was despite the incorporation of a 'no-less favourable treatment' provision in the agreement which stated that a Member State was allowed to, for overriding reasons related to public order or public security, to treat Singaporean investors less favourably than their own investors.[96] Member States were outraged as they contended that by laying down these commitments, the EU was interfering in matters of public

[90] TEU (n 51) article 4(2).
[91] FDI Screening Regulation (n 7) article 1; ibid article 18, recitals 7, 8, 17.
[92] Snell (n 76) 137-138.
[93] TFEU (n 2) article 73.
[94] Opinion 2/15 of the Court of Justice of the European Union 16 May 2017 (EU-Singapore Free Trade Agreement), [99]-[103].
[95] ibid [305]. See also Philip Hainbach, 'The CJEU's Opinion 2/15 and the Future of EU Investment Policy and Law Making' (2018) 45(2) Legal Issues of Economic Integration 199, 207.
[96] Opinion 2/15 (n 94) [101] – [102]. See also Commission, 'Annex to the Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part' COM (2018) 194 final, article 2.3(3) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0194> accessed 31 March 2021.

security and public interest which were under the exclusive competence of individual Member States pursuant to article 65(1)(b) TFEU.[97]

Some commentators were quick to submit that following the CJEU's opinion, the EU's competence under the CCP not only extended to investment restriction and liberalisation, but also could be viewed to apply to restrictions on FDI adopted on public interest grounds. If this was legitimate, the EU and its institutions could be viewed to have exclusive power to implement measures limiting inward FDI from non-EU countries.[98] Such an interpretation could potentially provide the legislative basis for a prospective ECFI, allowing for a singular European body that would protect the EU's economy, security and public order from third-country investors.

However, Di Benedetto posits a rather selective reading of Opinion 2/15. The court more rightly can be viewed to acknowledge that a provision in the ESFTA providing for the right to implement measures necessary to preserve public order or security 'lays down not a commitment, but the possibility of applying a derogation', under which 'a member state will be able, for overriding reasons relating to public order, public security [etc] to treat Singapore investors less favourably than its own investors'.[99] Whilst the EU does consult on matters that would typically be subject to the national competence of its Member States, it cannot reasonably be inferred that the CCP grants the EU exclusive competence over Member States' affairs concerning public policy or public security when it concerns FDI. It instead should only be viewed as allowing for the possibility of 'inserting a public order and public security carve-out for Member States in EU international investment agreements'.[100] The decision may then actually undermine Di Benedetto's proposal by indirectly affirming that the EU may not advance 'commitments' for Member States regarding their public order, public security or other public interests; or infringe on a Member State's competence that concerns its public order, public security and other public interests.[101] Therefore, it cannot be credibly advanced that Opinion 2/15 of the CJEU opens the gates for the development of an ECFI.

[97] Opinion 2/15 (n 94) [100].
[98] Fabrizio Di Benedetto, 'A European Committee on Foreign Investment?' (2017) Columbia FDI Perspectives No 214 <http://ccsi.columbia.edu/files/2016/10/No-214-Di-Benedetto-FINAL.pdf> accessed 17 March 2021.
[99] Opinion 2/15 (n 94) [100].
[100] Bismuth (n 83) 56.
[101] Jochem de Kok, 'Towards a European Framework for Foreign Investment Reviews' (2019) 44(1) European Law Review 24, 46.

An amendment to the European Treaties is the only realistic way to vest the Commission with the 'sole responsibility' for the screening assessment and to issue a binding decision.[102] In its current form, the FDI Regulation does not infringe upon Member States' competence to regulate public policy or public security concerns. Many commentators continue to view that the EU's underlying objective is parallel to that of the US, where a screening committee issues its reports to an executive body that takes definitive action.[103] However, it is clear that those who view the FDI Regulation as a stepping stone to a centralised screening system are likely to be disappointed.[104] From a political perspective, the FDI Regulation validates America's calls for the increased scrutiny of Chinese investments by its allies.[105] However, any expectations for the Commission to transpose a CFIUS-style system into Europe, fail to recognise the nuance of the Union's unique institutional framework.

E THE INTERPLAY BETWEEN EU MERGER CONTROL AND FDI SCREENING: IS THERE REALLY A NEED FOR TWO SYSTEMS TO ASSESS FDI TRANSACTIONS IN THE EU?

The Commission's proposal of the FDI Regulation acknowledges the intersection between the screening of FDI and competition law.[106] It was submitted in the explanatory memorandum that '[f]oreign direct investments may take the form of mergers, acquisitions and joint ventures that constitute concentrations falling within the scope of the EU Merger Regulation'.[107] The EUMR provides for the assessment of the public interest as a competition law test. This public interest assessment has generally been viewed not to encompass industrial or security policy concerns.[108] Article 21(4) provides that, even where the Commission has exclusive competence over a concentration, 'Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.'[109] It states that 'public security, plurality of the media and prudential rules' should be recognised as legitimate

[102] ibid.
[103] Dimitrije Canic, 'The Balkan Loophole: China's Potential Circumvention of EU Protectionism' (2018) 27(1) University of Miami Business Law Review 99, 123.
[104] Jason Jacobs, 'Tiptoeing the Line between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union' (2019) 47(2) International Journal of Legal Information 105, 117.
[105] Wayne M Morrison, 'China's Economic Rise: History, Trends, Challenges, and Implications for the United States' (*Congressional Research Service*, 5 February 2018) 13, 36-37.
[106] The Proposal (n 39) 5. See also FDI Screening Regulation (n 7) recital 36.
[107] ibid.
[108] Pandey, Rovetta and Smiatacz (n 82) 60.
[109] EUMR (n 9) article 21(4).

interests ('recognised interests'), and will be consistent with EU law as long as the measures are non-discriminatory and proportionate. The 'legitimate interests' under 21(4) EUMR are far narrower than those defined in article 36 TFEU for free movement of goods or free movement of capital. [110] Therefore, whilst there is a certain amount of overlap between the two regulations, both have different primary objectives. Competition law seeks to ensure fair competition and the preservation of free market principles, whilst FDI screening is focused on security and public order.[111]

Whilst the EUMR may have had a differing policy objective, it is questionable whether adding a parallel screening process alongside the EU merger control regime was the correct decision by the European legislature. Currently, the screening procedures under national mechanisms take between 2-4 months to complete.[112] Under the new cooperation framework in the FDI Regulation, the review of FDIs is expected to be even more time consuming and laborious, and this timeline is likely to increase significantly.[113] Therefore, under the FDI Regulation, the screening of investments may result in the increased risk of withdrawal by investors and high compliance expenses. This may lead to lower FDI flows into the EU. Considering that in a high proportion of cases FDI transactions by non-EU controlled investors will already meet the notification thresholds under the EUMR, it must be asked whether the EUMR could have been adapted as a less disruptive stand-alone mechanism to address strategic takeovers by foreign investors on both competition and public interest grounds?[114]

I The Public Security Exception under Article 21(4) EUMR

Public Security within article 21(4) EUMR has received a very narrow and somewhat uncertain application and interpretation by the Commission and the European Court of Justice (ECJ) and, therefore, it is unsure whether public security under article 21(4) has the sufficient scope to address key issues such as the acquisition of European technologies and critical infrastructure.[115] For a takeover to be blocked under 21(4) EUMR for reasons of industrial policy grounds, it must either be categorised as protecting public security or Member States

[110] TFEU (n 2) article 36.
[111] Pandey, Rovetta and Smiatacz (n 82) 60.
[112] Commission, 'Commission Staff Working Document Accompanying the document: Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union' SWD (2017) 297 final, 8.
[113] Pandey, Rovetta and Smiatacz (n 82) 63.
[114] EUMR (n 9) article 1(3).
[115] Jones and Davies (n 1) 475.

must request its recognition as another legitimate interest.[116] Moreover, many security concerns that are covered under the FDI Regulation under national security do not appear to be covered by the 'public security' derogation under the EUMR, and would similarly need to be accepted as 'another legitimate interest'.[117] In a decision concerning the proposed merger between EON/Endesa, the Commission equated public security in EUMR article 21(4) with the concept in internal market law, stating that 'public security must be relied on if there is a genuine and sufficiently serious threat to a fundamental interest of society'.[118] Moreover, the Commission in its decision in *Secil/Holderbank/Cimpo* held that the public security category can also extend to the security of supplies of a product or service considered of vital or essential interest.[119] However, the extent that 'public security' extends beyond these circumstances is more unclear.

In *Belgian Golden Shares*, the ECJ held that national rules that allowed authorities to prohibit investment that was contrary to the country's energy policy were allowed as they did not go further than what was necessary to ensure the objective of safeguarding energy supplies against a possible crisis, and therefore fell within the public security exception.[120] In contrast, in *French Golden Shares*, the ECJ refused to acknowledge that the French government's golden share in a petroleum company was essential to protect public security and to prevent an interruption of petroleum products that were of great economic and strategic importance to the country.[121] Whilst the ECJ accepted that the security of a company's energy supply features within the scope of public security, it emphasised that the public security exception only applied where there was a 'genuine and sufficiently serious threat to a fundamental interest of society'.[122] It was instead held that the French legislation did not provide precise, objective and non-discriminatory criteria for the authorisation of the golden share, or for determining how the national interests would influence the decision. The case suggests that the ECJ will not allow a broad public interest test for fear that it would result in decreased transparency and

[116] EUMR (n 9) article 21(4).
[117] FDI Screening Regulation (n 7) article 4; Jones and Davies (n 1) 475.
[118] *E.ON/Endesa* (Case COMP/M4197) Commission Decision of 26 September 2006 C (2006) 4279 final.
[119] *Secil/Holderbank/Cimpor* (Case COMP/M2054) Commission Decision of 22 November 2000: 'there may be wider considerations of public security both in the sense of Article 297 (former Article 224) and in that of Article 30 (former Article 36), in addition to defence interests in the strict sense. According to the Notes [on Council Regulation 4064/89], "[t]he requirement for public security, as interpreted by the Court of Justice, could cover security of supplies to the country in question of a product or service considered of vital or essential interest for the protection of the population's health."'
[120] Case C-503/99 *Commission v Belgium* [2002] ECR I-4809.
[121] Case C-483/99 *Commission v France* [2002] ECR I-4781.
[122] ibid [48].

uncertainty for investors.[123] Any legislation must, therefore, stipulate precise and objective criteria and the subsequent parameters for the exercise of discretion in the public interest.

This can be viewed in contrast to the operation of article 4(1)(a) of the FDI Regulation where, if an FDI transaction in any way affected a country's energy supply (a 'critical sector'), the screening mechanism would likely have been triggered. In a 2013 publication, the Commission acknowledged the efforts of lobbyists to advance a similarly general application of the public security exception within the EU energy market, but explicitly rejected this proposition.[124] The Commission's reluctance to accept a broader interpretation of 'public security' is likely due to the particular emphasis which it places on market liberalisation. Therefore, the acquisition of sophisticated technologies, domestic national champions, or even strategic infrastructures and utilities - all viewed as potential threats posed by Chinese FDI - will, in many cases, not meet the threshold of posing a 'serious threat to the fundamental interests of society', so as to allow them to fall under the public security exception under article 21(4).[125]

The only other option available for Member States that seek to prohibit a potential takeover on broader security and industrial policy grounds, would be to notify the Commission and contend that industrial policy and wider security concerns are legitimate interests that should be protected.[126] However, if these interests were generally viewed as legitimate by the Commission and the ECJ, it could potentially lead to diverging approaches by Member States regarding the prohibition of concentrations, undermining the uniformity of EU competition law.[127] As such, it is typically viewed that the Commission will not allow Member States to jeopardise the functionality of the EU system of merger control by pursuing national industrial policy and other broader policy objectives.[128] In the absence of a prominent public interest assessment of concentrations within the EUMR, a strict competition-based assessment will not

[123] Jones and Davies (n 1) 476.
[124] Santiago Barón Escámez and others, 'Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods' (*Commission – DG Enterprise and Industry*, 2010) 26-27 <https://op.europa.eu/en/publication-detail/-/publication/a5396a42-cbc8-4cd9-8b12-b769140091cd> accessed 17 March 2021: 'The Public security justification has been advanced in a specific area, namely the EU energy market, but the decision should be limited to the precise facts and is not of wide applicability.'
[125] *E.ON/Endesa* (n 118) [39]; Jonathan Galloway, 'The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy' (2007) 28(3) European Competition Law Review 172, 185.
[126] Galloway (n 125) 182.
[127] ibid.
[128] Sideek Mohammed, 'National Interests Limiting EU Cross-Border Bank Mergers' (2000) 21(5) European Competition Law Review 248, 256.

adequately protect critical European technologies, infrastructure and general national interests as would be under a purpose-built FDI screening regime.[129]

Therefore, the key challenge in utilising EUMR article 21(4) as an alternative to the FDI Regulation would be for the Commission and ECJ to liberalise the scope of application and interpretation of the 'public security' exception, or broaden the range of 'other' legitimate exceptions that may be utilised to prohibit a concentration. Such an approach would need to be subject to utmost scrutiny, so as to not allow undue protectionism to filter into the assessment of concentrations with an EU dimension.

II Lobbying as a Tool to Broaden the Public Interest Dimension within the EUMR

The Commission's recent decision to block the merger of *Siemens/Alstom* has furthered the debate surrounding the need for the Commission to move from a strict economic approach to competition policy, to one that accounts for the broader geopolitical interests of the EU.[130] Whilst the Commission was correct in its substantive competition assessment of the proposed concentration within the EU internal market, the German and French governments contended that the transaction should be cleared to allow Europe to compete on the global stage against China's Rolling Stock manufacturer CRRC.[131] Rather than focusing on technical features of competition law, the discussion being advanced is in the context of a political narrative in favour of industry at the European level, so that it can face increasing competition from other major economic blocs.[132] Therefore, the Commissioner faces increased pressure to account for geopolitical interests within EU internal market competition law. Under this proposed approach, merger control would assess whether any 'threats' exist outside the EU's borders, rather than solely focussing on the effects on competition within the internal market.[133] It is

[129] Kyriakos Fountoukakos and Molly Herron, 'Merger Control and the Public Interest: European Spotlight on Foreign Direct Investment and National Security' (*Competition Policy International*, 11 December 2017) <https://www.competitionpolicyinternational.com/merger-control-and-the-public-interest-european-spotlight-on-foreign-direct-investment-and-national-security/> accessed 31 March 2021.

[130] *Siemens/Alstom* (Case M8677) Commission Decision of 6 February 2019 [2019] OJ C300/14. See also 'Mergers: Commission Prohibits Siemens' Proposed Acquisition of Alstom' (*Commission*, 6 February 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881> accessed 17 March 2021; Alex Nourry and Dani Rabinowitz, 'European Champions: What Now for EU Merger Control after Siemens/Alstom' (2020) 41(3) European Competition Law Review 116, 121-122.

[131] Alan Riley, 'Nuking Misconceptions: Hinkley Point, Chinese SOEs and EU Merger Law' (2016) 37(8) European Competition Law Review 301, 313. See also Nourry and Rabinowitz (n 130) 121-122.

[132] See Jack Ewing and Liz Alderman, 'Siemens and Alstom Form European Train Giant to Beat Chinese Competition' *The New York Times* (Frankfurt, 27 September 2017) <https://www.nytimes.com/2017/09/27/business/dealbook/siemens-alstom-merger-china.html> accessed 17 March 2021.

[133] Evi Moutsipai and Andreas Geiger, 'Lobbying in EU Competition Law' (2019) 40(5) European Competition Law Review 229, 230-231.

believed that the substantial political fallout following *Siemens/Alstom* could, therefore, influence the current merger control revision of DG Competition.[134] DG Competition's need for efficient solutions that address the whole range of EU priorities should open the opportunity for the involvement of EU policy sectors as well as immediate stakeholders when reviewing transactions. To reflect these interconnected interests, EU agencies, Members of the European Parliament and other DG's should be involved in fashioning a collective solution to high-stakes transactions. It no longer appears viable for EU competition law to operate in a vacuum with no regard to interrelated EU political priorities.[135]

(a) The Franco-German Proposal

A potential way of achieving this greater institutional interplay is proposed in the Franco-German Manifesto which was drafted in response to the prohibition of the *Siemens/Alstom* intended merger. The proposal contended that the next Commission 'consider a right of appeal of the Council which would ultimately override Commission decisions, which could be appropriate in well-defined cases, subject to strict conditions'.[136] At first instance, this proposal seems unrealistic, suggesting that effective internal market competition be sacrificed for the advancement of national industrial policy. Furthermore, the practicalities of implementing a 'Council veto' were also subject to scrutiny.

However, a somewhat similar right of appeal is provided under the illegal state aid provisions within article 108(2)(3) TFEU and could provide the legislative model for a potential 'Council veto' mechanism within the EUMR.[137] Article 108(2)(3) TFEU provides that, in exceptional circumstances only, a Member State may apply to the Council, which may, acting unanimously, declare compatible internal aid which a Member State intends to grant a derogation of article 107 TFEU. Blanco refers to the procedure as a 'safety valve with the object of allowing Member States to override the Commission's point of view, for political reasons'.[138]

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[134] ibid. See also 'Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control' (*Commission*, 28 July 2017) <https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html> accessed 17 March 2021.
[135] Moutsipai and Geiger (n 133).
[136] 'A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century' (*French Government*, 19 February 2019) <https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century> accessed 17 March 2021.
[137] Nourry and Rabinowitz (n 130) 121-122: 'This section seeks to adapt the interpretation of the veto mechanism proposed by Nourry and Rabinowitz to facilitate the creation of national champions, as a potential means of widening the opportunity for Member States to block takeovers on public interest grounds.'
[138] Luis Ortiz Blanco (ed), *EU Competition Procedure* (3rd edn, Oxford University Press 2013) [21.97].

A key distinction between the Franco-German veto and article 108(2)(3) TFEU is that the veto is said to happen after the Commission issues its decision to prohibit a concentration, whilst article 108(2)(3) will only apply during the interim period between the application to the Commission and the final decision issued by the Commission. Therefore, it is suggested that a similar procedure could apply to the Franco-German 'Council veto' in which an application to the Council would trigger a stay of the Commission's approval procedure, after which competence would revert back to the Commission.[139] Whilst the proposed veto was framed in respect of the creation of European champions, it is believed that the veto could also operate reflexively, so as to potentially override the Commission in certain instances where individual Member States may have been prohibited from blocking a takeover on public interest grounds which are not recognised under EUMR article 21(4).[140] This could potentially allow Member States to apply EUMR article 21(4) under broader public interest grounds. For example, if CRRC, a dominant Chinese SOE, were to attempt to acquire Siemens, it is proposed that the German government could potentially apply to the Council for it to rule on whether the threat to the country's national transport infrastructure, as well as European industry were legitimate reasons to block the transaction under EUMR article 21(4).

When reformulated with reference to article 108(2)(3) TFEU and its related jurisprudence, the Franco-German proposal of a 'Council veto' appears to be a legitimate and proportionate addition to the EUMR.

A mechanism modelled on article 108(2)(3) TFEU could, therefore, address the asymmetry of powers in the EUMR by allowing Member States in exceptional circumstances to block transactions on public interest grounds that would not typically be granted by the Commission, most notably those of financial and economic nature, as well as broader European security policy. Such decisions would be subject to the scrutiny of the European Council and would ensure the legitimate advancement of European political priorities, rather than mere national protectionism. This would be a pragmatic method of introducing a greater cross-fertilisation of institutional interests when reviewing significant transactions, as well as broadening the public interest grounds available to Member States under EUMR article 21(4).

[139] Nourry and Rabinowitz (n 130) 121-122.

[140] Nicholas Levy, David Little and Henry Mostyn, 'European Champions – Why Politics Should Stay Out of EU Merger Control' [2019] 2 Concurrences Review – On-Topic 23, 29: 'There is a risk, though, particularly over time, that [the Franco German Manifesto] could extend to merger approvals, the outcome and terms of which third parties might seek to challenge on the ground that they risked harming European companies by creating a strengthened foreign rival'.

Whilst, the proposed 'veto mechanism' may be a welcome addition to achieving a more holistic assessment of concentrations, it is unfortunately doubtful whether it would be implemented in practice. Ultimately, the Commission has sole responsibility over legislative proposals, including the proposals listed in the Franco-German manifesto. It, therefore, appears unlikely that the Commission would support a proposal which undermines its own authority.[141]

III The Possibility for the Centralised Screening of FDI under EUMR Recital 23

As previously discussed, it is doubtful that the FDI Regulation is capable of developing into a centralised screening mechanism, given that national security will ultimately remain under the competence of individual Member States. However, a dual assessment of the competition aspects of a merger and the public interests considerations of a foreign takeover could be a function that could be attributable to DG Competition. Not only would this eliminate the added procedural hurdle of a parallel FDI screening regime, but the Commission would be able to issue binding decisions as Member States have already ceded jurisdiction for DG Competition to rule on mergers, acquisitions and joint ventures with an EU dimension.[142] It is suggested that a potential legislative basis for the Commission to consider public interest objectives under its assessment of concentrations exists under recital 23 EUMR.[143]

Recital 23 has been described as the EUMR issuing the 'smallest nod' towards the provision of anything other than a competition based test.[144] It is therefore proposed that the Commission could build upon this suggestive 'nod', and place greater weight on the objectives of article 3 TEU within their assessment of concentrations. Article 3 TEU is drafted broadly to include the security of citizens, employment, social progress and the protection of the environment. However, the provision has generally been interpreted to pose a non-binding duty on the Commission to make a decision that is broadly in line with the fundamental objectives of the EU, rather than requiring the Commission to consider each and every fundamental objective individually during the assessment process.[145] However, it is suggested that the latter approach

[141] Wolf Sauter, 'EU Competition Law and Industrial Policy: Reset, Upgrade or New Operating System Required?' (2019) 40(9) European Competition Law Review 401, 405-406.
[142] David Reader, 'At a Crossroads in EU Merger Control: Can a Rethink on Foreign Takeovers Address the Imbalances of Globalisation?' (2017) 1(2) European Competition and Regulatory Law Review 127, 133.
[143] EUMR (n 9) recital 23: '[i]t is necessary to establish whether or not concentrations with a Union dimension are compatible with the Common market in terms of the need to maintain and develop effective competition in the common market. In doing so, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in [Article 3 of the TEU].'
[144] Reader (n 142) 135.
[145] ibid.

could provide a robust foundation for the screening of sensitive FDIs. Recital 23 has only been applied in this fashion in a few select cases.

In *Vittel v European Communities* the General Court held that due to its obligations under recital 23, the Commission was required to assess the merger's potential effects on employment.[146] This approach was again taken in the *Air France/KLM* joint venture.[147] In this instance, the Commission chose to clear the transaction between the two airlines, notwithstanding that the merger created a 60% share in routes at two leading European airports and, more importantly, effectively formed the largest airline in Europe.[148] As well as considering the competition factors involved in the merger, the Commission was heavily influenced by the benefits that the consolidation of European carriers would have for the development of European transportation networks.[149] However, the most influential of these cases was *Boeing/McDonnell Douglas*, in which the transaction was strongly opposed on competition grounds, as well as on the basis that the merger would go against the article 3 EC objective of strengthening economic and social cohesion within the EU.[150] Whilst the merger was eventually given clearance, the Commission's initial opposition was motivated by a desire to preserve the European Civil Aviation Industry. This appears to support the proposition that the Commission could in fact oppose FDI transactions and strategic takeovers on broader public interest grounds under recital 23.

However, these decisions were made before the tenures of Commissioners Almunia and Vestager. Both Commissioners have advanced an unyielding competition-only assessment of concentrations. Vestager, in particular, has regularly stated that the Commission would not give in to demands by Member States and other governments to consider non-competition interests in their assessment of concentrations.[151] Therefore, the recent fundamentalist approach to competition policy by both Commissioners would appear to undermine any potential for a broad application of recital 23 EUMR.[152] However, the appointment of Ursula

[146] Case T-12/93 *Comité Central d'Entreprise de la SA Vittel and Comité d'Etablissement de Pierval v Commission* [1995] ECR II-1247, [38].
[147] A*ir France/KLM* (Case COMP/M3280) Commission Decision of 11 February 2004 [2004] OJ C60/5.
[148] Reader (n 142) 136.
[149] Peter Alexiadis and Daniel Kanter, 'The European Commission Consents to the Consolidation of Europe's Skies: The Air France/KLM Merger' (2005) 14(1) Utilities Law Review 1.
[150] *Boeing/McDonnell Douglas* (Case IV/M877) Commission Decision 97/816/EC [1997] OJ L336/16; Reader (n 142) 136.
[151] Jacob Lundqvist, 'Screening Foreign Direct Investment in the European Union: Prospects for a "Multispeed" Framework' (2018) Stanford-Vienna European Union Law Working Paper No 36, 16 <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/09/lundqvist_eulawwp36.pdf> accessed 17 March 2021.
[152] Lundqvist (n 151) 15-17.

von der Leyen as president of the Commission and the palpable dissatisfaction of Member States with market distortion by Chinese SOEs appears to have led Commissioner Vestager to retreat from her previously hard-line approach.[153] The capacity for a potential turning point in competition enforcement policy to account for broader political objectives is evidenced in President von der Leyen's open letter to Commissioner Vestager: 'Competition will have an important role in our industrial strategy**.** The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow.'[154]

The incorporation of public policy objectives within competition review is not merely abstract theory, making for interesting debate. Many competition regimes across the globe adopt a holistic approach to competition policy. The South African Competition Commission is specifically authorised to consider 'whether [a] merger can or cannot be justified on substantial public interest grounds'.[155] These prescribed public interest grounds are far-reaching and include a merger's effects on the 'ability of national industries to compete in international markets', as well as the effect of a merger on employment.[156] Similarly, under China's Anti-Monopoly Law, the competition regulator is required to consider the effect of a proposed transaction on the country's industrial policy.[157] If DG Competition is willing to take an innovative approach in directly tackling the issue of strategic takeovers by foreign investors, recital 23 EUMR could present a possible solution. The Commission could, thereby, conduct its initial assessment of a concentration on competition grounds, before assessing whether the decision is compatible with its wider Treaty goals.[158] The liberal application of recital 23 could have the pseudo-effect of a European Council on Foreign Investment, except that it would provide a comprehensive economic analysis and a public interest assessment of sensitive FDI transactions.

IV A Viable Alternative?

[153] Nourry and Rabinowitz, (n 130) 123-124.
[154] President Ursula von der Leyen of the European Commission, 'Mission Letter: Executive Vice-President for A Europe Fit for the Digital Age' (Brussels, 01 December 2019) <https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf> accessed 17 March 2021.
[155] South African Competition Act 1998, s 12A(1)(a)(ii); Lundqvist (n 151) 16.
[156] ibid ss 3(b), (d).
[157] Anti-Monopoly Law of the People's Republic of China (中华人民共和国反垄断法) (promulgated by the Standing Committee of the National People's Congress on 30 August 2007, effective 1 August 2008), article 7.
[158] Reader (n 142) 138.

On the basis of the above analysis, it is concluded that the EUMR does theoretically have the required regulatory grounding to screen FDI. Whilst some commentators have suggested that the EUMR is restricted to a strict economic assessment of concentrations, this is a somewhat superficial analysis and fails to take a comprehensive view of the legislative drafting and enforcement history of this regulatory instrument.[159] Article 21(4) EUMR does provide some scope for individual Member States to block FDI transactions which pose a threat to its national interests. Whilst recital 23 EUMR confers upon the Commission the competence to assess concentrations with regards to the fundamental objectives of the EU as contained in article 3 TEU.

However, it is the actual enforcement of these provisions that make it difficult to champion the EUMR as a pragmatic alternative to the FDI Regulation. The 'legitimate interests' (particularly public security) enshrined in article 21(4) are currently interpreted too restrictively to provide any consistent protection of Member State's general security and industrial policy interests. It has been advanced that the current political climate is primed for the development of a more holistic competition policy that could take account of wide ranging European political priorities. Such developments could potentially widen the public interest considerations accepted under article 21(4) and recital 23. Whilst this may be the case, it ultimately appears ill-advised to adopt a mechanism whose effective enforcement is dictated by ambulatory political sentiment. Furthermore, it is difficult to envisage the Commission departing from its strict competition-only assessment of concentrations and embracing the resulting 'procedural shift' in enforcement policy.[160] Finally, the potential politicisation of European merger clearance runs the risk of giving rise to a more protectionist industrial strategy within the EU.[161] This may paint a negative picture about the openness of the EU to inward investment and diminish the EU's reputation abroad. Third-country companies could be less likely to want to invest in Europe if political leaders had the possibility of obstructing inwards foreign investment.[162] Commissioner Vestager is most likely correct in that the EU's 'legitimacy and credibility' relies on maintaining a non-politicised competition regime.[163]

[159] Pandey, Rovetta and Smiatacz (n 82) 60.
[160] Reader (n 142) 128.
[161] Levy, Little and Mostyn (n 140) 29.
[162] ibid 29.
[163] Margrethe Vestager, 'Independence is Non-Negotiable' (Chatham House Competition Policy Conference, London, 18 June 2015).

Ultimately, FDI screening under a separate regulatory regime is necessary to preserve the integrity of European competition policy and it does not appear that the EUMR can simply be manipulated to fulfil a more extensive function.[164] It is also doubtful whether competition regulators would have the requisite expertise to assess a state's motives and to navigate its complex political and economic institutions to determine whether it exerts influence over its SOEs.[165] This responsibility should preferably be left in the hands of national security experts.[166] Whilst a dual-track approach for the assessment of sensitive FDI transactions is, therefore, to be welcomed by EU competition purists, it is likely that the attractiveness of the European investment landscape will still suffer with the introduction of the FDI Regulation. The increased procedural burden associated with FDI screening will be felt by a general class of foreign investors in 'critical sectors' or with governmental ties who automatically trigger the FDI Regulation, not only those who pose a perceived threat as would be targeted under article 21(4) and recital 23 EUMR.

F CONCLUSION

The FDI Regulation was fast-tracked through the legislative process to address defined strategic threats posed by Chinese investment and more general third-country FDIs. However, the finalised FDI Regulation appears to have a number of flaws that call into question its effectiveness as a regulatory solution to strategic takeovers of European companies by Chinese SOEs. Firstly, the adoption of a national screening mechanism is not mandatory. This will undermine the effectiveness of the cooperation and enforcement mechanisms as opinions and comments cannot be issued against Member States that do not have a screening mechanism in place. Secondly, as the Commission's opinions are 'non-binding' it appears that the FDI Regulation's enforcement function may be wholly ineffective as individual Member States will ultimately decide on whether or not they block a transaction. Whether these opinions will have a de facto screening effect, will need to be seen in the enforcement practice which develops in due course. Ultimately, these gaps in the FDI Regulation cause uncertainty for investors as they will need to consider the individual screening regime and political climate of the specific Member States that they are investing in. Whilst a system of centralised screening would,

[164] Angela Huyue Zhang, 'The Antitrust Paradox of China, Inc' (2017) 50(1) New York University Journal of International Law and Politics 159, 218.
[165] ibid.
[166] ibid.

therefore, be a preferable solution, this does not appear to be possible under the Common Commercial policy upon which the FDI Regulation is founded.

The grounds for screening will disproportionately affect Chinese FDI, which tends to focus in 'critical sectors' and, by virtue of the country's economic model, investors will often have some institutional connection with the Chinese government (a 'third-country government'). This seems to create a lose-lose scenario in which beneficial Chinese investment will be forced to face an additional costly clearance process by virtue of its 'Chinese characteristics' whilst FDIs that pose a threat to the EU can simply be approved at the Member State level. The adaptation of the EUMR for screening FDI on public interest grounds would, therefore, have removed this general barrier faced by Chinese FDI under the FDI Regulation. However, this ultimately does not appear practical. Therefore, in the opinion of the author, the FDI Regulation, in its current form, will seriously impede Chinese FDI, while not sufficiently protecting European strategic interests to the extent that it warrants the resulting reduction in Chinese FDI flows.

HIGH FREQUENCY TRADING: A CRITICAL ANALYSIS OF MiFID II – A RETURN TO THE FUNDAMENTALS?

Eoin Doyle*

A INTRODUCTION

Thales of Miletus, the world's first option trader, made his wealth from a monopoly on olive presses.[1] During the winter, Thales acquired his presses at low cost which reflected the lack of demand. However, he correctly predicted as the large crop of olives ripened, demand would increase, and profit would ensue. The basic fundamentals of trading have remained unchanged ever since: buy low and sell high.

However, technological developments have caused a shift in the evolution of trading. Prices are no longer decided by economic fundamentals; instead, they are distorted by the rapid nature of the modern markets.[2] The financial markets are myopic; they focus on profit in the very near term, with profits arising from intraday price exploitation.[3] It is suggested that the 'short sightedness' of speculation has increased market volatility.[4] In fact, the price distortions caused by rapid trading tend to favour such speculators, feeding into another cycle of even higher levels of trading.[5]

The Global Financial Crisis (GFC) should have resulted in a radical rethink of the financial services industry.[6] Whilst the introduction of the Markets in Financial Instruments Directive II (MiFID II) is a formal recognition of the risks posed by automated trading, it is submitted that

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[1] Boudewijn de Bruin and others, 'Philosophy of Money and Finance', The Stanford Encyclopedia of Philosophy (Winter edn, 2020) <https://plato.stanford.edu/archives/win2020/entries/money-finance/> accessed 18 March 2021.

[2] Stephan Schulmeister, 'Boom-Bust Cycles and Trading Practices in Asset Markets, the Real Economy and the Effects of a Financial Transaction Tax' (2010) Austrian Institute of Economic Research Working Paper No 364, 2 <https://www.wifo.ac.at/en/publications/working_papers?detail-view=yes&publikation_id=38641> accessed 18 March 2021.

[3] De Bruin and others (n 1) 4.1.3.

[4] ibid.

[5] Stephan Schulmeister, Margit Schratzenstaller and Oliver Picek, 'A General Financial Transaction Tax. Motives, Revenues, Feasibility and Effects' (*Austrian Institute of Economic Research*, March 2008), 36 <https://www.wifo.ac.at/en/publications/search_for_publications?detail-view=yes&publikation_id=31819> accessed 18 March 2021.

[6] Ross P Buckley, 'Reconceptualizing the Regulation of Global Finance' (2016) 36(2) Oxford Journal of Legal Studies 242, 254.

this Directive is playing catchup, attempting to patch the holes illuminated by the GFC, rather than overhauling the system.[7]

This article will examine High Frequency Trading (HFT) and evaluate the most recent attempt at its regulation, MiFID II.[8] The author will then turn to the future and argue that a more stringent approach should be taken to its regulation.

B WHAT IS HIGH FREQUENCY TRADING (HFT)?

Developed in the 1980s, Algorithmic Trading (AT) is the use of a computer programme to replicate decisions previously made by traders.[9] It quickly rose in popularity with Buckley describing it as 'one of the fastest paradigm shifts we have seen ... over the past 30 years'.[10]

HFT, a subset of AT, has occurred as a result of technological and regulatory developments.[11] It relies on a powerful automated computer system to analyse data and places thousands of orders within microseconds, taking advantage of small profits or opportunities which only exist for very little time.[12] It accounts for approximately 85% of all equity trades in the US and nearly 40% of the European and Japanese trades.[13]

HFT's increased notoriety has led to a divergence of opinion with regards to its benefits and risks, even amongst national regulators.[14] In the Netherlands, a 'pro-HFT' approach has been taken. This has arguably been encouraged by several local HFT firms which are amongst the most active in Europe.[15] This is in stark contrast to the French and German 'anti-HFT' view, which argues that HFT is a form of market abuse. The seminal decision of Autorité des Marchés Financiers (AMF) which is discussed later in this article, represents the French view that the

[7] Pierre-Henri Conac, 'Algorithmic Trading and High Frequency Trading' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford University Press 2017) 17.61; MiFID II adopts a technical approach mostly focused on prevention of a repeat of the 2010 Flash Crash and some provisions on market abuse.
[8] Parliament and Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 (MiFID II).
[9] Conac (n 7) para 17.04.
[10] Buckley (n 6), citing Edward Leshik and Jane Cralle, *An Introduction to Algorithmic Trading: Basic to Advanced Strategies* (Wiley 2011) 3.
[11] Conac (n 7) para 17.07; Examples include increased computing power, improved telecommunications infrastructure, falling processing costs, all of which reduce the latency (delay) to the markets.
[12] Martin Wheatley, 'We Need Rules to Limit the Risks of Superfast Trades' *Financial Times* (London, 20 September 2010) <https://www.ft.com/content/ad7f31f6-c4cd-11df-9134-00144feab49a> accessed 18 March 2021.
[13] Buckley (n 6) 248.
[14] Conac (n 7) para 17.17.
[15] 'High Frequency Trading: The Application of Advanced Trading Technology in the European Marketplace' (*The Netherlands Authority for the Financial Markets*, November 2010) <https://www.afm.nl/~/profmedia/files/rapporten/2010/hft-report-engels.ashx> accessed 18 March 2021.

risks of HFT outweigh the benefits.[16] In Germany, legislation introduced requires HFT traders to obtain a licence and determines some AT practices as a form of insider trading.[17] The preamble to MiFID II gives an insight into the opinion of the European legislators as to the benefits, including increased market participation and improved liquidity whilst reducing short term volatility, and also providing means for the better execution of orders.[18]

However, the emergence of this technique has raised concerns regarding market stability and potential abuse.[19] Without sufficient control, losses can quickly accumulate causing increased volatility and amplification of systemic risk. AT tends to amplify market swings as algorithms react to one another and deepen their position.[20] Some suggest that the benefits listed above are 'marginal' as users of HFT strategies only hold the position for milliseconds and, as a result, the liquidity provided is only 'transitory'.[21] If one of the main virtues of HFT is not as reliable as previously imagined, it is questionable whether such a favourable approach should be taken. It is suggested that a stringent approach to regulation is therefore warranted.

C WHAT IS THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE (MiFID II)?

MiFID II is a predominately principles-based systemic regulation which was introduced after the failings of the GFC pushed HFT into the spotlight.[22] The principles-based approach gained popularity following the 2007 crash as the previous, more rules-based regimes allowed a broad interpretation and enabled avoidance of regulations. It aims to increase market transparency by harmonising EU rules, expanding who shall be subject to regulatory obligations, improving market supervision, and unlike its predecessor MiFID I, tackles market manipulation head on with reference to the European Market Abuse Regime.[23]

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[16] Decision of the Sanction Commission of the AMF against Euronext Paris SA and Virtu Financial Europe Ltd (SAN-2015-20) (AMF).
[17] Empfehlungen der Ausschüsse - Gesetz zur Vermeidung von Gefahren und Missbräuchen im Hochfrequenzhandel (Hochfrequenzhandelsgesetz) BR 156/1/13 (2013).
[18] Danny Busch, 'MiFID II: Regulating High Frequency Trading, Other Forms of Algorithmic Trading and Direct Electronic Market Access' (2016) 10(2) Law and Financial Markets Review 72, 73.
[19] Conac (n 7) para 17.10.
[20] ibid.
[21] ibid para 17.12.
[22] Tilen Čuk and Arnaud Van Waeyenberge, 'European Legal Framework for Algorithmic and High Frequency Trading (Mifid 2 and MAR): A Global Approach to Managing the Risks of the Modern Trading Paradigm' (2018) 9(1) European Journal of Risk Regulation 146, 146.
[23] Parliament and Council Regulation (EU) 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Parliament and Council Directive 2003/6/EC and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1 (MAR); Parliament and Council Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L173/179.

I Accessing the Market

In order to access the market, HFT firms must successfully navigate several regulatory obstacles. This includes receiving regulatory authorisation, adapting to changing legal exemptions and ensuring they comply with the expanded requirements imposed by MiFID II.

(a) Redefining HFT

In order to acquire authorisation from regulators, firms must provide a detailed explanation of the algorithm in use, how it works and who is in control of it, prior to accessing the market. There was initial concern that commercially sensitive detail, such as the code itself, would be demanded. However, this has been avoided, relying instead on the use of unique Legal Entity Identifiers (LEI) to track the algorithm's activity.[24] The decision to require prior authorisation has created a need for a clear definition of HFT. Article 4(1)(40) provides that HFT is characterised by the use of special infrastructure to reduce latency, automated order management without human intervention, and display high intraday rates of messages.

However, the vague definition of high intraday rates has failed to provide clarity, and caused confusion and uncertainty in the market, ultimately leading the European Commission to turn to the European Securities and Markets Authority (ESMA) for guidance. In 2016, almost two years after the Directive's publication, the Commission announced its supplementary Delegated Regulation which provided what constitutes high levels of intraday rates. Article 19(1) provides that intraday rates which exhibit message rates of more than 2 per second per financial instrument or 4 messages per second per instruments on any trading venue, would constitute HFT.[25]

This initial vagueness was in stark contrast to the precise nature of algorithms and was, perhaps, indicative of the Commission's desire to take a broad approach to regulation. While this author accepts that a too tightly defined definition could lead to some participants escaping regulation, it is suggested that non-essential vagueness is likely to cause uncertainty and make it difficult for market participants to adequately prepare. This could, ultimately, hamper cooperation

[24] Čuk and Van Waeyenberge (n 22) 150.
[25] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Parliament and Council Directive 2014/65/EU as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2017] OJ L87/1 (Delegated Regulation).

between users and regulators; in the AMF decision we see an example of such, as Virtu claimed the French anti-manipulation provisions were unconstitutionally vague.[26]

(b) Expanded Scope

Arguably one of the most important measures within MiFID II is the removal of the exemption for proprietary trading.[27] This widens the regulatory net, requiring proprietary traders operating in Europe to apply for a licence as an investment firm. Conac suggests that this approach goes further than expected as the categorisation of proprietary traders as investment firms will trigger article 9(1) of MiFID II, requiring them to maintain a minimum capital level at all times in accordance with the Capital Requirements Directive (CRD IV).[28] Although any attempt to address systemic risk is 'a step forward', Binder suggests that such a blanket approach to regulation of banks and investment firms which have widely varying business models and activities is 'questionable'.[29] It is likely that the requirement to retain additional capital reserves will dramatically increase the operational costs for HFT users, which could reduce market activity.[30]

However, a solution may be in sight as the EU announced its Investment Firms Directive (IFD) and Investment Firms Regulation (IFR) which will underpin its new prudential framework for MiFID authorised investment firms.[31] Rather than applying a one-size fits all approach, the new framework, due to take full effect in June 2021, will allow for 'differentiated regulation' based on a firm's classification.[32] This will be determined by a firm's business activity and risk profile and structure, and should allow for more equitable regulation. The meaning of investment firms has been expanded to include Direct Electronic Access (DEA) users, after ESMA issued guidelines which identified such activities as a source of risk, and decided to increase requirements, including minimising any potential disruption caused by third parties.[33]

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[26] AMF (n 16).
[27] MiFID II (n 8) art 2(1)(d)(iii); Under MiFID I this was possible.
[28] Parliament and Council Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338, arts 88 and 91.
[29] Jens-Hinrich Binder, 'Governance of Investment Firms under MiFID II' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford University Press 2017) para 3.07.
[30] Conac (n 7) para 17.45.
[31] Parliament and Council Directive (EU) 2019/2034 of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU [2019] OJ L314/64.
[32] 'The Investment Firm Directive and Regulation' (*A&L Goodbody*, 24 June 2020) <https://www.algoodbody.com/insights-publications/the-investment-firm-directive-and-regulation> accessed 18 March 2021.
[33] MiFID II (n 8) art 2(1)(d)(iii).

DEA is often used by market participants who cannot afford co-locations, the somewhat controversial way in which traders physically connect to trading venues instead of relying on arrangements with a member of a trading venue to make use of their trading code.[34] The increased responsibility for DEA providers to ensure the 'suitability' of clients will likely result in extensive due diligence costs.[35] It will be interesting to see the effects of this requirement in practice and to what extent providers will be held liable for their clients' indiscretions.

(c) New Requirements

One of the key objectives of MiFID II is increased transparency. In order to evaluate its effectiveness, this section will examine some of the new requirements imposed such as the regulation of co-location, the introduction of a minimum tick size to reduce volatility and an attempt to ensure the continued provision of liquidity.[36]

Co-location has been alleged to give certain users of HFT an 'illegitimate advantage' as participants have attempted to gain an edge on their competitors by making special arrangements with trading venues in order to reduce the physical distance that the data must travel.[37] This would essentially give privileged firms the possibility of early access to market data, enabling inequality in the markets. Whilst MiFID II failed to impose an outright ban on co-location, it ensures such arrangements are transparent, fair and non-discriminatory, and venues will now be required to publish co-location offers on their websites.[38] This author submits that, whilst this introduction is welcome, it was a missed opportunity on the regulatory body to eradicate the structural inequality which arises as a result of co-location. In order to ensure equality, it is suggested that co-location should be outlawed entirely. In the absence of such an overhaul, there have been innovative attempts to ensure fair pricing, such as the introduction of propagation delays by stock exchanges. For example, the IEX Stock Exchange installed 61KM of fibre optic cable, which introduced a propagation delay (time taken for a signal to reach its destination) of 350 microseconds for all traders. This ensures fair pricing as no HFT system can gather information on prices from the market and place an order faster than the exchange can update their own prices.

[34] ibid art 4(1)(41); Delegated Regulation (n 25) art 20.
[35] Busch (n 18) 79.
[36] Other provisions include regulation of fee structures of trading venues (art 27(2)), and order to trade ratios.
[37] Čuk and Van Waeyenberge (n 22) 150.
[38] MiFID II (n 8) art 48(8).

A major concern regarding HFT is market volatility, which has only increased following technological advances.[39] In order to discourage this, MiFID II has attempted to harmonise minimum tick size, the smallest price increment allowed for a financial product, which ensures a universal floor.[40] This is a welcome imposition which halts the 'race to the bottom' as trading venues are prevented from enticing traders with lower tick sizes than their competitors.[41]

One of the main attributes of HFT is the increased liquidity it supposedly provides and Gomber and others suggest this was, perhaps, the reason why regulators were so slow to initially intervene.[42] However, as many HFT firms are 'de facto market markers' but are not required to register as such, deficient market-making can cause liquidity to vanish in times of crisis.[43] Market-making can be defined as issuing:

> firm, simultaneous two-way quotes of comparable size and at competitive prices relating to one or more financial instruments on a single trading venue or across different trading venues, with the result of providing liquidity on a regular and frequent basis to the overall market.[44]

By expanding the obligations of market makers, and ensuring continued liquidity even in times of turbulence, MiFID II attempted to tackle the issue; a firm which falls within the definition of a market-maker shall be required to enter into a binding written Market Maker Agreement (MMA) with the trading venue, which requires them to continuously provide liquidity even in stressed market conditions. However, Fox suggests that such a restrictive approach could come with a cost; in order to maintain profitability, firms will resort to quoting wider spreads in the normal market, reducing liquidity.[45] It is this author's belief that a balance must be struck between reducing the systemic risk posed by volatile conditions, while simultaneously avoiding an illiquid market; lax regulation could lead to instability and uncertainty, whereas over-regulation could impede HFT firms, reducing the liquidity supply and bringing the market to a standstill.

II An Increasingly Watchful Eye

[39] Conac (n 7) para 17.61.
[40] MiFID II (n 8) art 48(6).
[41] Huw Jones, 'EU Agrees Preliminary Deal to Rein in Speed Traders' *Reuters* (London, 22 October 2013) <https://www.reuters.com/article/europe-speedtrading-idUSL5N0IC1NH20131022> accessed 18 March 2021.
[42] Peter Gomber and others, 'High Frequency Trading' (*Deutsche Börse Group*, 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858626> accessed 18 March 2021.
[43] MiFID II (n 8) art 17(4).
[44] ibid 51.
[45] Merritt B Fox, 'MiFID II and Equity Trading: A US View' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford University Press 2017) para 18.116.

On 6 May 2010, an error from a singular algorithm caused a 'flash crash', and the Dow Jones Index lost close to 10% of its value only to rebound without any human intervention within 20 minutes.[46] Unsurprisingly, this forced action as the G20 Seoul Global Summit urged regulators to 'mitigate the risks posed to the financial system by the latest technological developments'.[47] An investigation subsequently launched by the US Department of Justice and the Commodity Futures Trading Commission (CFTC) concluded that although HFT was not the sole cause of the flash crash, it had exacerbated it.[48]

Therefore, it could be argued that MiFID II was introduced reactively, to prevent future flash crashes, falling short of the broad overhaul proffered by Buckley. The introduction of increased supervisory requirements for market participants suggests that the regulatory authorities will no longer accept inept supervision as a justification for economic fallout.

(a) Enhanced Supervision

MiFID II attempts to reduce risk in the market by imposing a compliance function for both firms and venues, increasing their responsibility and ensuring continuity.

Investment firms are required to have suitable internal systems and controls to ensure that their systems are resilient, have sufficient capacity, are subject to certain threshold limits, prevent erroneous orders and ensure they do not contribute to a disorderly market.[49] Similar requirements are imposed on trading venues, who are viewed as 'a second line of defence' against market instability.[50] Any firm which engages in AT will be required to notify competent authorities of their home state, who may request additional information on their strategies and risk controls. However, Busch suggests that the authority is in fact 'quite remote', and proper supervision would require the necessary computer systems and expertise to adequately assess the need for intervention.[51] Whilst this would suggest that the authorities

[46] Staffs of the US Commodity Futures Trading Commission and Security Exchange Commission, 'Findings Regarding the Market Events of May 6, 2010: Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues' (*Commodity Futures Trading Commission and Security Exchange Commission*, 2010) 1, 45 (The Report) <https://www.sec.gov/news/studies/2010/marketevents-report.pdf> accessed 18 March 2021.
[47] G20 Leaders, 'The G20 Seoul Summit Leaders' Declaration' (G20 Seoul Summit, Seoul, 12 November 2010) <http://www.g20.utoronto.ca/2010/g20seoul.html> accessed 18 March 2021.
[48] The Report (n 46) 2; It was a very large sell order which caused the Flash Crash, however as HFT users left the market in response to the order, liquidity dissipated and severe price swings occurred.
[49] MiFID II (n 8) art 17(1); New requirements include: ensuring their systems comply with the MAR, that business continuity arrangements are in place in case of failure, must regularly stress-test system and sufficiently monitor to ensure meets all of requirements.
[50] Conac (n 7) para 17.33.
[51] Busch (n 18) 79.

are relying on the market participants' sense of responsibility and cooperation, it is likely the users have 'every interest in' collaboration in order to avoid the imposition of stricter regulations.[52]

If 'unusual' activity occurs on the market, article 12 of ESMA's draft Regulatory Technical Standard 6 (RTS 6), requires that both the firm and venue are capable of halting trading with a 'kill function'.[53] In case of crisis, regulators have attempted to make reconstruction of trading activity possible, by requiring firms and venues to synchronise their clocks and timestamp their activity within 100 microsecond accuracy and this data must be stored for 5 years.[54]

It is likely that these new requirements will increase compliance costs and they may detrimentally impact smaller firms with less resources. In order to counter the financial concern and increase the likelihood of future cooperation, Čuk and Van Waeyenberge advocate the use of regulatory sandboxes which have been successfully implemented in the UK's Project Innovate.[55] The initiative aims to reduce time to market, improve access to finance and encourage innovation.[56] These sandboxes would allow businesses to test their innovations in a controlled 'real world' environment, enabling firms to innovate at low cost and allowing the regulator to benefit from early exposure to future developments, ultimately increasing transparency in the market.

(b) A Welcome Approach to Market Manipulation

Market manipulation is the artificial influencing of prices in order to achieve a profit, and it has been argued that HFT should be viewed as such with some describing it as 'legalised front-running' or 'basically evil'.[57] Although MiFID II does not explicitly deal with market manipulation, it refers to the new EU Market Abuse Regime, consisting of a Market Abuse Regulation (MAR) and a Market Abuse Directive (CSMAD), which became applicable in Ireland in 2016 and aims to detect and deter market abuse.

[52] ibid.
[53] European Securities and Markets Authority, 'Regulatory Technical and Implementing Standards – Annex I: MiFID II / MiFIR' (ESMA/2015/1464, 28 September 2015) 201–46.
[54] MiFID II (n 8) art 50.
[55] Čuk and Van Waeyenberge (n 22) 153.
[56] 'Regulatory Sandbox' (*Financial Conduct Authority*, 11 May 2015) <https://www.fca.org.uk/firms/regulatory-sandbox> accessed 18 March 2021.
[57] Sam Mamudi, 'Charlie Munger: HFT is Legalized Front-Running' *Barron's* (New York City, 3 May 2013) <https://www.barrons.com/articles/BL-SWB-27750> accessed 18 March 2021. See also Michael Lewis, *Flash Boys: A Wall Street Revolt* (WW Norton & Company 2014) 274.

Attempts to disrupt or delay trading venues' services with the aim of distorting the supply and demand of a product or making it difficult to identify genuine orders are prohibited.[58] Examples would be of 'spoofing' or 'quote stuffing' which are ruinous to the competitive nature of the market.[59] This author contends that the decision to place the burden on the participants of the market to report any suspicious trading activity to their regulator, increases the likelihood of cooperation which is undoubtedly welcome moving forward.

However, MiFID II fails to suitably increase the arsenal available to regulators, who are 'using bicycles to try and catch Ferraris'.[60] This author argues that any potential repercussions for market manipulation should outweigh the profit which can be gained, and that future regulation should follow the strict approach witnessed by the AMF against Virtu and Euronext.[61] Euronext was held to have acted with a 'lack of neutrality and impartiality' by giving Virtu an exemption of its fee without public disclosure; Virtu was liable for layering, which is a form of market manipulation. Both received sanctions of €5 million for their actions, which was 6 times the profit made by Virtu on these trades. Conac argued such a stringent approach to market manipulation was 'equivalent to a de facto ban on HFT in France' and has seen Virtu leave the market.[62] However, due to the requirement of cross-board cooperation, such accusations can be difficult to prove and will require huge costs from supervisors. Despite this, it is submitted that successful pan-European harmony cannot be achieved without cost.

D FUTURE APPROACH

One of the main arguments for HFT is the increased liquidity and market participation it provides. But what if, similarly to the AMF, it was determined that the 'efficiency gains are marginal while the risks of market abuse are high?'[63] Buckley believed it was time for a radical rethink of the system, and that we needed to adopt the first of Stiglitz's 'Principles for a New Financial Architecture', that financial markets are not a means to an ends but rather a support

[58] MAR (n 23) art 12(2)(c).
[59] Spoofing involves a system making an overpriced offer to the market, but cancels before anyone else can buy. Other programs in the market respond to this offer, causing the market price to rise, and the spoofer then sells their previously acquired options for a significant profit; Quote stuffing involves targeting other algorithms by making thousands of unimportant offers, overloading them with information to sift through, thus slowing them down.
[60] John Bates, 'Post Flash Crash, Regulators Still Use Bicycles to Catch Ferraris' (*Traders Magazine*, 24 April 2015) <https://www.tradersmagazine.com/departments/technology/post-flash-crash-regulators-still-use-bicycles-to-catch-ferraris/> accessed 18 March 2021.
[61] AMF (n 16).
[62] Conac (n 7); The Sanction Commission held that the usual behaviour of high-frequency traders constituted a violation of French law.
[63] ibid para 17.17.

to the productivity of the real economy.[64] Whilst reforms like MiFID II are likely to avoid another crisis in the near future, we must be willing to 'think big' if we are to succeed in the long run. This would include a stronger approach to the regulation of HFT, with the potential imposition of a Financial Transaction Tax, and a Minimum Holding Period.

I Financial Transaction Tax (FTT)

A FTT would involve the imposition of between 0.01%-0.1% on all wholesale capital market secondary transactions.[65] Although this is not a new concept, it has been suggested that it is needed today more than ever.[66] If implemented correctly, it could discourage purely speculative, short term positions, whilst leaving the longer term investments unaffected. This would reground trade in economic fundamentals rather than speculation which HFT has caused a shift towards.

In 2011, the European Commission agreed to implement a FTT by early 2018 with some Member States allowed early rollout.[67] It should be noted that at this stage, a pan-European implementation has yet to occur. However, it is submitted that the recovery package provided for the COVID-19 pandemic, could increase the likelihood of implementation, in order to recoup funds.[68] As European Commissioner for Financial Services, Mairead McGuinness recently stated 'every loan has to be repaid'.[69]

Buckley believes such a tax is 'eminently feasible', as the nature of the present centralised markets makes implementation easier in comparison to the proprietary systems of the past.[70] In fact, the IMF concluded that the implementation of a FTT 'is no more difficult and, in some respects easier, to administer than other taxes'.[71] Such a tax would encourage simpler transactions, enhancing the effectiveness of security regulations.

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[64] Jones (n 41).
[65] Buckley (n 6) 263.
[66] Such a tax was first proposed by Keynes, and subsequently resurrected by Tobin.
[67] Phillip Inman, 'EU Approves Financial Transaction Tax for 11 Eurozone Countries' *The Guardian* (London, 22 January 2013) <https://www.theguardian.com/business/2013/jan/22/eu-approves-financial-transaction-tax-eurozone> accessed 18 March 2021; Countries include Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.
[68] Meabh McMahon, 'What's Ahead for the EU on Trade and Finances' (*Euronews*, 15 January 2021) <https://www.euronews.com/2020/12/15/what-s-ahead-for-the-eu-s-trade-and-financial-future> accessed 18 March 2021.
[69] ibid.
[70] Buckley (n 6) 264.
[71] John D Brondolo, 'Taxing Financial Transactions: An Assessment of Administrative Feasibility' (2011) International Monetary Fund Working Paper No 11/185, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910488> accessed 18 March 2021.

It is submitted that in order to achieve the level of forward thinking encouraged by Buckley, and to correct the structural problems of price inaccuracy and instability, the implementation of a FTT is necessary to Europe's future success.

II Minimum Resting Period

As HFT involves trading such a large quantity of trades within microseconds, there is potential for the market to be overloaded.[72] In order to tackle this volatility, the European Parliament has moved to introduce a minimum resting period.[73] This would require orders to stay on an order book for at least 500 milliseconds, 'effectively killing off high-frequency trading'.[74] A similar approach was almost taken in Australia, with a resting time of 500 milliseconds proposed in order to 'reduce excessive noise'.[75] However, these have failed to materialise, with critics arguing that the move would only serve to increase high-frequency trading by creating an order whose price was frozen in the market for 500 milliseconds.[76] In Australia, it was determined that the cost of system development would exceed the benefit from enforcing such a restriction.[77] Perhaps there is potential to offset these costs, using the income generated from the simultaneous implementation of a FTT?

E CONCLUSION

Buckley believes the lens with which you view HFT is important; if its principal aim is to increase liquidity then arguably a soft approach to regulation should be implemented. However, if you focus on the financial markets as a support to the real economy and society, then increased transparency and grounding price to fundamentals are key.

Whilst increased regulation is welcomed, it is argued that MiFID II falls short of the radical overhaul recommended by Buckley. It is more of a temporary patch-work than a new regime. That is not to say that it has not been successful; it did improve supervision and increase the responsibilities of market participants, while tackling the issue of market manipulation. Future cooperation seems likely and should help to increase market transparency. Despite these positives, it is argued that the regulation was simply not looking at the bigger picture.

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[72] MiFID II (n 8) preamble.
[73] Jones (n 41).
[74] ibid.
[75] Buckley (n 6) 267.
[76] Philip Stafford, 'Europe Agrees on High-Speed Trading Regulation' *Financial Times* (London, 22 October 2013) <https://www.ft.com/content/810ce436-3b28-11e3-87fa-00144feab7de> accessed 18 March 2021.
[77] 'Report 364 – Response to Submissions on CP 202 Dark Liquidity and High-Frequency Trading: Proposals' (*Australian Securities and Investments Commission*, August 2013) 23-24.

As MiFID III is likely 'around the corner', this author believes it is time to focus on the future system we want, rather than the past mistakes we want to avoid repeating.[78] It is believed that the risks posed by HFT far outweigh the positives, and as such a more stringent approach should be taken; fundamental change is needed. In order to remove structural inequality, co-locations should be outlawed. The implementation of a FTT could enable regulators to afford a minimum resting period and the use of regulatory sandboxes should be encouraged as a means of reducing participants' costs.

The approach taken by the AMF in France suggests a possible trend towards more stringent regulation; however, this hope for the future should be tempered by the cost required for successful cross-border prosecution, and, as Member States continue to differ in their attitude towards HFT, Conac believes 'Europe stands to stay divided for a long time'.[79] Rather than prepare for the future by focusing on the past, we should act like Thales of Miletus, and go back to our fundamentals.

[78] Čuk and Van Waeyenberge (n 22) 9.
[79] Conac (n 7) para 17.62.

‘GEE, LET’S GO TO WAR’. L’IRLANDE, LE CONSEIL DE SÉCURITÉ DE L’ORGANISATION DES NATIONS UNIES, ET LES POUVOIRS DU CHAPITRE VII: EST-CE QUE LA RÉFORME LÉGALE OU POLITIQUE EST POSSIBLE?[1]

Philip Crowe*

A INTRODUCTION

Le système de sécurité collective de l’Organisation des Nations Unies (ONU) a longtemps été critiqué comme un moyen pour les pays puissants de cibler leurs ennemis tout en protégeant leurs amis, et un moyen pour les grandes puissances de s'injecter dans les conflits nationaux.[2] Tandis que le but de ce système est de maintenir la paix et la sécurité internationale, le fait est qu'il possède une approche politisée et une interprétation sélective de la sécurité internationale. Mais, comme j’indiquerai, ce manque d’objectivité était essentiel pour construire l’ONU avec succès après la deuxième guerre mondiale.

L’impasse actuelle sur le Conseil de Sécurité (le Conseil) concernant les résolutions relatives à la Syrie représente un bon exemple. Depuis le début du conflit syrien en 2010, beaucoup de résolutions ont été proposées qui concernent les opérations militaires mais aussi les opérations de l’aide humanitaire. Cette impasse est largement à l'intérêt des États-Unis et de la Russie dans la région. Chacun soutient les parties opposées du conflit et bloquent ainsi toute effort de l'autre de prendre des mesures.[3] Les efforts à produire une réponse du Conseil aux attaques aux armes chimiques et aux crimes de guerre présumés ont toutes fait l'objet d'un veto du membre permanent.[4]

Naturellement, il faut poser la question: comment fonctionne-t-il réellement le système de sécurité collective et comment peut-il être amélioré?

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[1] John Bowden, ‘Bolton: Trump's Pentagon Shakeup “Destructive”’ (*The Hill*, 15 novembre 2020) <https://thehill.com/homenews/administration/526081-bolton-trumps-pentagon-shakeup-destructive> accédé le 24 mars 2021; Le tweet de l’ancien Président des États-Unis, Donald Trump, décriant son conseiller de la sécurité nationale, John Bolton quand il l’a renvoyé. Bolton était ancien ambassadeur des États-Unis à l’ONU et un homme très agressif concernant le droit unilatéral d’utiliser de force militaire.

[2] Anne Orford, ‘What Kind of Law is This?’ (*London Review of Books Blog*, 29 mars 2011) <https://www.lrb.co.uk/blog/2011/03/29/anne-orford/what-kind-of-law-is-this/> accédé le 24 mars 2021.

[3] Michelle Nichols, ‘Russia, Backed By China, Casts 14th UN Veto on Syria to Block Cross-Border Aid’ *Reuters* (New York City, 20 décembre 2019) <https://www.reuters.com/article/us-syria-security-un-idUSKBN1YO23V> accédé le 24 mars 2021.

[4] ‘Russia's 12 UN Vetoes on Syria’ (*RTÉ*, 11 avril 2018) <https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/> accédé le 24 mars 2021.

La République d'Irlande a été élue pour un mandat non permanent de deux ans au Conseil le 18 juin 2020, vainquant le Canada, membre du G7, à un siège.[5] Elle a occupé son siège le 1 janvier 2021. Il s'agissait d'un coup d'État diplomatique pour une petite nation insulaire qui a préconisé sa précieuse contribution aux déploiements des soldats de la paix de l'ONU comme une pierre angulaire de sa campagne.[6]

Tandis que le débat au sujet du multilatéralisme s'est récemment transformé en critique, la promesse de l'Irlande de travailler pour 'les réformes et les changements nécessaires au Conseil de sécurité, qui se font attendre depuis longtemps', sera mise à l'épreuve. Afin de réussir avec ses réformes, il faut en vérifier la nature juridique et politique précise.

L'Irlande a servi trois mandats précédents sur le Conseil, chacun correspondant avec une crise géopolitique (la crise des missiles de Cuba en 1962, la guerre des Malouines en 1982, les attentats du 11 septembre en 2001). Donc, pour un petit pays qui ne possède ni une histoire ni une présence militaire, l'Irlande a beaucoup d'expérience des machinations du Conseil. A son avis, les pouvoirs de chapitre VII de la Charte de l'ONU doit être réformé tel que le Conseil fonctionne mieux face aux crises de ce siècle et, pour ma part, je proposerai que la réforme politique du veto soit la réforme le plus possible.

La présence sur le Conseil de deux autres pays qui ont travaillé récemment sur les réformes proposées du veto (la France et le Mexique),[7] les relations fortes entre l'Irlande et trois membres permanents (les États-Unis, le Royaume-Uni et la France) et sa réputation comme courtier honnête indiquent qu'il y existe une bonne chance de réformes fructueuses.

La deuxième partie de cet article examinera la formation et l'histoire du Conseil et le fonctionnement du système de sécurité collective. La troisième partie abordera la nature interprétative des résolutions du Conseil, en particulier les raisons juridiques sur lesquelles les conflits en Afghanistan et en Irak ont été fondés. La quatrième partie analysera les réformes possibles pour améliorer le fonctionnement du système de sécurité collective et examinera les

[5] 'Ireland Wins Seat on United Nations Security Council' (*Department of Foreign Affairs*, 18 juin 2020) <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2020/june/ireland-wins-seat-on-united-nations-security-council-.php> accédé le 24 mars 2021.

[6] 'Une Introduction à la Candidature de l'Irlande au Conseil de Sécurité des Nations Unies 2021—2022' (*Department of Foreign Affairs*, juillet 2018) <https://dfa.ie/media/dfa/ourrolepolicies/unitednations/UNSC_Booklet_fr.pdf> accédé le 24 mars 2021.

[7] L'Irlande soutient cette initiative franco-mexicaine; Micheál Martin, 'Speech by An Taoiseach, Micheál Martin TD' (75th Session of the United Nations General Assembly, 26 septembre 2020) <https://merrionstreet.ie/en/news-room/speeches/speech_by_an_taoiseach_micheal_martin_t_d_united_nations_general_assembly_75_saturday_26_september_2020.html> accédé le 24 mars 2021.

aspects juridiques et politiques des réformes potentielles. La cinquième partie conclura. Tout au long, je contextualiserai mon commentaire en termes de la contribution historique de l'Irlande au Conseil et de la contribution future découlant de son mandat de deux ans (2021-2022).

B LE CONSEIL DE SÉCURITÉ ET LA SÉCURITÉ COLLECTIVE

I Le Conseil de Sécurité – les Origines, la Pratique et l'Adhésion de l'Irlande

L'objectif des rédacteurs de la Charte des Nations Unies était que le Conseil centraliserait le contrôle de l'usage de la force au sein d'un seul organe et interdirait également l'usage unilatéral de la force par les États (à l'exception de la légitime défense).[8] L'une de ses principales fonctions, déléguées par cet objectif principal de l'ONU elle-même, est de préserver la paix et la sécurité internationales.[9] Le Conseil a été investi du pouvoir de décider quand la paix et la sécurité internationales étaient menacées et donc la nécessité de sanctions et/ou d'intervention militaire dans un conflit.[10]

Le Conseil a été créé par la Charte des Nations Unies et se compose de 15 membres de l'ONU, dont cinq membres permanents-la Chine, les États-Unis, la Russie, le Royaume-Uni et la France.[11] Les dix autres États sont élus par l'Assemblée Générale des Nations Unies (l'Assemblée) et ont un mandat de deux ans. Ce qui rend ces cinq États uniques, c'est qu'ils détiennent le pouvoir d'opposer unilatéralement leur veto à toute proposition soumise au Conseil et dans ce cas, la proposition est annulée.

La proposition d'une organisation internationale a représenté des priorités différentes pendant la phase finale de la deuxième guerre mondiale. Tandis que les États-Unis possédaient une perspective globale et ils voulaient éviter n'importe quelle restriction sur leurs pouvoirs, le Royaume-Uni et la Russie étaient motivés par la stabilité européenne et voulaient empêcher l'ascension militaire allemande encore.[12] Les fonctionnaires britanniques ont réalisé qu'il y avait un besoin d'une organisation globale au lieu des accords régionaux de la sécurité pour encourager la participation américaine. Pendant les négociations pour le Conseil, quelques

[8] Christine Gray, *International Law and The Use of Force* (2nd edn, Oxford University Press 2004) 195.
[9] La Charte des Nations Unies (adopté le 26 juin 1945, entrée en vigueur le 24 octobre 1945) 1 UNTS XVI, art 1 <https://www.un.org/fr/charter-united-nations/> accédé le 24 mars 2021.
[10] ibid art 24.
[11] ibid art 23.
[12] Edward Luck, 'A Council for All Seasons: The Creation of the Security Council and Its Relevance Today' in Vaughan Lowe and others (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (Oxford University Press 2010).

petits et moyens états ont demandé les définitions détaillées des situations où les grandes puissances interviendraient. Mais le grand trois (les États-Unis, la Russie et le Royaume-Uni) ont préféré d'avoir la flexibilité d'adapter aux situations sans limites. Le représentatif russe a déclaré que la Charte doit être un sommaire des principes généraux et non un code concret.[13]

En ce qui concerne la permanence de certains pays, le grand trois ont été certains que leur unité serait la clé du succès de l'ONU et donc il faudrait être membres permanents du Conseil. Le président Roosevelt a déclaré en 1942: 'tant que ces quatre nations [la Grande-Bretagne, la Russie, les États-Unis, la Chine] resteront solidaires ... il n'y aura aucune possibilité qu'une nation agresseur se déclare pour déclencher une autre guerre mondiale.'[14] La France serait accordé le statut permanent pour protéger encore mieux contre l'ascension Allemande.

Grâce aux tailles des membres permanents, la non-adhésion d'un ou plusieurs serait catastrophique pour le projet entier. Donc, étant donné que les grands écarts économiques et politiques existaient entre le grand trois (et quatre avec la Chine) le veto serait conçu comme moyen de protection contre la menace que certains membres permanents ne seraient pas d'accord. Ainsi, pour assurer que les pouvoirs de l'institution ne seraient pas utilisés contre un membre fondateur, le veto était confirmé comme pierre angulaire (et exigence non-négociable) pour la création du Conseil.

Une idée répandue souvent est que la divergence des volontés entre les trois membres permanents 'occidentaux' et les deux membres permanents 'orientaux' est un défaut évident de la formation du Conseil. En effet, pendant la guerre froide, le Conseil était en quelque sorte paralysé et incapable de remplir son rôle en raison du veto et de l'impasse est/ouest. Il est fait remarquable que le droit de veto a été utilisé 279 fois de 1945 à 1984.[15] Ce nombre ne reflète pas pleinement le pouvoir du véto, car de simples menaces d'invoquer un veto ont conduit à la refonte de nombreuses résolutions proposées jusqu'à ce qu'une solution mutuellement acceptable pour les membres permanents soit trouvée. Après la guerre froide, l'utilisation du veto s'est considérablement diminuée, mais seulement jusqu'en 2011, lorsque le taux de veto a augmenté avec l'explosion du conflit syrien.[16]

[13] ibid.
[14] ibid.
[15] Gray, *International Law and The Use of Force* (n 8) 196.
[16] 'UN Security Council Working Methods – The Veto' (*Security Council Report*, 16 décembre 2020) <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> accédé le 24 mars 2021.

Tandis que cette divergence semble comme un enjeu fondamental de la formation du Conseil, il faut rappeler que le Conseil a été conçu pour préserver un équilibre de vues entre les puissances afin qu'aucune nation ne puisse imposer sa volonté aux autres. Alors là où certains voient une faille, d'autres voient un équilibre nécessaire.

L'expérience irlandaise avec le veto s'étend plus loin que son abonnement de l'ONU et un événement précoce peut indiquer une base pour son avis du veto. La candidature de l'Irlande à adhérer à l'ONU a été initialement victime d'un veto russe en 1947. Lors d'une réunion de l'ONU, le représentant russe a indiqué que la Russie ne soutiendrait pas la candidature de l'Irlande car:

> (i) nous n'avons pas de relations diplomatiques avec le Union soviétique; (ii) en raison de notre comportement pendant la guerre lorsque, selon lui, nous n'avons pas aidé les Alliés, avons exprimé notre sympathie aux puissances de l'Axe et à Franco-Espagne et aucune justification de notre comportement pendant la guerre n'avait été produite depuis la fin de la guerre

selon un fonctionnaire irlandais.[17]

Cette action russe a provoqué le premier ministre d'Irlande (Taoiseach) à décrire l'usage du veto par la Russie comme 'un abus de procédure' et le représentant australien a estimé que l'usage du veto de cette manière était tel que d'obstruer de manière non démocratique à la volonté de la majorité des membres de l'ONU.[18] Bien que ce ne soit pas dans un contexte de sécurité, l'expérience initiale de l'Irlande en matière de veto a sans doute donné le ton à une opinion cohérente sur la nécessaire réforme de celui-ci. L'Irlande a ensuite adhéré à l'ONU en 1955 et a servi des mandats au Conseil en 1962, 1981-1982 et 2001-2002.[19]

II La Sécurité Collective et si on Utilisait les Sanctions ou la Force?

La sécurité collective concerne les États qui coopèrent collectivement pour prévenir ou arrêter les guerres ou autres violations de la paix internationale qui peuvent conduire à une catastrophe humanitaire. Le chapitre VII de la Charte énonce les mesures d'exécution.[20] Ces mesures

[17] 'Extracts From a Memorandum Entitled "Note for the Minister's Information" on Ireland and the United Nations' (*Documents on Irish Foreign Policy*, 7 octobre 1947) <https://www.difp.ie/volume-8/1947/memorandum-by-the-department-of-external-affairs/4525/#section-documentpage> accédé le 24 mars 2021.

[18] ibid.

[19] Brian O'Donovan, 'Ireland Wins Seat on United Nations Security Council' (*RTÉ*, 18 juin 2020) <https://www.rte.ie/news/2020/0616/1147864-un-security-council-vote/> accédé le 24 mars 2021.

[20] La Charte des Nations Unies (n 9) art 39; Le Conseil de sécurité constate l'existence d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression et fait des recommandations ou décide quelles mesures seront prises conformément aux articles 41 et 42 pour maintenir ou rétablir la paix et la sécurité internationales.

incluent article 41 qui permet l'interruption complète ou partielle des relations économiques et des communications ferroviaires, maritimes, aériennes, postales, télégraphiques, radioélectriques et des autres moyens de communication, ainsi que la rupture des relations diplomatiques' et article 42 qui permet 'toute action qu'il juge nécessaire au maintien ou au rétablissement de la paix et de la sécurité internationales'.[21] Il est évident que la force a été conçue comme un dernier recours et le Conseil tentera d'adhérer aux moyens de puissance économique et diplomatique collective des grands États comme moyen de dissuasion avant qu'ils n'autorisent la force. Cela reflète l'idée de la création de l'ONU, qui était d'empêcher de nouveaux combats militaires au lieu de les provoquer. Cette crainte de combat est réfléchie dans une citation de l'ancien Secrétaire Général Dag Hammarskjöld, le deuxième Secrétaire Général de l'ONU, qui a déclaré éloquemment que 'l'ONU n'a pas été créée pour emmener l'humanité au paradis, mais pour sauver l'humanité de l'enfer'.[22]

En ce qui concerne les étapes menant au dernier recours à l'usage de la force, le recours aux sanctions en tant que mesure de sécurité collective est courant mais suscite également des critiques pour ses résultats contre-productifs.[23] Bien que l'objectif des sanctions soit de réduire le soutien à un dirigeant sanctionné, en revanche elles réalisent régulièrement le contraire et agissent comme un bouc émissaire étranger utile sur lequel les dirigeants peuvent se moquer.[24]

Sur le plan économique, les sanctions contribuent au renforcement du pouvoir de la classe dirigeante à travers la monopolisation des biens et la montée de l'économie souterraine. En outre, ils offrent aux criminels l'opportunité de faire des profits en raison de la rareté des articles essentiels. Globalement, les plus pauvres d'une nation sanctionnée sont régulièrement ceux qui souffrent le plus de l'imposition de sanctions.[25] L'effet des sanctions de l'ONU sur les civils était évident à partir de celles imposées à l'Irak par la résolution 661 en 1990, qui a contribué

[21] La Charte des Nations Unies (n 9) arts 41, 42.
[22] Ban Ki-moon, **'**Evolving Threats, Timeless Values: The United Nations In A Changing Global Landscape' (Dag Hammarskjöld Lecture, Stockholm, 30 mars 2016) <https://www.un.org/sg/en/content/sg/statement/2016-03-30/secretary-generals-remarks-dag-hammarskj%C3%B6ld-lecture-%E2%80%9Cevolving> accédé le 24 mars 2021.
[23] Jacques Hubert-Rodier, 'Les Sanctions Internationales: Une Arme à Double Tranchant' *Les Echos* (Paris, 19 octobre 2019) <https://www.lesechos.fr/idees-debats/editos-analyses/les-sanctions-internationales-une-arme-a-double-tranchant-1138656> accédé le 24 mars 2021; Thierry Coville, 'Les Sanctions Contre l'Iran, le Choix d'une Punition Collective Contre la Société Iranienne?' (2015) 97(1) Revue Internationale et Stratégique 149, 150.
[24] 'Mugabe Blames Sanctions for Zimbabwe Problems' *The Irish Times* (Dublin, 29 novembre 2008) <https://www.irishtimes.com/news/mugabe-blames-sanctions-for-zimbabwe-problems-1.832354> accédé le 24 mars 2021.
[25] Erica Moret, 'Humanitarian Impacts of Economic Sanctions on Iran and Syria' (2015) 24(1) European Security 120.

à une crise humanitaire.[26] Par suite de ces effets, le Conseil a développé les sanctions ciblées financières et les restrictions aux déplacements contre fonctionnaires et dirigeants des régimes délinquants. Les effets des sanctions ciblées sur les cibles peuvent varier, mais l'utilisation démontre l'engagement du droit international.[27]

En ce qui concerne la question si le Conseil est effectivement lié par le droit international reste incertaine. Occupant une position unique dans le monde, elle possède des pouvoirs exécutif, législatif et judiciaire – dans la sphère internationale, la doctrine de la séparation des pouvoirs n'existe pas. Il y a un argument selon lequel le Conseil n'est pas lié par le droit international parce que la Charte ne le lie expressément.[28] Les spécialistes qui soutiennent cette position font référence à une déclaration de la Cour Internationale de Justice (CIJ) tirée de l'affaire de la Namibie, selon laquelle le Conseil ne sera limité que par les principes et les politiques du chapitre I de la Charte:

> Pour ce qui est du fondement juridique de la résolution, l'article 24 de la Charte confère au Conseil de sécurité les pouvoirs nécessaires pour prendre des mesures comme celle qu'il a adoptée dans le cas présent … Les seules restrictions ressortent des principes et buts fondamentaux qui figurent au chapitre premier de la Charte.[29]

Cependant, le juge Weeramantry de la CIJ a exprimé une opinion opposée dans l'affaire Lockerbie et a noté dans sa opinion dissidente que le droit international limite les pouvoirs du Conseil en disant que 'la genèse de la Charte des Nations Unies confirme donc que la plénitude des pouvoirs du Conseil de sécurité a été clairement limitée par le fait que ces pouvoirs doivent être exercés conformément aux principes bien établis du droit international.'[30] Il est également avancé que seules les normes de *jus cogens* lient le processus de prise de décision du Conseil,

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[26] United Nations Security Council Resolution 661 (6 août 1990) UN Doc S/RES/661; Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 190; John Pilger, 'Squeezed to Death' *The Guardian* (London, 4 mars 2000) <https://www.theguardian.com/theguardian/2000/mar/04/weekend7.weekend9> accédé le 24 mars 2021.

[27] Alexandra Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law' (2019) 113 American Journal of International Law Unbound 163.

[28] Mary Ellen O'Connell, 'The United Nations Security Council and the Authorisation of Force: Renewing the Council Through Law Reform' in Niels M Blokker and Nico J Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Brill-Nijhoff 2005).

[29] Cour Internationale de Justice, 'Conséquences Juridiques pour les Etats de la Présence Continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) Nonobstant la Résolution 276 (1970) du Conseil de Sécurité' (21 juin 1971) 16, [110] <https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-FR.pdf> accédé le 24 mars 2021.

[30] Questions d'Interprétation et d'Application de la Convention de Montréal de 1971 Résultant de l'Incident Aérien de Lockerbie (Jamahiriya Arabe Libyenne c Royaume-Uni), Opinion dissidente de M Weeramantry 14 avril 1992 65 <https://www.icj-cij.org/public/files/case-related/88/088-19920414-ORD-01-07-FR.pdf> accédé le 24 mars 2021.

mais quelles normes correspondent exactement à ces critères est un autre sujet de débat, dont cet article ne parlera pas.[31]

C UNE AUTORISATION D'UTILISER LA FORCE - UNE QUESTION D'INTERPRÉTATION?

L'utilisation de la langue est importante pour appliquer la question de l'autorisation de la force à des scénarios de conflit spécifiques. La spécificité de cette langue a changé au fil des années et est devenue plus précise et définie. Pour constater ce fait, il suffit de comparer les résolutions du Conseil 83 en 1950 et 940 en 1994.[32] Le flou de certaines résolutions a conduit à une distinction entre ce que l'on appelle les 'autorisations expresses' et les 'autorisations implicites', ces dernières étant décrites comme 'repoussant les limites de la loi'.[33] Les autorisations implicites sont généralement justifiées par une combinaison d'interprétation des résolutions du Conseil, la pratique coutumière des États ou la législation nationale.[34] Comme on verra, ce manque de certitude légale peut mettre à mal le cadre du Conseil et contribue à la crise de confiance dans le système entier.

I Afghanistan 2001

'Operation Enduring Freedom' (OEF) était le nom donné à l'opération en Afghanistan à la suite des attentats du 11 septembre 2001. La justification américaine de l'attaque contre l'Afghanistan à l'ONU ne faisait aucune référence à l'autorisation du Conseil, mais s'appuyait plutôt sur le droit inhérent à la légitime défense individuelle et collective, qui lui-même n'exige aucune autorisation du Conseil. Cependant, le Conseil avait adopté la résolution 1368 le 12 septembre 2001 qui déclarait que le Conseil 'Se déclare prêt à prendre toutes les mesures nécessaires pour répondre aux attaques terroristes du 11 septembre 2001 et pour combattre le

[31] Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26(3) European Journal of International Law 671, 675.

[32] United Nations Security Council Resolution 83 (27 juin 1950) UN Doc S/RES/83: 'Recommande aux membres de l'ONU d'apporter à la République de Corée toute l'aide nécessaire pour repousser les assaillants et rétablir dans cette région la paix et la sécurité internationales'; United Nations Security Council Resolution 940 (31 juillet 1994) UN Doc S/RES/940: 'utiliser dans ce cadre tous les moyens nécessaires pour faciliter le départ d'Haïti des dirigeants militaires, eu égard à l'Accord de Governors Island, le prompt retour du Président légitimement élu et le rétablissement des autorités légitimes du Gouvernement haïtien, ainsi que pour instaurer et maintenir un climat sûr et stable qui permette d'appliquer l'Accord de Governors Island.'

[33] Michael Wood, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 Indian Journal of International Law 345, 353.

[34] House of Commons Debate 25 novembre 2002, vol 395, cols 100-103 <https://publications.parliament.uk/pa/cm200203/cmhansrd/vo021125/debtext/21125-28.htm> accédé le 24 mars 2021; Prime Minister's Office, 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position' (UK Government, 29 août 2013) <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> accédé le 24 mars 2021.

terrorisme sous toutes ses formes, conformément à ses responsabilités en vertu de la Charte des Nations Unies'.[35] Cette résolution a été suivie par la résolution 1373 le 28 septembre 2001, qui détaillait un régime de sanctions contre le terrorisme.[36] Mais, lorsque les États-Unis ont commencé l'action militaire le 7 octobre 2001, il n'y avait pas d'autorisation expresse du Conseil sous la forme d'une résolution autorisant le recours à la force en Afghanistan. Donc, les États-Unis ont compté sur la légitime défense. Cette définition légale de l'OEF en tant que légitime défense a été renforcée par l'administration américaine ultérieure.[37]

À l'époque, L'Irlande occupait le rôle de la présidence du Conseil, au cours de son mandat de deux ans (2001-2002). Les États-Unis ont eu l'intention d'informer uniquement l'ONU de leurs actions militaires par écrit et ils n'ont pas demandé l'autorisation du Conseil pour utiliser la force. Cependant, l'ambassadeur irlandais auprès de l'ONU a convaincu les fonctionnaires des États-Unis de venir à l'ONU le jour du début des opérations militaires, le 7 octobre 2001, pour rendre compte de la politique d'autodéfense. C'était un petit geste qui, selon le représentant irlandais, garantissait que les préoccupations en matière de droits de l'homme liées à l'opération n'étaient pas négligées.[38]

Quelques semaines après l'invasion, le Conseil a adopté la résolution 1378 qui a donné à l'ONU un rôle dans une administration afghane de transition. Puis, alors que la situation militaire se détériorait, le Conseil a adopté la résolution 1386 créant une force internationale d'assistance à la sécurité (FIAS) qui a opéré aux côtés des forces américaines.[39] Cette force était autorisée à 'prendre toutes les mesures nécessaires à l'exécution du mandat de celle-ci' de maintien de la sécurité et de garantir le soutien du gouvernement afghan intérimaire.[40] Malgré le fait que la force était décrite comme une autorisation expresse du recours à la force collective, la FIAS était toujours soumise à l'autorité des forces américaines pour s'assurer qu'il n'y avait pas de conflit entre les deux.[41] Donc, il parait plus comme une contribution à une opération militaire

[35] United Nations Security Council Resolution 1368 (12 septembre 2001) UN Doc S/RES/1368.
[36] United Nations Security Council Resolution 1373 (28 septembre 2001) UN Doc S/RES/1373.
[37] Harold Hongju Koh, 'The Obama Administration and International Law' (Annual Meeting of the American Society of International Law, Washington DC, 25 mars 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> accédé le 24 mars 2021.
[38] Christophe Gillissen, 'The Back to the Future? Ireland at the UN Security Council, 2001-2002' (2006) 5 Nordic Irish Studies 23, 36.
[39] United Nations Security Council Resolution 1378 (14 novembre 2001) UN Doc S/RES/1378; United Nations Security Council Resolution 1386 (20 décembre 2001) UN Doc S/RES/1386.
[40] ibid; 'Agissant à ces fins en vertu du Chapitre VII de la Charte des Nations Unies, 1. Autorisé, comme prévu à l'annexe I à l'Accord de Bonn, la constitution pour six mois d'une force internationale d'assistance à la sécurité pour aider l'Autorité intérimaire afghane à maintenir la sécurité à Kaboul et dans ses environs, de telle sorte que l'Autorité intérimaire afghane et le personnel des Nations Unies puissent travailler dans un environnement sûr...'.
[41] Gray, *International Law and The Use of Force* (n 8) 262.

américaine qu'une intervention des nations du monde pour préserver la paix. Mais, en parlant réellement, n'importe quelle participation de l'ONU était meilleure qu'une absence totale.

Alors que la bataille s'intensifiait en 2003, les États-Unis ont accepté d'étendre la FIAS au-delà de Kaboul et la résolution 1510 a été adoptée par le Conseil l'a autorisée.[42] Bien qu'elles ne soient pas entièrement expresses et 'propres', ces résolutions représentent un exemple de la manière dont le système de sécurité collective fonctionne lorsque les membres du P5 sont d'accord, même rétrospectivement. Comme j'indiquais au-dessus, la participation de l'ONU, dans n'importe quelle capacité, est importante pour l'apparition que cette opération ne représente pas une occupation étrangère unilatérale, mais une opération multilatérale.

II Irak 1990-2003

Après l'invasion de Koweït par l'Irak en 1990, la résolution 687 a été adoptée en 1991 pour promouvoir un cessez-le-feu formel au conflit irakien/koweïtien et pour vérifier que l'Irak terminerais son programme d'armes chimiques.[43] La résolution contenait une disposition qui permettait au Conseil de 'prendre toutes nouvelles mesures qui s'imposeraient en vue d'assurer l'application de la présente résolution'. En effet, pour garantir l'adhérence de l'Irak. Par la suite en 1998, lorsque l'Irak a entravé les inspections obligatoires des armes chimiques, le Conseil a adopté la résolution 1205 qui a condamné les actions irakiennes et a exigé qu'il coopère avec les inspecteurs d'armes.[44] L'adoption de cette résolution a été suivie de près par l'opération 'Desert Fox' en 1998, une lourde campagne de bombardements de quatre jours contre des cibles militaires irakiennes par les forces américaines et britanniques.[45]

En 2003, le Conseil a adopté la résolution 1441 qui a donné à l'Irak une dernière chance de se conformer aux exigences en matière de désarmement. Il a mis en garde contre les 'graves conséquences' en cas de non-coopération, mais n'a pas expressément mentionné l'usage de la force.[46] Lorsque l'Irak ne conformait pas, les États-Unis et le Royaume-Uni ont demandé du Conseil une deuxième résolution pour autoriser le recours à la force, mais l'ont rétractée car ils savaient qu'elle ferait l'objet d'un veto de la France et de la Russie.[47]

[42] United Nations Security Council Resolution 1510 (13 octobre 2003) UN Doc S/RES/1510.
[43] United Nations Security Council Resolution 687 (3 avril 1991) UN Doc S/RES/687.
[44] United Nations Security Council Resolution 1205 (5 novembre 1998) UN Doc S/RES/1205.
[45] Patrice de Beer, 'Les Républicains Dénoncent le "Timing" choisi par M Clinton' *Le Monde* (Paris, 18 décembre 1998) <https://www.lemonde.fr/archives/article/1998/12/18/les-republicains-denoncent-le-timing-choisi-par-m-clinton_3681700_1819218.html> accédé le 24 mars 2021.
[46] United Nations Security Council Resolution 1441 (8 novembre 2002) UN Doc S/RES/1441.
[47] Gray, *International Law and The Use of Force* (n 8) 273.

Ensuite, n'ayant aucune autorisation explicite, les États-Unis, l'Australie et le Royaume-Uni ont procédé à l'opération 'Iraqi Freedom'. La base juridique de l'Australie et le Royaume-Uni était double; que la Résolution 1441 n'exigeait pas une autre résolution pour autoriser l'usage de la force et que les Résolutions 678 et 687 étaient encore suffisantes pour autoriser l'usage de la force.[48] Les États-Unis se fiaient sur la doctrine de la légitime défense de préemption contre les armes de l'Irak.[49] Le résultat était que le régime de Saddam Hussein a été renversé mais aucune arme de destruction massive n'a été trouvée.[50] La résolution 1483 suivante n'a fait aucune référence à la légalité de l'invasion, mais a reconnu le pouvoir de la coalition dirigée par les États-Unis en tant qu'autorité de commandement de l'État. Donc aucune implication quant à la légalité de l'invasion n'a pu être comprise.[51]

L'Irlande était encore membre non permanent du Conseil pendant des débats de 2002 précédant l'invasion américaine de l'Irak en 2003. L'Irlande avait soutenu la nécessité d'une deuxième résolution, selon lui: un processus en deux étapes constatant que le Conseil vérifie d'abord si l'Irak était en violation des exigences légales concernant les armes et alors décider des prochaines étapes.[52] Taoiseach Bertie Ahern a décrit une deuxième résolution comme un impératif politique.[53] En votant pour la résolution 1441 avant la fin de son mandat, l'Irlande a réaffirmé son interprétation de la résolution et du processus en deux étapes qu'elle représentait.[54]

Les politiciens sont souvent jugés sur la situation intérieure et l'économie au lieu de la politique étrangère et leurs attitudes à l'égard du multilatéralisme. Conscient de cela, le gouvernement

[48] United Nations Security Council Resolution 678 (29 novembre 1990) UN Doc S/RES/678: 'Autorise les États-membres … à user de tous les moyens nécessaires pour faire respecter et appliquer la résolution 660 (1990)'; 'Full Text: Iraq Legal Advice' *The Guardian* (London, 28 avril 2005) <https://www.theguardian.com/politics/2005/apr/28/election2005.uk> accédé le 24 mars 2021; 'The Government's Legal Advice on Using Force' *Sydney Morning Herald* (Sydney, 19 March 2003) <https://www.smh.com.au/world/middle-east/the-governments-legal-advice-on-using-force-20030319-gdggf5.html> accédé le 14 janvier 2021.

[49] The White House, 'National Security Strategy: Part V Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction' (*The White House President George W Bush Archive*, 2002) <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> accédé le 24 mars 2021; Authorisation for Use Of Military Force Against Iraq Resolution, House Joint Resolution 114, 107th Congress (2002) <https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf> accédé le 24 mars 2021: 'Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States'.

[50] Gerry Simpson, 'The War in Iraq and International Law' (2005) 6(1) Melbourne Journal of International Law 167, 182.

[51] United Nations Security Council Resolution 1483 (22 mai 2003) UN Doc S/RES/1483.

[52] John Doyle, 'Irish Diplomacy on the UN Security Council 2001-2: Foreign Policy-Making in the Light of Day' (2004) 15 Irish Studies in International Affairs 73, 79.

[53] Gillissen (n 38) 36.

[54] Doyle (n 52) 80; Dáil Deb 20 March 2003, vol 563, no 3, 'Foreign Conflicts: Motion' <https://www.oireachtas.ie/en/debates/debate/dail/2003-03-20/4/> accédé le 24 mars 2021.

irlandais a soigneusement maintenu un équilibre entre le respect du droit international tout en maintenant les relations cordiales avec les États-Unis pour protéger la relation économique irlandaise-américaine. Lorsque le terme irlandais dans le Conseil a été terminé, l'Irlande a autorisé l'aéroport de Shannon à être utilisé comme point de ravitaillement pour les avions américains se rendant en Irak.[55] Il faut noter que, si l'Irlande avait été encore membre du Conseil au moment de l'invasion américaine de l'Irak, sa constance dans son opposition aux politiques américaines antérieures sur certains enjeux étrangers aurait été sévèrement mise à l'épreuve par les États-Unis, sur ce que les États-Unis considéraient un défi plus importante pour leurs intérêts.[56]

D LA RÉFORME DES POUVOIRS DE CHAPITRE VII – ILS SONT QUOIQUELLES SONT LES OPTIONS POUR L'IRLANDE?

Alors que l'Irlande entame son nouveau mandat au Conseil de 2021 à 2022, le concept de sécurité était redéfini au cours des douze mois précédents. Lors d'une visioconférence du Conseil avec le Secrétaire Général de l'ONU en septembre 2020, il a réprimandé le Conseil pour son échec en matière de coopération internationale pour faire face à la pandémie du COVID-19. De nombreux États ont noté qu'une menace pour la santé humaine est incontestablement une menace pour la paix et la sécurité internationales.[57] Tandis qu'il n'est pas l'intention de cet article d'examiner la sécurité dans son sens le plus large, mais de se concentrer sur le système de sécurité collective du Conseil, ces vues soulignent la nature dynamique de la sécurité qui a été inscrite dans la Charte des Nations Unies.

I La Voie Juridique

Lorsqu'il s'agit de recourir à la force, les principes de nécessité et proportionnalité sont préconisées souvent ainsi que la promotion de l'état de droit dans lequel l'utilisation de la force est autorisée.[58] Cette stratégie donnerait plus de certitude et transparence aux situations où la force est utilisée, selon les partisans pour elle. Tentant d'améliorer le cadre juridique concernant les pouvoirs du chapitre VII, le Secrétaire Général de l'ONU a convoqué en 2003 'le Groupe de personnalités de haut niveau sur les menaces, les défis et le changement', pour évaluer les

[55] Nicola Byrne, 'Irish Protest Military Use of Shannon Airport' *The Guardian* (London, 19 janvier 2003) <https://www.theguardian.com/world/2003/jan/19/iraq3> accédé le 24 mars 2021.
[56] Doyle (n 52) 100.
[57] 'Secretary-General Highlights "Essential" Failure of International Cooperation, in Address to Security Council Meeting on Post-Coronavirus Global Governance' (UN Doc SC/14312, *United Nations Security Council*, 24 septembre 2020) <https://www.un.org/press/en/2020/sc14312.doc.htm> accédé le 24 mars 2021.
[58] O'Connell (n 28) 16.

menaces futures auxquelles le monde est confronté et faire des recommandations en conséquence. Le rapport final mettait fortement l'accent sur l'importance de la sécurité collective.[59]

Les auteurs ont noté que même lorsque la force peut être utilisée légalement, cela ne veut pas dire qu'elle devrait être utilisée. Ils ont en outre précisé que leur tâche n'était pas de trouver des alternatives au pouvoir du Conseil, mais de rendre le Conseil plus efficace qu'auparavant. Pour ce faire, le Groupe a recommandé que cinq critères soient adoptés pour évaluer l'autorisation du recours à la force, et en particulier pour renforcer la légitimité du système de sécurité collective. En outre, ces critères veilleraient que le recours à la force ne soit utilisé que sur la base de preuves solides et pour des raisons morales.[60] Les critères recommandés étaient:

> Pour déterminer s'il doit autoriser ou approuver l'usage de la force militaire, le Conseil de sécurité devrait toujours examiner, quelles que soient les autres considérations dont il puisse tenir compte, au moins les cinq critères fondamentaux de légitimité suivants:
>
> **a) Gravité de la menace**. La nature, la réalité et la gravité de la menace d'atteinte à la sécurité de l'État ou des personnes justifient-elles de prime abord l'usage de la force militaire? En cas de menaces intérieures, y a-t-il un risque de génocide et autres massacres, de nettoyage ethnique ou de violations graves du droit international humanitaire, effectifs ou imminents?
>
> **b) Légitimité du motif**. Est-il évident que l'opération militaire envisagée a pour objet principal de stopper ou d'éviter la menace en question, quelles que soient les autres considérations ou motivations en présence?
>
> **c) Dernier ressort**. Toutes les options non militaires pour faire face à la menace ont-elles été examinées et peut-on penser raisonnablement que les autres mesures sont vouées à l'échec?
>
> **d) Proportionnalité des moyens**. L'ampleur, la durée et l'intensité de l'intervention militaire envisagée sont-elles le minimum requis pour faire face à la menace en question?
>
> **e) Mise en balance des conséquences**. Y a-t-il des chances raisonnables que l'intervention militaire réussisse à faire pièce à la menace en question, les conséquences de l'action ne devant vraisemblablement pas être pires que les conséquences de l'inaction?
>
> Ces directives régissant l'usage de la force devraient être consignées dans des résolutions déclaratoires du Conseil de sécurité et de l'Assemblée générale.[61]

[59] Assemblée Générale, 'Un Monde Plus Sûr: Notre Affaire à tous - Rapport du Groupe de Personnalités de Haut Niveau sur les Menaces, les Défis et le Changement' (UN Doc A/59/565, 2 décembre 2004) <https://digitallibrary.un.org/record/536113?ln=en> accédé le 24 mars 2021.
[60] ibid 57.
[61] ibid 62.

Le but de ces critères était qu'ils pourraient représenter une modèle pour un plus grand consensus international sur des questions de la force qui divisent profondément les États membres. Le Secrétaire Général a estimé que l'adoption de ces critères renforcerait la légitimité du Conseil en tant qu'organe, au lendemain de la guerre en Irak.

Cependant, le débat sur les propositions a révélé les divisions mêmes que les critères proposés cherchaient à surmonter. Certains États, comme le Canada, étaient favorables aux propositions. Mais d'autres États opposés ont noté que les critères de recours à la force étaient déjà établis dans la Charte des Nations Unies et que le Conseil n'avait jamais été critiqué pour avoir utilisé trop de force, mais pour un manque de la force là où cela était nécessaire, par exemple face aux atrocités de masse en Rwanda, selon eux.[62] Ainsi, il a été proposé que des restrictions supplémentaires ne permettraient pas d'utiliser la force quand un besoin existe-il, ce qui entraînerait une plus grande perte de vies.

Un argument divergeant, également contre, a fait valoir que les propositions concentreraient davantage de pouvoir d'autoriser la force au sein du Conseil et en particulier du P5, et agiraient comme une feuille de route pour l'usage de la force, conduisant aux plus des situations militaires.[63] Telle était l'opposition aux propositions, que le Secrétaire Général les a enlevé dans son 'Document final du Sommet mondial', dans lequel la section concernant l'usage de la force ne faisait que réitérer et réaffirmer les positions existantes.[64]

Étant une petite nation insulaire et honnête courtier de la paix, l'Irlande pourrait-elle tenter de revitaliser ces critères comme membre du Conseil? À première vue, les critères constituent un bon moyen pour interroger des raisons aux États lorsqu'ils demandent une autorisation de sécurité collective. Les besoins d'estimer la gravité, de démontrer qu'il n'y existe aucune autre option et d'évaluer les conséquences peuvent assurer que l'autorité est accordée correctement.

Cependant, l'argument que les critères pourraient encourager à l'usage de la force est convaincant. Il faut considérer aussi, si l'acte d'appuyant les critères serait vraisemblablement en contradiction politique avec la position constitutionnellement neutre de l'Irlande.[65] Les

[62] 'Rwandan Genocide: Security Council Told Failure of Political Will Led to "Cascade of Human Tragedy"' (*UN News*, 16 avril 2014) <https://news.un.org/en/story/2014/04/466342-rwandan-genocide-security-council-told-failure-political-will-led-cascade-human> accédé 24 mars 2021; Michael N Barnett, 'The UN Security Council, Indifference, and Genocide in Rwanda' (1997) 12(4) Cultural Anthropology 551, 561.
[63] Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56(1) International and Comparative Law Quarterly 157, 166.
[64] Assemblée Générale, 'Résolution Adoptée par l'Assemblée Générale le 16 septembre 2005' (UN Doc A/RES/60/1, 24 octobre 2005) [72] <https://digitallibrary.un.org/record/556636?ln=en> accédé le 24 mars 2021.
[65] The Irish Constitution, Article 29.

critères n'adressent pas le problème fondamental du recours à la force, que les superpuissances réservent leur droit à une action unilatérale si les conditions politiques et diplomatiques au Conseil ne se présentent pas. C'est une question plus profonde que l'état de droit aura du mal à contester de manière significative. Évaluant les critères, il faut que nous nous posions s'ils auraient évité la crise de l'Irak en 2003? Le problème à l'époque n'était pas un manque d'un cadre juridique - le cadre existait. L'enjeu était que certains pays ont totalement ignoré les exigences du système multilatéral. Si les pays du P5 n'appuient pas les critères en 2005, la capacité pour un membre non permanent comme l'Irlande à reproposer des mesures pour renforcer l'état du droit international en matière de sécurité collective est faible.

II La Voie Politique

L'Irlande est l'un des principaux membres du Groupe Responsabilité, cohérence et transparence (Groupe ACT) au sein de l'ONU. Ce groupe est composé de 27 petits et moyens États tels que la Suisse, la Nouvelle-Zélande et le Danemark. Ce groupe cherche à améliorer les méthodes de travail du Conseil pour incorporer davantage des traits énumérés dans le titre du groupe dans le processus décisionnel de l'organe, par exemple en mettant la pression diplomatique sur le Conseil pour qu'il adhère aux procédures appropriées de l'ONU.[66]

En ce qui concerne le travail de l'Irlande pour le groupe ACT relatif aux pouvoirs du chapitre VII, le groupe a proposé un 'Code de conduite concernant l'action du Conseil de sécurité contre le génocide, les crimes contre l'humanité ou les crimes de guerre'.[67] Le Code demande à toutes les nations du Conseil (les permanentes et les élus) de ne pas voter contre une résolution rédigé crédible destinée à prévenir ou à mettre fin aux atrocités de masse. Une telle situation serait basée sur les faits actuels à l'époque et sur une évaluation du Secrétaire Général de l'ONU.

Cependant, l'absence totale de soutien de la part d'un membre permanent du Conseil signifie que le Code de conduite de Groupe ACT reste largement ambitieux. Aucun membre permanent ne voudrait limiter leur pouvoir à cause des exigences des petits états. Donc, il n'y existe

[66] Permanent Mission of Ireland to the UN, 'UN Reform' (*Department of Foreign Affairs*) <https://www.dfa.ie/pmun/newyork/ireland-at-the-un/un-reform/> accédé le 24 mars 2021; Conseil de Sécurité, 'Lettre Datée du 19 juillet 2019, Adressée au Président du Conseil de sécurité par le Représentant Permanent de la Suisse auprès de l'Organisation des Nations Unies' (UN Doc S/2019/582, 19 juillet 2019) <https://digitallibrary.un.org/record/3813090?ln=en> accédé le 24 mars 2021.

[67] 'Explanatory Note on a Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes' (*Centre for UN Reform*, 1 septembre 2015) <https://centerforunreform.org/wp-content/uploads/2015/09/Final-2015-09-01-SC-Code-of-Conduct-Atrocity.pdf> accédé le 24 mars 2021.

aucune opportunité véritable de réforme pour les pays qui restent dehors de la sphère d'influence.

La crise de légitimité en face du Conseil est une dichotomie. La moitié des critiques est un enjeu de trop d'intervention, c'est-à-dire le Moyen-Orient. Mais d'un autre part, il y existe une crainte de manque d'intervention. Cette crainte vient des situations où l'échec d'agir a résulté dans un abandon des gens vulnérables. Les fantômes du Rwanda hantent encore beaucoup de diplomates, ainsi que le taux de mortalité en Syrie plus récemment.[68]

En réalité, la perspective d'abolir le droit de veto est extrêmement faible et toute mesure proposée par des États non permanents échouera certainement. Cela rend l'initiative de veto proposée par la France et le Mexique en 2013 attractif en tant que moyen de réforme. La France et le Mexique ont coopéré pour proposer une suspension de veto en cas d'atrocité de masse 'pour ne pas se résigner à la paralysie du Conseil de sécurité lorsque des atrocités de masse sont commises'.[69] La France propose de donner un rôle au Secrétaire Général de l'ONU pour constater l'existence d'atrocités de masse. Alors, il déciderait de référer l'enjeu au Conseil de sécurité soit de sa propre initiative, soit sur proposition du Haut-Commissaire aux droits de l'homme ou d'un certain nombre d'États membres, que la France propose de fixer à 50.[70] Grâce au fait que cette action de suspension représenterait un accord entre les P5, la Charte ne devrait pas être modifiée.

Le soutien d'un État permanent donne un élan à cette proposition et représente un changement évolutif, non révolutionnaire, le type d'amélioration dynamique du fonctionnement du Conseil qui laisserait la position privilégiée du P5 largement intacte. Il faut noter que quelques États estiment qu'ils ont plus à gagner qu'à perdre à améliorer le fonctionnement du système de sécurité collective et tandis que les échecs du multilatéralisme sont évidents, les échecs récents d'un manque de coopération sont évident aussi, souvent plus évident.[71] Il est plus probable que les États P5 accepteraient une restriction diplomatique volontaire du veto qu'une restriction

[68] Toby Vogel, 'France Accused of "Complicity" in Rwandan Genocide' *Politico* (Brussels, 6 août 2008) <https://www.politico.eu/article/france-accused-of-complicity-in-rwandan-genocide/> accédé le 24 mars 2021; François Hollande, 'France: HE Mr François Hollande: Statement Summary' (68th Session of the United Nations General Assembly, New York City, 24 septembre 2013) <https://gadebate.un.org/en/68/france> accédé le 24 mars 2021.

[69] 'Pourquoi la France Veut Encadrer le Recours au Veto au Conseil de Sécurité des Nations Unies' (*France Diplomatie*) <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-et-les-nations-unies/pourquoi-la-france-veut-encadrer-le-recours-au-veto-au-conseil-de-securite-des/> accédé le 24 mars 2021.

[70] ibid.

[71] Scott Sheeran, 'The UN Security Council Veto is Literally Killing People' *The Washington Post* (Washington DC, 11 août 2014) <https://www.washingtonpost.com/posteverything/wp/2014/08/11/the-un-security-council-veto-is-literally-killing-people/> accédé le 24 mars 2021.

juridique.[72] Donc, on peut dire que l'inaction du Conseil est un problème qui serait mieux traité par la politique internationale que par le droit international.

L'Irlande, même si elle est petite, a vaincu le Canada, membre du G7, d'accéder à un mandat non permanent du Conseil. Pendant sa campagne, l'Irlande a réaffirmé sa conviction que les réformes politiques sont la voie à suivre pour le Conseil, et pas les réformes juridiques.[73] Avec la direction de la France travaillant partout dans le P5, l'Irlande peut commencer une sorte de 'trafic d 'influence – en utilisant sa bonne réputation diplomatique et sa position neutre pour avancer l'initiative de la France et du Mexique. Certains pourraient qualifier la réforme politique au lieu de la réforme légale peu ambitieuse, d'autres diraient que c'est réaliste.

E CONCLUSION

Le système de sécurité collective paraît plus comme un forum de discussion qu'un système de sécurité et est simplement une facilité dans laquelle les superpuissances peuvent maintenir un échange pacifique entre eux.[74] L'idée de sécurité collective n'est pas fondamentalement viciée, la faille vient du fait que la plupart de la puissance juridique mondiale repose dans les mains de cinq pays ou moins, qui s'écartent de ce système s'il leur convient.

On a vu que, si tous les efforts échouent, certains pays du P5 maintiennent leur droit inhérent d'utiliser la force, malgré la publicité négative de leurs actions. Souvent, les mêmes méfaits qui sont vus négativement par la communauté internationale sont vus favorablement au niveau national. Est-ce que le président George Bush et le premier ministre Tony Blair ont souffert des répercussions politiques pour l'invasion illégale de l'Irak? Non. Les deux étaient élus pour un deuxième mandat comme dirigeant de leurs pays en 2004 et 2005 respectivement. Donc, il faut considérer, la proposition sinistre, si le mépris du droit international est en fait encouragé et récompensé?

En conséquence, le droit international public sera une facilité limitée pour renforcer le cadre en ce qui concerne les autorisations de recours à la force. Cela dit, il n'y a personne saine

[72] Laurent Fabius, 'A Call for Self-Restraint at the UN' *The New York Times* (New York City, 4 octobre 2013) <https://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html> accédé le 24 mars 2021.
[73] Simon Coveney, 'Speech by Tánaiste Simon Coveney TD to the General Assembly of the United Nations' (73rd Session of the United Nations General Assembly, New York City, 28 septembre 2018) <https://www.dfa.ie/news-and-media/speeches/speeches-archive/2018/september/speech-by-tanaiste-simon-coveney-to-the-general-assembly-of-the-united-nations.php> accédé le 24 mars 2021.
[74] Mohamed S Helal, 'Am I My Brother's Keeper? The Reality, Tragedy, and Future of Collective Security' (2015) 6(2) Harvard National Security Journal 383.

d'esprit qui voudrait voir une autre situation comme l'Irak, ou même l'impasse actuelle concernant la Syrie. Donc, quelques réformes sont nécessaires.

Le système de l'ONU est fondé sur la base de l'égalité souveraine entre les États.[75] Cela peut être vu à l'Assemblée Générale où les États-Unis ont le même nombre de voix que Saint-Marin (un). On ne peut pas dire la même pour le Conseil où le droit de veto renforce la notion que tous les états ne sont pas égaux.[76] Par exemple, dans l'Assemblée et les comités, il y existe souvent des résolutions qui sont promulguées par la majorité des pays mais qui sont opposées par les membres du P5. Les résolutions de l'Assemblée où un comité qui critiquent les actions de l'Israël qui réussissent par une majorité sont souvent opposées par les États-Unis, mais dans le Conseil, le véto est utilisé pour protéger ces mêmes intérêts.[77] Donc, les membres du P5 peuvent utiliser le véto pour assurer que certaines critiques restent politiques et ne deviennent pas des obligations juridiques.

Cependant, si l'égalité juridique entre les pays représente un pont trop loin pour la réforme du système de sécurité collective, des efforts peuvent être faits pour assurer une plus grande égalité diplomatique en termes d'utilisation du veto. Une amélioration comme celle-ci évitera vraisemblablement la paralysie du Conseil face aux atrocités. Même s'il n'évitera pas une autre situation comme l'Irak en 2003, on peut espérer que plus de l'attention sur les actions du P5 et plus de la coopération entre eux créeraient un système de sécurité collective qui fonctionne de manière plus transparente et cohérente.

L'Irlande est un pays qui exerce une influence démesurée à l'ONU, compte tenu de sa taille modeste, mais aussi qui voit clairement les réalités politiques du monde: que les membres du P5 n'abandonneront pas volontairement leur pouvoir juridique. Donc, le rôle de l'Irlande dans la réforme du système de sécurité collective de l'ONU peut être au moyen d'utilisant sa compétence politique pour pousser les réformes diplomatiques à l'utilisation du veto concernant les pouvoirs du chapitre VII.

[75] La Charte des Nations Unies (n 9) chapitre 1.
[76] Sean Butler, 'Separating Protection from Politics: The UN Security Council, the 2011 Ivorian Political Crisis and the Legality of Regime Change' (2015) 20(2) Journal of Conflict and Security Law 251.
[77] Jacob Magid, 'UN Panel Votes 163-5 in Support of Palestinian Statehood, End of Occupation' *The Times of Israel* (New York City, 20 novembre 2020) <https://www.timesofisrael.com/un-votes-163-5-in-support-of-palestinian-statehood-end-of-occupation/> accédé le 24 mars 2021; Peter Beaumont, 'US Outnumbered 14 to 1 as it Vetoes UN Vote on Status of Jerusalem' *The Guardian* (Jerusalem, 19 décembre 2017) <https://www.theguardian.com/world/2017/dec/18/us-outnumbered-14-to-1-as-it-vetoes-un-vote-on-status-of-jerusalem> accédé le 24 mars 2021.

L'OBLIGATION POSITIVE DE L'ÉTAT DE PROTÉGER LES DROITS DE L'ENFANT SELON LA CEDH: UNE ANALYSE JURIDIQUE DE L'AFFAIRE *SABATIER* [2020]

Cliodhna Buckley*

A INTRODUCTION

> 'Il n'est pas de pacte plus sacré que celui que le monde a avec ses enfants. Il n'est pas de tâche plus noble que celle de garantir le respect de leurs droits.'[1]
>
> - Kofi Annan, Ancien Secrétaire Général de l'Organisation des Nations Unies.

L'arrêt *Association Innocence en Danger et Association Enfance et Partage (au nom de M Sabatier) c France* autrement dit 'l'affaire *Sabatier*' concerne l'obligation positive de l'État français en tant que 'défenseur des enfants'.[2] Dans cet arrêt, la France a été condamnée par la Cour Européenne des Droits de l'Homme (CEDH) du fait des manquements graves du Parquet du Mans et des carences des services sociaux conduisant à la mort de l'enfant, M Sabatier.

En juin 2012, les parents de M Sabatier ont été condamnés à 30 ans de réclusion criminelle, assortis d'une peine de sûreté de 20 ans par la cour d'assises de la Sarthe.[3] Il va sans dire que la culpabilité des parents de M Sabatier est évidente mais cela dit, peut-on constater qu'ils étaient les seuls coupables? D'ailleurs, est-ce que l'État français aurait-il pu empêcher le décès de cette jeune fille? On peut même se poser la question: qui sont les vrais coupables dans cette triste affaire?

La torture et la maltraitance des enfants restent un problème répandu en France. Selon une étude menée récemment par l'inspection générale des affaires sociales, on peut constater 'qu'un enfant est tué par l'un de ses parents tous les cinq jours'.[4] Le dispositif français de la

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[1] 'Défendre Les Droits de L'Enfant: Guide à l'usage des Professionnels de la Prise en Charge Alternative des Enfants' (*Conseil de l'Europe*, 2014) <https://rm.coe.int/168046ceae> accédé le 12 mars 2021.

[2] *Association Innocence en Danger et Association Enfance et Partage c France* Requêtes nos 15343/15 et 16806/15 (CtEDH, 04 juin 2020).

[3] '30 Ans Minimum Requis contre les Parents de Marina' (*France Info*, 25 juin 2012) <https://france3-regions.francetvinfo.fr/pays-de-la-loire/2012/06/25/30-ans-au-moins-requis-contre-les-parents-de-marina-37945.html> accédé le 12 mars 2021.

[4] Claire Compagnon et autres, 'Mission sur les Morts Violentes d'Enfants au Sein des Familles' (*Ministère des Solidarités et de la Santé, Ministère de la Justice, Ministère de l'Éducation Nationale et Ministère de l'Enseignement Supérieur, de la Recherche et de l'innovation*, mai 2018) <http://www.justice.gouv.fr/art_pix/2018-044%20Rapport_Morts_violentes_enfants.pdf> accédé le 12 mars 2021.

protection de l'enfance est fondé sur une protection judiciaire, qui est sous la responsabilité du procureur de la République et du juge des enfants. Ce dispositif est également fondé sur une protection administrative qui est sous la responsabilité des Conseils départementaux. La loi no 2007-293 du 5 mars 2007 a reformé ce dispositif en matière de protection de l'enfance.[5] Elle résulte de l'article 375 du Code Civil qui vise à protéger 'la santé, la sécurité ou la moralité' des mineurs en danger.[6]

La Convention Européenne des Droits de l'Homme (dorénavant appelée 'la Convention'), a pour objectif de garantir les libertés individuelles et les droits fondamentaux.[7] La Convention souligne les obligations incombant aux États contractants de la Convention. En vertu de l'article 1 de la Convention, 'Les Hautes Parties contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention'.[8] La CEDH veille à ce que la Convention soit respectée par les États l'ayant ratifiée, y compris la France en 1974. Les arrêts de la CEDH ont eu une influence importante sur la législation française et de la même manière, sur la jurisprudence appliquée par les instances judiciaires.

Le but de cet article est d'analyser la décision controversée prise par la CEDH d'appliquer l'article 3 de la Convention. Le jugement rendu par la Cour de ne pas appliquer l'article 2 protégeant le droit à la vie, a été ouvertement critiqué parmi les avocats des requérants et par deux juges de la Cour. La mise à l'écart de l'article 2 par les juges strasbourgeois est surprenant, surtout étant donné le fait qu'il existe la possibilité que la vie de M Sabatier aurait pu être sauvée si les autorités de l'État français avaient été moins négligentes.

Avant d'entreprendre l'analyse de cet arrêt, il convient tout d'abord de définir les termes 'État' et 'obligation positive'. Un État désigne une unité souveraine formée par des populations vivant sur un territoire défini et reconnu comme une organisation juridique et politique de la société internationale.[9] La CEDH adopte une approche binaire en classant les obligations d'États en deux catégories distinctes: il y a des obligations négatives d'un côté et des obligations positives de l'autre. Les obligations positives exigent que les autorités nationales prennent 'les mesures nécessaires'[10] à la sauvegarde d'un droit ou, plus précisément qu'elles adoptent 'des mesures

[5] Loi no 2007-293 du 5 mars 2007 réformant la protection de l'enfance.
[6] Code Civile article 375.
[7] La Convention Européenne des Droits de l'Homme (La Convention).
[8] ibid article 1.
[9] 'Définition de État' (*Dictionnaire Juridique*) <https://www.dictionnaire-juridique.com/definition/etat.php> accédé le 12 mars 2021.
[10] *Hokkanen c Finland* Requête no 19823/92 (CtEDH, 23 septembre 1994).

raisonnables et adéquates pour protéger les droits de l'individu'.[11] Tandis que les obligations négatives traduisent le fait de s'abstenir d'agir pour ne pas interférer de manière injustifiée avec les droits de la Convention.

L'analyse juridique de l'affaire *Sabatier* sera divisée en deux parties: la première rappellera les faits et le contexte de l'affaire en retraçant le processus juridique de l'affaire qui avait mené au jugement rendu par la Cour le 4 juin 2020. La deuxième fera l'analyse de la décision de la Cour d'examiner l'affaire uniquement sous l'angle des article 3 et 13 de la Convention. D'ailleurs, cet article va aborder la responsabilité de l'État français relative à son obligation positive envers les enfants et les mineurs en danger et le fonctionnement défectueux du service public de la justice. La polémique suscitée par cet arrêt sera également examinée en profondeur.

B LES FAITS DE L'ÉSPÈCE

M Sabatier décéda dans la nuit du 6 août 2009 d'une succession d'actes violents infligés par ses parents qui attendirent jusqu'au 9 septembre 2009 pour signaler à la police la 'fausse' disparition de leur fille. Après le récit contradictoire des parents lors d'une audition, le père avait décidé de conduire la police au corps de sa fille de 8 ans.[12] Au préalable des faits, M Sabatier subissait des sévices réguliers avant de se rendre à l'école primaire à l'âge de six ans en 2007: 'privations de nourriture sur plusieurs jours'.[13] Deux enquêtes ont été menées par les autorités françaises entre 2008 et 2009 par la police judiciaire et l'Aide sociale à l'enfance, après plusieurs signalements que M Sabatier subissait des violences dans le cadre familial. Les enquêtes ont été classées avant son décès, car les autorités responsables de la protection de l'enfant ont constaté qu'il n'existait pas de présence d'un danger imminent à la vie de l'enfant**.**

I Les Enquêtes Menées Par L'État

Le 19 juin 2008, la directrice de l'école de l'époque, soutenue par le médecin scolaire avait décidé d'avertir les services sociaux. La directrice avait également adressé un 'signalement au titre de la protection de l'enfance' au procureur de la République du Mans et au président du conseil général.[14] En effet, elle y avait joint des pages manuscrites rédigées par les enseignants

[11] *López-Ostra c Espagne* Requête no 16798/90 (CtEDH, 9 décembre 1994).
[12] Patricia Jolly, 'Affaire Marina: Les Institutrices Avaient Tenté de Protéger la Fillette de ses Parents' *Le Monde* (Paris, 14 juin 2012) <https://www.lemonde.fr/societe/article/2012/06/14/affaire-marina-les-institutrices-avaient-tente-de-proteger-la-fillette-de-ses-parents_1718569_3224.html> accédé le 12 mars 2021.
[13] Mathilde Hirsinger, 'Marina Sabatier: l'innocence Assassinée' (*Innocence en Danger*, 12 julliet 2017) <https://innocenceendanger.org/2019/11/12/marina-sabatier-linnocence-assassinee/> accédé le 12 mars 2021.
[14] *Association Innocence en Danger* (n 2) 4.

dans l'école détaillant des nombreuses marques découvertes sur le corps de la jeune fille entre 2017 et 2018.[15]

En juillet 2008, un agent de police judiciaire fut saisi de l'enquête visé à la maltraitance de M Sabatier. L'agent de police judiciaire conclut '[M] ne nous a pas paru en danger au sein de sa famille…de l'enquête effectuée, il ne ressort aucun élément susceptible de présumer que [M] a été ou est victime de maltraitance.'[16] Par conséquent, l'enquête de l'affaire est classée en octobre 2008. En 2009, L'Aide Sociale à l'Enfance (ASE) demande l'ouverture d'une nouvelle enquête concernant M Sabatier après que le directeur de sa nouvelle école primaire a signalé des blessures de nature très sévères et son absentéisme fréquent. En avril 2009, M Sabatier est envoyée directement aux urgences de l'hôpital quand ses enseignants remarquent qu'elle boite à cause d'abus infligé par ses parents.

Peu après son retour de l'hôpital, le président du Conseil général est alerté par le personnel de l'école. Malgré les soupçons de l'équipe médicale qui traitait M Sabatier et plusieurs avertissements donnés aux services sociaux qui attestent des suspicions de maltraitance de la jeune fille à l'encontre de ses parents, l'enfant est à nouveau confiée à sa famille en mai 2009. En juin 2009, deux intervenants des services sociaux rendirent visite à la famille Sabatier séparément. Ces visites avaient pour objectif de décider si la sécurité et la vie de M Sabatier était menacée. Ils conclurent qu'il y avait une absence de danger pour l'enfant dans son cadre familial. M Sabatier décéda deux mois après cette dernière visite.

C LA RESPONSABILITE DE L'ETAT SELON LA COUR EUROPÉENNE DES DROITS DE L'HOMME (CEDH)

I Le Parcours à la CEDH

Le 5 octobre 2012, les deux associations requérantes (Innocence en Danger et Enfance et Partage) assignèrent l'État français en responsabilité civile pour fonctionnement défectueux de la justice au nom de M Sabatier. Elles estimaient notamment qu'entre juin et octobre 2008, les services d'enquête et du parquet avaient commis une série de négligences et de manquements caractérisant la faute lourde au sens de l'article L 141-1 du Code de l'Organisation Judiciaire (COJ): 'L'État est tenu de réparer le dommage causé par le fonctionnement défectueux du

[15] ibid 5.
[16] ibid 20.

service de la justice. Sauf dispositions particulières, cette responsabilité n'est engagée que par une faute lourde ou par un déni de justice.'[17]

Elles constatent que, si l'enquête pénale avait été effectuée correctement, la vie de l'enfant aurait pu être sauvée. Le tribunal d'instance de Paris et la cour de cassation n'ont pas reconnu cette faute lourde de l'État. Les deux requérantes, suite à l'épuisement des voies de recours internes français ont décidé de saisir *in fine* la CEDH à Strasbourg afin de dénoncer des manquements commis par les services de l'État français.

II La Décision de la CEDH

La Cour décida d'examiner l'espèce sous l'angle des articles 3 et 13 de la Convention et considérait que l'objet du litige était dans la question de 'savoir si les autorités internes auraient dû déceler les mauvais traitements subis par l'enfant et la protéger de ces actes qui ont fini par causer son décès'.[18] La Cour a tranché qu'il y a eu violation de l'article 3 de la Convention par l'État français et qu'il n'y avait pas violation de l'article 13 de la Convention.

III Article 3 de la Convention

Les précédents arrêts rendus par la Cour démontrent que les pouvoirs publics doivent assumer leur rôle de 'défenseur des droits' en exécutant leurs obligations positives d'empêcher des mauvais traitements aux personnes vulnérables dont ils avaient ou auraient dû avoir connaissance.[19] Des sanctions avaient déjà été prises par la Cour contre les État contractants à la Convention pour la négligence de leur responsabilité envers les enfants sous l'article 3 de la Convention. En 2014, la Grande Chambre de la Cour Européenne a condamné l'Irlande dans l'arrêt dit *O'Keeffe* en raison du manquement de l'État irlandais à son obligation de protéger la requérante contre les abus sexuels dont elle avait été victime à l'école.[20]

Ce fut également le cas pour la Roumanie dans l'affaire *DMD c Roumanie*.[21] Cette affaire concernait les violences domestiques d'un enfant par son père. La CEDH a souligné le fait que les enfants doivent 'bénéficier d'une protection supérieure, pas moindre, contre les violences'.[22] La Cour a mis accent aussi sur le fait que les État contractants à la Convention

[17] Code de l'Organisation Judiciaire article L141-1.
[18] *Association Innocence en Danger* (n 2) 27.
[19] *O'Keeffe c Irlande* Requête no 35810/09 (CtEDH, 28 janvier 2014).
[20] ibid.
[21] *DMD c Roumanie* Requête no 23022/13 (CtEDH, 3 octobre 2017).
[22] ibid.

sont dans l'obligation de prévenir de telles formes de violence à l'encontre des enfants.[23] En outre, la Cour a eu égard au caractère fondamental des droits garantis par l'article 3 pour les enfants et à leur vulnérabilité particulière et distinctive dans ces affaires.

En invoquant l'article 3 de la Convention dans le présent arrêt, les deux associations requérantes ont affirmé qu'il était incontestable que 'les sévices subis par M ont atteint le seuil requis pour être qualifiés de torture'.[24] Celles-ci notèrent aussi que la phase d'enquête préliminaire de la police jusqu'au classement sans suite pourrait être caractérisée par sa 'lenteur et passivité'.[25] D'ailleurs, elles déplorent l'absence de suivi de l'affaire de M Sabatier de la part du parquet du Mans. Elles constatent également que les services sociaux étaient inefficaces pour protéger la vie de M Sabatier et ces carences de protection ont menées à des mois d'abus physique de l'enfant qui continuèrent jusqu'à son décès. Par contre, le gouvernement a contesté qu'il y ait eu une violation de l'article 3 de la convention.[26]

L'article 3 de la Convention prévoit que 'nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants'.[27] Dans son jugement, la Cour souligne que, pour tomber dans les limites de l'article 3 de la Convention, un mauvais traitement doit atteindre 'un minimum de gravité'.[28] D'ailleurs, ce seuil de gravité est souvent relatif; il dépend de la nature et du contexte du traitement reçu, de sa durée, de ses effets mentaux et physiques et parfois de l'âge, du sexe et de la santé de la victime dans l'affaire.[29] Il est incontestable que les sévices infligés sur M Sabatier par ses parents atteignent ce seuil de gravité au vu de la nature sévère de ses blessures pour tomber dans les limites de l'article 3 de la Convention.

Dans le présent arrêt, la Cour estimait également que le signalement aux autorités françaises par la directrice de M Sabatier en juin 2008 a déclenché l'obligation positive de l'État.[30] La Cour nota que les autorités françaises ont négligées leur responsabilité lorsque le père de M Sabatier fut présent lors de l'examen médicolégal de sa fille qui ne s'aligne pas avec le protocole départemental de la Sarthe car cet examen aurait dû être effectué par un médecin seul

[23] ibid.
[24] *Association Innocence en Danger* (n 2) 29.
[25] ibid 145.
[26] ibid 156.
[27] La Convention (n 7) article 3.
[28] ibid.
[29] *Opuz c Turquie* Requête no 33401/02 (CtEDH, 9 juin 2009).
[30] *Association Innocence en Danger* (n 2) 33.

avec l'enfant.[31] En outre, il y avait 'un défaut de transmission d'information' à l'ASE par le parquet du Mans concernant la mineure en danger dans cette espèce.[32]

Après avoir examiné ces facteurs combinés, la Cour considéra que l'État français n'avait pas rempli son obligation positive de protéger cet enfant.[33] Donc, la Cour a reconnu seulement une violation de l'article 3 de la Convention prohibant la torture et les traitements inhumains ou dégradants par l'État français. Il existe une forte possibilité que la Cour ait pris la décision de condamner la France sous l'angle de l'article 3 au lieu de l'article 2 de la Convention parce qu'elle est 'symbolique'.[34] Les dispositions de l'article 2 contrastent avec l'article 3 de la Convention concernant le concept d'indérogeabilité:

> 2 La mort n'est pas considérée comme infligée en violation de cet article dans les cas où elle résulterait d'un recours à la force rendu absolument nécessaire:
>
> a) pour assurer la défense de toute personne contre la violence illégale;
>
> b) pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue;
>
> c) pour réprimer, conformément à la loi, une émeute ou une insurrection.[35]

L'article 3 ne prévoit aucune dérogation de la Convention, quelles que soient les circonstances. L'article 3 est donc, un droit absolu contrairement à l'article 2 protégeant le droit à la vie qui permet des dérogations de cet article dans des circonstances exceptionnelles. L'État français a donc violé un droit absolu, ce qui rend la décision de la Cour d'autant plus symbolique.

IV Article 2 de la Convention

La Cour n'a pas estimé nécessaire d'étudier l'affaire sous l'angle de l'article 2 de la Convention garantissant le droit primordial à la vie combiné avec l'article 3. La seule justification que la CEDH a donné vis-à-vis de sa position est qu'elle est seulement confiée de la compétence de 'maîtresse de la qualification juridique des faits de la cause' issue de l'article 32 de la Convention.[36] La mise à l'écart de l'article 2 de la Convention par la Cour est étonnant, ainsi

[31] ibid 170.
[32] ibid 173.
[33] ibid 176.
[34] Méryl Recotillet, 'Actes de Maltraitance ayant Entraîné le Décès d'une Enfant: Condamnation de la France' *Dalloz Actualité* (Paris, 15 septembre 2020) <https://www.dalloz-actualite.fr/flash/actes-de-maltraitance-ayant-entraine-deces-d-une-enfant-condamnation-de-france#.YDfApS2cY > accédé le 12 mars 2021.
[35] La Convention (n 7) article 2.
[36] *Handyside c Royaume-Uni* Requête no 5493/72 (CtEDH, 7 décembre 1976) 41; La Convention (n 7) article 32.

que l'absence d'une véritable explication quant à cette décision prise, malgré le fait que la Cour s'est déjà prononcée sur la violation de l'article 2 de la Convention dans sa jurisprudence.

Dans l'affaire *Kurt c Autriche*, un garçon de huit ans a été tué par son père.[37] La mère de l'enfant reproche aux autorités autrichiennes de ne pas avoir protégé son fils contre son mari violent qui avait déjà été dénoncé pour violences domestiques. La Cour a conclu qu'il y avait eu non-violation de l'article 2 de la Convention quand elle a jugé que les autorités autrichiennes n'avaient pas manqué à leur obligation découlant de l'article 2 de protéger le fils de la requérante contre son mari. Par contre, dans l'affaire *Sabatier* la Cour a souligné que les autorités françaises avaient manqué dans leur obligation de protéger M Sabatier mais elle n'a pas considéré qu'il y a eu violation de l'article 2 de la Convention. Donc, la négligence de l'État français ne suffisait pas pour constater une violation de l'article 2 de la Convention dans l'affaire *Sabatier*, mais selon la CEDH on peut dire que la négligence par les autorités aurait été suffisant pour constituer une violation de l'article 2 dans l'arrêt *Kurt.* Donc, la position de la Cour reste floue et incertaine en jugeant des affaires portant sur le sujet de la présence ou l'absence d'une véritable violation de l'article 2 de la Convention.

Dans une opinion séparée du présent arrêt, les juges Yudkivska et Hüseynov estimaient qu'ils ne pouvaient pas partager la décision surprenante prise par la Cour d'examiner l'arrêt uniquement sous l'angle de l'article 3 de la Convention. D'ailleurs, les juges notèrent que la Cour 'n'offre aucune explication propre à justifier pareille approche'. Ces juges constataient également qu'en analysant une affaire de maltraitance, la Cour aurait dû souligner des violences domestiques subies par les enfants et la vulnérabilité des enfants qui habitent dans ces environnements:

> Nous estimons qu'en décident de ne pas examiner sous l'angle de l'article 2 de la Convention […] la Cour néglige d'une part la spécificité des violences domestiques en tant que phénomène social à part entière et, d'autre part la vulnérabilité particulière des enfants affectés par pareilles violences.[38]

Les juges réfèrent également à sa position prise dans l'affaire *Talpis c Italie* où les autorités italiennes avaient été informées à plusieurs reprises par la mère de deux enfants que son mari fut très violent avec eux et avait abouti au décès de l'un de ses fils.[39] Dans cette affaire, la CEDH était très précise en soulignant ce qui constitue une menace à la vie d'un enfant 'le

[37] *Kurt c Autriche* Requête no 62903/15 (CtEDH, 4 juillet 2019).
[38] *Association Innocence en Danger* (n 2) 43.
[39] *Talpis c Italie* Requête no 41237/14 (CtEDH, 2 mars 2017).

risque d'une menace réelle et immédiate (contre la vie) doit être évaluée en prenant dûment en compte le contexte particulier des violences domestiques'.[40] La Cour a conclu que les instances italiennes avaient manqué à leur obligation de protéger la vie des intéressés. La Cour a reconnu aussi l'obligation positive de l'État 'de tenir compte du fait que des épisodes successifs de violence se réitèrent dans le temps au sein de la cellule familiale'.[41] D'ailleurs, dans l'affaire *Osman c Royaume-uni* la CEDH a été aussi très clair dans sa formulation du 'critère *Osman*', en vertu duquel il faut être établi que 'les autorités savaient ou auraient dû savoir sur le moment qu'un individu donné était menacé de manière réelle et immédiate dans sa vie' pour que les obligations positives de l'État se déclenchent.[42]

En appliquant la même logique en analysant l'affaire *Sabatier*, il est indiscutable qu'il y avait eu la présence d'une menace immédiate et réelle à la vie de M Sabatier puisqu'elle subissait des sévices infligés par ses parents régulièrement. En effet, les services sociaux et la police judiciaire ont été alerté de la situation précaire de la jeune fille un an avant son décès. C'est un fait universellement reconnu que la violence faite contre les enfants peut avoir des conséquences fatales et que les enfants qui subissent des violences graves sont exposés à un 'danger de mort' comme ce fut le cas de M Sabatier.[43]

Dans l'opinion séparée rendu par les juges, ils ont considéré que le critère *Osman* est satisfait dans le présent arrêt pour tomber sous les limites de l'article 2 de la Convention, 'le critère *Osman* est satisfait à raison du caractère réel de la menace […] qu'il existe une forte probabilité que le risque se matérialise si les pouvoirs publics ne font pas preuve de la diligence requise.' Les premières indications de sévices sur la personne de M Sabatier ont été transmises directement aux autorités françaises un an avant son décès, ils étaient donc au courant de la gravité de la situation dans laquelle M Sabatier se trouvait. Les sévices infligés par ses parents étaient d'une nature très sérieuse et par conséquent, la violence que M Sabatier subissait présentait un risque réel et immédiate pour sa vie.

L'avocat de l'Enfance et Partage, Monsieur Rodolphe Costantino a souligné la nécessité de l'État d'intervenir et agir dans les cas d'enfants maltraités dont les vies sont en danger. Il estime que '[l]'urgence ne se compte pas en semaines, l'urgence ne se compte pas en jours, l'urgence

[40] ibid 121.
[41] ibid 122.
[42] *Osman c Royaume-Uni* Requête no 23452/94 (CtEDH, 28 octobre 1998).
[43] *Association Innocence en Danger* (n 2) l'opinion séparée 43.

se compte en heures parce qu'un coup mortel peut prendre deux secondes. Ces enfants reçoivent des coups tous les jours, heure après heure, minute après minute.'[44]

Ce fut le cas de M Sabatier, comme des milliers d'enfants qui meurent chaque année en France et à travers l'Europe à cause de la maltraitance. En l'occurrence, il va sans dire que l'article 2 de la Convention aurait dû être appliquée par la Cour.

V Article 13 de la Convention

L'article 13 de la Convention prévoit que:

> toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles.[45]

La Cour jugea que le seul fait que les associations requérantes furent déboutée de leur demande devant la cour d'assise et la cour de cassation ne constituait pas en soi un élément suffisant pour juger du caractère 'effectif ou non' du recours. La Cour a donc pris la position qu'il n'y a pas eu violation de l'article 13 de la Convention.

En revanche, la Cour a déjà prononcé des violations des articles 3 et 13 combinés de la Convention en présence de maltraitances et d'abus affectifs à l'encontre des enfants commis dans un contexte familial. En effet, le Royaume-Uni avait été sanctionné à plusieurs reprises pour l'absence de recours effectif devant ses juridictions nationales. Dans l'affaire *Z et autres c Royaume-Uni*, la Cour a considéré qu'un État sera tenu responsable pour mauvais traitements et torture infligés à des enfants, même si ces traitements n'ont pas été directement infligés par un individu relevant de la 'sphère public'.[46] Dans cette affaire, la Cour a tranché que l'autorité locale n'a pas pris des mesures suffisantes pour protéger quatre enfants d'être gravement abusés par leurs parents.

La Cour a donc considéré que l'autorité locale a negligé sa responsibilité de protéger ces enfants. D'ailleurs, les victimes n'avaient pas pu bénéficier d'un examen des manquements des autorités locales à les protéger d'un traitement inhumain, ni d'une procédure contradictoire.[47]

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[44] France 3, 'Marina: L'Interview de Rodolphe Costantino, Avocat d'Enfance et Partage' (*Youtube*, 5 juin 2012) <https://www.youtube.com/watch?v=hAJ7wVUHCMA> accédé le 12 mars 2021.
[45] La Convention (n 7) article 13.
[46] *Z et autres c Royaume-Uni* Requête no 27034/05 (CtEDH, 10 mai 2001).
[47] ibid.

Par conséquent, leur cas a été rejeté du fait du défaut de mécanisme permettant d'établir la responsabilité fautive des fonctionnaires ou des organismes pour prévenir de tels actes. La Cour a donc constaté qu'il y a eu violation des article 3 et 13.

En revanche, dans le cas de M Sabatier, malgré les similitudes entre ces deux affaires concernant la négligence de l'État, la Cour n'a pas estimé qu'il y a eu violation au droit à un recours effectif. On peut donc constater, que la position prise par la Cour dans cet arrêt à l'encontre de la négligence de l'État de protéger une enfant est discutable.

D UNE VICTOIRE POLÉMIQUE

L'arrêt rendu par la CEDH représente une grande avancée pour les droits des enfants. Tout d'abord, cet arrêt fera de la jurisprudence en reconnaissant la faillite du système française de la protection de l'enfance. D'ailleurs, cet arrêt a ouvert de nouvelles voies de droit pour défendre les enfants maltraités. Le Gouvernement français estimait que les requérantes n'ont pas eu ni la qualité pour agir au nom de M Sabatier en tant que victime directe, ni la qualité d'introduire les requêtes devant la CEDH. 'Le Gouvernement argue que les associations ne témoignent d'aucun lien avec M de son vivant ni d'aucun contact significatif aves ses proches après son décès, et qu'elles n'ont pas non plus reçu de pouvoir d'instructions de la part de ces derniers.'[48] Par contre, en l'espèce, la Cour a considéré que la qualité à agir de ces deux associations n'a jamais été remise en cause devant les juridictions nationales et résultait directement de leurs objets sociaux et de la mise en œuvre de l'article 2-3 du Code de Procédure Pénale français.[49] La Cour a donc estimé que les associations requérantes avaient la qualité de représentantes de facto de M Sabatier au regard des circonstances de l'espèce.[50] Par conséquent, on peut constater que cet arrêt est une double victoire pour les droits des enfants.

De surcroît, depuis cette affaire, des mesures ont été prises pour lutter contre les défaillances des dispositifs de protection de l'enfance en France par le Secrétaire d'État. Ces mesures incluent la centralisation des informations préoccupantes au niveau départemental des enfants en danger, ainsi qu'un plan de lutte contre les violences faites aux enfants pour 2020-2022.[51] L'avocat d'Enfance et Partage, a affirmé que dorénavant, la justice française aurait

[48] *Association Innocence en Danger* (n 2) 21.
[49] Code de Procédure Pénal articles 2, 3.
[50] *Centre de Ressources Juridiques au nom de Valentin Câmpeanu c Roumanie* Requête no 47848/08 (CtEDH, 17 juillet 2014).
[51] Dorothée Louessard, 'Marina Sabatier: la France Condamnée Pour ne pas Avoir Protégé la Fillette' (*Journal des Femmes*, 5 juin 2020) <https://www.journaldesfemmes.fr/maman/enfant/2640657-affaire-marina-sabatier-cedh-france-condamnee/> accédé le 12 mars 2021.

'l'obligation de ne pas traiter ces affaires à la légère'.[52] Cependant, malgré ces avancées dans le monde des droits de l'enfant, le jugement de la CEDH a été critiquée par certains des associations requérantes qui réclamaient une condamnation de la Cour sous l'angle de l'article 2 et 13 de la Convention. En outre, ces associations regrettent que la CEDH ait considéré que les recours internes français soient effectifs pour engager la responsabilité de l'État français pour faute lourde.[53]

À l'instar des juges Hüseynov et Yudkivska, Maître Grégory Thuan, l'avocat de l'Association Innocence en Danger a critiquée la position prise par la CEDH de considérer que l'objet du litige concernait uniquement les mesures prises ou non par l'État d'empêcher la maltraitance de la jeune fille. Selon lui, la question essentielle dans l'affaire était 'le risque réel et immédiat pour M Sabatier sur sa vie, et non pas uniquement sur les mauvais traitements'.[54]

L'État a une obligation positive d'intervenir pour assurer la protection des droits des enfants, et il est évident que l'État français a failli dans le cas de M Sabatier. Les services sociaux dans l'affaire ont été informés à de nombreuses reprises des abus infligés sur M Sabatier 'ils n'ont pas été assez réactifs'.[55] Par contre, l'arrêt rendu par la Cour démontre qu'en ce qui concerne les enfants maltraités par leurs parents ou gardiens, ces actes ne seront pas considérés comme des menaces à la vie des enfants. D'ailleurs, l'arrêt a mis l'accent sur le fait que l'État et les services sociaux ne seront pas jugés pour ne pas avoir protéger les enfants qui sont décédés à la suite des abus infligés par leurs parents. Ils seront uniquement tenus par la Cour sous l'article 3 de la Convention de ne pas avoir empêché la maltraitance et la torture d'un enfant dès qu'il est signalé que l'enfant est dans une situation précaire.

La décision de la Cour du 4 juin 2020 a pour effet qu'il n'est toujours pas clair si l'accumulation d'abus infligés sur les enfants suffiront pour présenter une menace imminente et réelle à la vie selon la CEDH. La Cour n'a pas jugé que la torture répétée sur M Sabatier ait pu mener au décès de la jeune fille, mais elle a précisé que les sévices subis par la jeune fille ont atteint le seuil requis pour être qualifiés de torture. Pourtant, la torture elle- même n'ont pas atteint le

[52] Julie Le Duff et Alice Kachaner, 'Affaire Marina: L'État français Condamné par la Cour Européenne des Droits de l'Homme' (*France Bleu*, 4 juin 2020) <https://www.francebleu.fr/infos/faits-divers-justice/affaire-marina-l-etat-francais-condamne-par-la-cour-europeenne-des-droits-de-l-homme-1591260119> accédé le 12 mars 2021.
[53] 'Affaire Marina Sabatier: Un Arrêt qui n'est pas allé aussi Loin' (*Innocence en Danger*, 9 juin 2020) <https://innocenceendanger.org/2020/06/09/affaire-marina-sabatier-larret-de-la-cedh-du-4-juin-2020-qui-condamne-la-france-nest-pas-alle-assez-loin/> accédé le 12 mars 2021.
[54] ibid.
[55] 'Annexe: Les Arrêts de la Cour européenne des Droits de l'Homme (CEDH) Concernant la France qui ont été Rendus en 2020' (*Le Sénat*, 3 février 2021) <http://www.senat.fr/rap/r20-286/r20-28612.html> accédé le 12 mars 2021.

seuil requis pour constituer une menace à la vie. On peut constater donc, que selon la Cour, la maltraitance et la torture subie par un enfant n'est pas suffisant pour constituer une menace à la vie d'un enfant ou mineur.

Une question se pose: quel point faut-il atteindre pour que la torture puisse être considéré comme une menace 'réelle et imminente' à la vie? En avril 2009, quatre mois avant le décès de M Sabatier, l'enfant n'arrivait pas à marcher à causes de graves brûlures infligées par ses parents, mais selon la CEDH cet acte de torture ne tombe pas sous le coup de l'article 2 de la Convention. Cette position prise par la Cour est assez étonnante, surtout étant donné le fait qu'il existe un lien direct entre la torture subie par M Sabatier et son décès.

En outre, en notant la gravité de sévices infligés sur la jeune fille, on ne peut pas nier que la maltraitance et la torture qu'elle subissait allait aboutir à son décès au fur et à mesure, comme le firent remarquer les juges Hüseynov et Yudkivska.

Il va sans dire que la décision rendue par la Cour est très surprenante: la précision du jugement rendu dans l'affaire *Sabatier* contraste de manière frappante avec le niveau de précision rendu par la Cour dans ses arrêts précédents concernant les cas de violences faites aux enfants. D'ailleurs, il faut noter que la juxtaposition entre la position prise par la Cour en *Talpis* et l'affaire *Sabatier* a pour effet la diminution juridique du niveau de protection pour des mineurs en danger. C'est pour toutes ces raisons que ce manque de précision de la CEDH a fait polémique.

E CONCLUSION

L'arrêt rendu par la CEDH du 4 juin 2020 est emblématique et historique. C'est la première fois que la Cour a condamné la France pour violation de l'article 3 de la Convention pour avoir manqué à son obligation positive de prévention des actes de torture, de barbarie et de tout traitement inhumain et dégradant envers les enfants et les mineurs. On peut affirmer aussi que cet arrêt a constitué une grande avancée pour les droits des mineurs mais également et surtout, pour les litiges à venir devant la Cour.

De plus, l'analyse de cette affaire a mis en lumière de nombreuses lacunes administratives et judiciaires. Cet arrêt a permis une remise en question du système de protection de l'enfance en France. Il est évident que l'État français aurait pu éviter le décès de M Sabatier et cette condamnation met en évidence que l'État était responsable pour le fonctionnement défectueux de ses acteurs judiciaires et administratifs qui ont classé les enquêtes sans suite. Par ailleurs,

on peut déduire en examinant cette affaire, qu'un État sera tenu responsable par la CEDH de ne pas avoir respecté son obligation positive envers les enfants et les mineurs en dangers en tant que personnes vulnérables dans notre société. Cet arrêt servit comme une leçon pour la France et toutes les parties contractantes à la Convention. Il faut que les États respectent et fassent appliquer les articles de la Convention, surtout dans les cas concernant leurs obligations positives envers les enfants.

Néanmoins, il est regrettable que la Cour n'ait pas estimé nécessaire d'étudier l'affaire sous l'angle 2 de la Convention. En conséquence, cet arrêt soulève plusieurs problématiques pour l'avenir de la Cour. Par exemple, continuera-t-elle d'aborder des affaires concernant les menaces à la vie des enfants avec l'approche adoptée dans l'affaire *Sabatier*? On peut se poser la même question pour les affaires portant sur le sujet du déclenchement des obligation positives d'États sous l'article 3 de la Convention. Est-il possible qu'un jour la CEDH décidera de prendre la même position que les juges Yudkivska et Hüseynov, en examinant les affaires où la sécurité et la vie des enfants sont en jeu?

Pour le moment, la position de la Cour reste ambiguë et incertaine, étant donné le fait que la Cour a parfois tendance à appliquer l'article 2 dans les affaires concernant les cas de violences domestiques envers les enfants. Cette absence d'explication par la Cour concernant sa position fragilise la sécurité des enfants maltraités, comme ce fut le cas pour M Sabatier. La Cour a estimé en l'espèce que les actes de la torture subis par des enfants ne seraient toujours pas considérés comme des menaces à la vie. Il faudra donc attendre pour que la Cour éclaircisse sa position concernant le rôle et l'obligation positive de l'État d'empêcher la maltraitance et la torture des enfants.

CHARITY OR JUSTICE? HOW A TELEOLOGICAL INTERPRETATION OF THE ECHR SUPPORTS JUDICIAL INTERVENTION IN ARTICLE 3 DESTITUTION CASES

Emma Young*

A INTRODUCTION

> '[O]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life.'[1]
>
> - Nelson Mandela

The European Convention on Human Rights (ECHR) (Convention) was drafted in 1950 to ensure the atrocities perpetrated by governments against their own people would never again be repeated.[2] In the following decades, Europe has changed drastically to become the cradle of the modern welfare state, with many countries embracing advanced models of progressive taxation and social welfare. However, despite significant economic and social development, extreme poverty still remains a factor within Member States of the Council of Europe.[3] In its case law, the European Court of Human Rights (ECtHR) (the Court) has so far remained reluctant to pronounce upon the human rights implications of such poverty.

In this article, the approach of the Court to cases of destitution falling within the remit of article 3 ECHR will be analysed. It has been established by the Court that state-sanctioned poverty can in certain circumstances constitute 'inhuman or degrading treatment' under article 3.[4] However, it has failed to provide a coherent set of principles with which to guide judicial application and the scope of state responsibility remains limited. In this article, it is contended that the Court's existing approach to destitution is unsatisfactory and that state responsibility for destitution should be extended to those not falling within an 'inherently vulnerable' group.

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[1] Simon Jeffery, 'Mandela Calls for Action on "Unnatural" Poverty' *The Guardian* (London, 3 February 2005) <https://www.theguardian.com/world/2005/feb/03/hearafrica05.development> accessed 03 April 2021.

[2] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 3.

[3] 'Child Poverty and Social Exclusion in Europe: A Matter of Children's Rights' (*Save the Children*, 2014) <https://resourcecentre.savethechildren.net/sites/default/files/documents/child-poverty-and-social-exclusion-in-europe-low-res.pdf> accessed 18 March 2021.

[4] *Francine van Volsem v Belgium* App no 14641/89 (ECtHR, 9 May 1990).

This approach is grounded in a teleological interpretation of the Convention based on the overall spirit and purpose of the document.

The scope of state responsibility for social deprivation, as well as socio-economic rights in a general sense, is a highly contentious issue before the Court. Competing concerns such as justiciability, the separation of powers and resource allocation are complex, and it is submitted that a detailed examination of these issues is beyond the scope of this article. The proposed argument will proceed based on the prior reasoning of the Court, which has established that cases of extreme poverty may in certain circumstances fall within the scope of article 3.

Part B of this article will cover the history of the Court's integration of socio-economic rights within the civil and political provisions of the Convention as well as outlining the case law on destitution. In Part C, the two main issues with the Court's interpretation of said case law will be identified. Finally, in Part D, a critical analysis of these issues will be performed based on a teleological interpretation of the ECHR.

B BACKGROUND

The ECHR was drafted in 1950 as a civil and political rights document.[5] Civil and political rights, defined as classic 'first generation' rights, trace their origins back to the French and American Revolutions and are characterised by the negative involvement of the State in the lives of citizens.[6] Socio-economic rights emerged in the aftermath of World War II (WWII) and the creation of the modern welfare state.[7] Their characterisation as 'positive rights' requires States to take positive actions to provide for the welfare of citizens. For this reason, socio-economic rights have been seen to fit more in the domain of public policy and are commonly viewed as non-justiciable.[8]

This distinction between both categories of rights has over time been considered 'artificial' and a 'fallacy'.[9] They rely on each other for their existence - the right to life cannot exist without the provision of adequate nutrition and vice versa. This interrelation of rights was first articulated by the Court in *Airey v Ireland*, where it recognised that no 'water tight division'

[5] Rainey, Wicks and Ovey (n 2) 4.
[6] ibid 3.
[7] Jeff Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights - A Legal Perspective* (Hart Publishing 2003) 1.
[8] ibid 2.
[9] ibid 1, 3.

exists between the provisions of the Convention and the sphere of socio-economic rights.[10] The Court has since reaffirmed that autonomous social rights may not be enumerated from the provisions of the Convention.[11] However, through tools of interpretation it has been able to integrate a social rights dimension into existing provisions including article 2, article 3 and article 8.[12] This approach has been considered 'integral' to a sensible and coherent system of human rights protection [13] and has been strengthened by the introduction of positive obligations, requiring States to take action to realise their commitments under the Convention.[14]

Article 3 is an example of such a provision that has experienced an expansion in its socio-economic capacity. This article was first envisaged as a bastion of protection against state violence, with its scope further extended to include situations where suffering is naturally occurring but is 'exacerbated by treatment ... for which the authorities can be held responsible.' [15] In the case of *Francine van Volsem v Belgium*, the former European Commission on Human Rights was first confronted with the possibility of extending the notion of inhuman or degrading treatment to cases of extreme poverty.[16] The Commission declared the case manifestly ill-founded on the grounds that it did not reach the 'level of humiliation or debasement' required by inhuman and degrading treatment.[17] However, it did accept in theory that Belgium could, in sufficiently severe circumstances, be held responsible for the socio-economic conditions of its citizens.

Subsequent cases invoking destitution were subject to similar 'cursory dismissals' by the Court.[18] In *Pancenko v Latvia* and *O'Rourke v United Kingdom*, the Court considered that a lack of access to social security and street homelessness respectively did not meet the 'minimum level of severity' necessary to trigger article 3.[19] In *Larioshina v Russia*, the

[10] *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979) [26].
[11] *Jazvinský v Slovakia* App nos 33088/96, 52236/99, 52451/99-52453/99, 52455/99, 52457/99-52459/99 (ECtHR, 7 September 2000).
[12] *Nencheva and Others v Bulgaria* App no 48609/06 (ECtHR, 18 June 2013); *Moldovan and Others v Romania* App nos 41138/98 and 64320/01 (ECtHR, 12 July 2005).
[13] *N v United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) [6].
[14] Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 European Human Rights Law Review 583.
[15] *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [52].
[16] *Van Volsem* (n 4); Antonio Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) 2(2) European Journal of International Law 141.
[17] ibid 143.
[18] Aoife O'Reilly, 'The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3' (2016) 15 Hibernian Law Journal 1, 8.
[19] *Pančenko v Latvia* App no 40772/98 (ECtHR, 28 October 1999); *O'Rourke v United Kingdom* App no 39022/97 (ECtHR, 26 June 2001).

applicant complained that a monthly pension equivalent to €25 fell far below the level of basic subsistence.[20] Despite accepting in principle that an insufficient pension could constitute inhuman or degrading treatment, the Court once again declared that the complaint did not meet the requisite level of severity.[21]

As demonstrated in the case law, the Court has adopted a cautious approach when ruling on the admissibility of article 3 destitution cases. However, in extreme circumstances involving deportees and asylum seekers, the Court has occasionally allowed destitution-based claims to succeed. In *MSS v Belgium and Greece*, the applicant was an Afghan asylum seeker who had travelled through Greece to seek asylum in Belgium.[22] He was subsequently deported back to Greece, where he was subject to intolerable living conditions and later, homelessness. The Court noted the applicant's 'inherent vulnerability' as an asylum seeker and determined that in allowing him to reach such extreme destitution, Greece had subjected him to inhuman or degrading treatment to the standard required by article 3. Belgium was also found to be in contravention of article 3 for deporting the applicant and therefore failing to take the necessary steps to protect the applicant from experiencing inhuman or degrading treatment.[23]

C ISSUES WITH THE COURT'S APPROACH TO DESTITUTION

It is against this background of case law on destitution that a number of issues with the Court's approach can be identified. First, the Court has failed to outline the scope of state responsibility for the degradation of its citizens under article 3.[24] In *van Volsem*, despite acknowledging that a State could in certain circumstances be held to contravene article 3, the Court did not provide any explanation as to what those circumstances might be.[25] As noted by Cassese, this lack of guidance as to the scope of state responsibility creates a general sense of uncertainty for plaintiffs, lawyers and national authorities.[26] This was echoed by the UK Court of Appeal in *Anufrijeva v London Borough of Southwark*, with Lord Woolf noting that there was a 'dearth of authority' from Strasbourg on the issue of state responsibility.[27] De Schutter hypothesises

[20] *Larioshina v Russia* App no 56869/00 (ECtHR, 23 April 2002).
[21] ibid [3].
[22] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
[23] ibid 89.
[24] O'Reilly (n 18) 16.
[25] Cassese (n 16) 145.
[26] ibid.
[27] [2003] EWCA Civ 1406, [2004] QB 1124 [25].

that this lack of guidance is a product of consequentialist reasoning intended to limit the precedential effect of socio-economic obligations under article 3.[28]

Despite uncertainty regarding the scope of state responsibility, based on existing case law it appears likely that only a narrow category of individuals may invoke destitution successfully. It is submitted that this high threshold for admissibility poses a problem in itself. This author contends that by dismissing the vast majority of cases at the admissibility stage, the Court loses the opportunity to develop a coherent set of principles to be used by future iterations when faced with cases of destitution. It is submitted that based on a teleological reading of the Convention, described in further detail below, the lack of reasoning provided by the Court in destitution cases is in contravention of the rule of law and the 'object and purpose' of the ECHR. It is further submitted that a teleological interpretation provides the basis for the Court to extend the scope of state responsibility to cover a broader category of individuals experiencing destitution.

D TELEOLOGICAL INTERPRETATION

In *Soering v United Kingdom*, the Court affirmed that 'any interpretation of the rights and freedoms guaranteed has to be consistent with the "general spirit" of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.'[29] This goal-oriented approach is known as teleological interpretation, one of the three established schools of treaty interpretation.[30] The teleological approach is represented in the Vienna Convention on the Law of Treaties (VCLT) by article 31(1), which states that provisions are to be interpreted in light of the 'object and purpose' of the treaty.[31] This approach has been considered the most appropriate when interpreting human rights treaties, where terms are 'deliberately left vague to enable them to be applied to changing social circumstances'.[32]

The Court has often employed a teleological approach to justify innovative departures from the text of the Convention. Ideas such as human dignity,[33] personal autonomy[34] and democratic

[28] Olivier de Schutter, 'The Protection of Social Rights by the European Court of Human Rights' in Peter van der Auweraert and others (eds), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (Maklu 2002) 218.
[29] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) [87].
[30] Gleider Hernández, *International Law* (Oxford University Press 2019) 180.
[31] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[32] Anne Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland* (Pretoria University Law Press 2014) 5.
[33] *Pretty* (n 15) [65].
[34] *RR v Poland* App no 27617/04 (ECtHR, 26 May 2011) [180].

values[35] have been incorporated into the reasoning of the Court on many occasions, notably in the area of socio-economic entitlements.[36] In addition, the Court has emphasised on a number of occasions that the Convention is a 'living instrument' that must be interpreted in an 'evolutive and dynamic manner.'[37] Both a strict textualist approach to the interpretation of the Convention as well as an adherence to the views expressed by the drafters in the travaux préparatoires would inhibit the Court from adapting to changing attitudes towards human rights in Europe.[38]

The Court has used a teleological reading of the Convention to enforce positive obligations on Contracting States. In *Airey*, the Court affirmed that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[39] The Court has used this principle to justify the enumeration of positive obligations, which themselves find no textual basis in the Convention.[40] The Court has also deduced the existence of positive obligations from the preamble, which invokes both 'the maintenance and further realisation of Human Rights and Fundamental Freedoms' and 'a common heritage of political traditions, ideals, freedom and the rule of law'.[41]

As outlined above, a rich heritage of teleological interpretation is displayed in the case law of the ECtHR. The effective realisation of fundamental rights and freedoms, the rule of law and human dignity have been pursued through the incorporation of socio-economic entitlements and positive obligations into existing civil and political provisions. It is against this backdrop that the approach of the Court in destitution cases will be analysed.

I Undefined Scope of State Responsibility

The preamble places the rule of law as an indispensable aspect of the 'common heritage' of Member States.[42] The Venice Commission, at the request of the Council of Europe, has defined the rule of law as encompassing several aspects, including 'legal certainty', 'prohibition of

[35] *Vogt v Germany* App no 17851/91 (ECtHR, 2 September 1995).
[36] *MSS* (n 22) [253].
[37] Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 86.
[38] Ida Elisabeth Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective' (2006) 10(4) The International Journal of Human Rights 405.
[39] *Airey* (n 10) [24].
[40] O'Reilly (n 18) 5.
[41] ibid.
[42] European Convention on Human Rights, preamble.

arbitrariness' and 'respect for human rights'.[43] Respect for the rule of law has been confirmed by the Court in *Engel v The Netherlands* as forming part of the 'spirit' of the Convention.[44]

It is clear that one of the fundamental responsibilities of the Court is to ensure compliance with the rule of law among Contracting States. However, in its role as a quasi-constitutional court, it stands that it must also comply with the rule of law in its decisions. It holds a dual role both to adjudicate individual petitions while also providing general guidance for national authorities and prospective plaintiffs.[45] According to Leijten, it is 'widely recognised' that decisions of the Court are not only binding in individual cases but work erga omnes.[46] The prevention of arbitrariness and compliance with legal certainty, as established by the Venice Commission, are clear requirements that must be met for the rule of law to be effectively upheld. Leijten argues that more transparent and consistent reasoning on socio-economic rights is needed, as 'the effectiveness of the Court system is dependent on the acceptance and implementation of its judgments by the Member States.'[47] Therefore, in publishing well-reasoned decisions and clearly defining the contours of particular rights, the Court is fulfilling its obligation vis-à-vis the rule of law.

In cases where the Court has enumerated a right not found within the text of the Convention, it is submitted that it has an increased responsibility towards Contracting States to provide clarity as to the scope of such a right. It is further submitted that an absence of reasoning and guiding principles provided in cases involving destitution under article 3 is in clear violation of this obligation.

II Limited Scope of State Responsibility

The view that states should be held judicially responsible for poverty occurring within their jurisdictions is one espoused by prominent human rights lawyers, welfare economists and philosophers alike.[48] The concept of a right to 'basic subsistence' was first espoused by Henry

[43] Parliamentary Assembly of the Council of Europe (PACE) (2007) Resolution 1594.
[44] *Engel and Others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976) [69].
[45] Leijten (n 37) 55.
[46] ibid 56.
[47] ibid 21.
[48] See Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press 2002); Sandra Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' (2006) Oxford Legal Studies Research Paper No 38/2006, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923936&download=yes> accessed 18 March 2021.

Shue and has been considered a constitutional necessity for the enjoyment of all other rights.[49] Gowder argues that the elimination of poverty should count as a 'constitutional necessity' under Rawls's 'social minimum' framework, which states that all citizens must meet a minimum standard of social conditions in order to effectively participate in the political process.[50] Sen takes perhaps a stronger view, stating that 'people are hungry if they lack entitlements that enable them to eat: thus: "the law stands between food availability and food entitlement."'[51]

Based on its particular role as a supranational institution, the Court has so far taken a restrained approach to the issue.[52] In the past, the Court has been reluctant to reconcile poverty, traditionally associated with State inaction and accepted as a natural consequence of capitalist society, with 'inhuman and degrading treatment', traditionally associated with State tyranny and oppression.[53] Despite this, the jurisprudence of article 3 has evolved to include forms of inhuman and degrading treatment which do not form part of the classic definition of torture or State tyranny, including neglect of at-risk children[54] and individuals with disabilities or illnesses who have come under the control of the state.[55]

Cases of destitution under article 3 are currently limited to asylum seekers, a group Member States are obliged to provide for due to their inherent vulnerability.[56] It is submitted that there is little on the face that differentiates two individuals suffering from conditions of extreme poverty, one that forms part of a 'vulnerable grouping' and one that does not. The key differentiating factor is the scope of state responsibility, outlined by the Court in *Pretty* as a case where suffering is naturally occurring but is 'exacerbated by treatment ... for which the authorities can be held responsible'.[57] The following section will investigate to what extent, based on a teleological reading of the Convention, Member States can be held responsible for individual instances of poverty occurring within their jurisdictions.

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[49] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996); Paul Gowder, 'Equal Law in an Unequal World' (2014) 99(3) Iowa Law Review 1021.
[50] ibid 1062-63.
[51] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1981) 166.
[52] O'Reilly (n 18) 5.
[53] De Schutter (n 28).
[54] *A v United Kingdom* App no 3455/05 (ECtHR, 19 February 2009).
[55] *Keenan v United Kingdom* App no 27229/95 (ECtHR, 3 April 2001); *Price v United Kingdom* App no 33394/96 (ECtHR, 10 July 2001).
[56] See Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96; *MSS* (n 22) [251]; *Budina v Russia* App no 45603/05 (ECtHR, 18 June 2009).
[57] *Pretty* (n 15) [52].

Member States are not considered to be under a general obligation to prevent poverty within their respective jurisdictions. However, based on the 'further realisation of rights' and a 'dynamic and evolutive' interpretation of the Convention, nothing in theory prevents the Court from reconceptualising the notion of State responsibility for extreme poverty - in fact, a teleological interpretation encourages it. Below, state practice will be outlined which reflects the changing notion of state responsibility for the social welfare of citizens.

Classical neoliberal scholarship regards poverty as a natural consequence of a free market society which the State is under no obligation to correct.[58] However, in the seventy years following the adoption of the ECHR, a majority of Member States have adopted sophisticated taxation and social welfare regimes based on a human rights framework - the now - quintessentially European idea of the 'welfare state'.[59] O'Cinneide argues that the idea of poverty as a natural phenomenon is no longer supported at a European level, where state practice indicates that it is the responsibility of States to provide (at least in a limited capacity) for their citizens.[60]

There is also an increasing recognition that poverty may exist as a direct consequence of national economic policy, with a number of studies linking austerity measures with the degradation of socio-economic rights.[61] This theory is of particular importance in the context of the COVID-19 pandemic, with the United Nations Committee on Economic, Social and Cultural Rights noting the negative impact of national containment measures on citizens' enjoyment of various socio-economic rights.[62] This was found to be especially true for marginalised groups including women, children and the elderly.[63] Thornton argues that the protection of socio-economic rights 'is in effect, another means of upholding the rule of law in Contracting States', and that where a particular Member State has legislated in an area of social

[58] Joel F Handler, 'The "Third Way" or the Old Way?'(2000) 48(4) University of Kansas Law Review 765, 796-800.
[59] Ellie Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2(4) Erasmus Law Review 397.
[60] O'Cinneide (n 14) 589.
[61] Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) European Law Journal 521.
[62] UN Committee on Economic, Social and Cultural Rights, 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights' (E/C 12/2020/1, *United Nations*, 17 April 2020).
[63] ibid [5].

welfare, the withdrawal or lack of implementation of such a policy may result in a violation of the Convention.[64]

If the Convention is to be interpreted based on the further realisation of rights and the rule of law, instances of extreme poverty may therefore be conceived as a result of positive state action in the form of economic policy. If recognised by the Court, this would require that the State take adequate measures to prevent extreme poverty within its jurisdiction, regardless of the 'inherent vulnerability' of the individual.

This author recognises the challenges that such a decision would pose for Member States with underdeveloped (or even well developed) social welfare mechanisms. However, it is submitted that expanding the scope of state responsibility does not necessarily translate into a high standard of living - the threshold of inhuman and degrading treatment must remain high to preserve the integrity of article 3. A classic example of a situation that may constitute destitution of sufficient gravity is street homelessness, especially circumstances involving children or unaccompanied minors as was the case in the Calais Jungle. It is the role of the Court to define the contours of such responsibility in relation to each State.

This approach has been endorsed by various authors including O'Reilly and Fredman.[65] It has also been referenced in national courts. In R (*Limbuela) v Secretary of State for the Home Department* Baroness Hale noted that 'an indefinite state of rooflessness and cashlessness ... is in today's society both inhuman and degrading.'[66]

E CONCLUSION

The task before the Court in any given case is a delicate and challenging one. As the most authoritative regional human rights mechanism currently in operation, it must balance the responsibility of vindicating the rights of applicants while respecting the sovereignty of its Contracting States.[67] Despite this, it is submitted that the proposal of this article - to extend the scope of state responsibility from 'inherently vulnerable' groups to all those suffering from extreme poverty - does not represent a radical departure from the prior reasoning of the Court and is supported by a teleological reading of the Convention.

[64] Liam Thornton, 'The European Convention on Human Rights: A Socio-Economic Rights Charter?' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional 2014) 7.
[65] Fredman (n 48) 4; O'Reilly (n 18) 18.
[66] *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 [78].
[67] Hernández (n 30) 420.

When the Convention was first drafted in the aftermath of WWII, the main threat to the rights and safety of individuals was state tyranny and war. However, in our modern, developed continent, it is submitted that socio-economic deprivation represents the most existential threat to the lives of European citizens. Considering the severe economic consequences flowing from the COVID-19 pandemic, it is especially urgent that the Court formulate its position on state responsibility for destitution under article 3.

The House of Lords in *Limbuela* considered human rights as 'operating in the heartland of the Welfare State, so that political responsibility interacts closely with legal duties.'[68] European society is built on the values of equality, dignity and respect for human rights - it is submitted that the Court must take the lead in ensuring that our modern understanding of rights accurately reflects reality.

[68] Fredman (n 48) 9.

CONSTITUTIONAL RIGHTS AND COVID-19: *O'DOHERTY & ANOR v MINISTER FOR HEALTH & ORS* [2020] IEHC 209

Gearóid Smiddy*

A INTRODUCTION

This matter involved two former journalists seeking leave of the Court to bring judicial review proceedings challenging the constitutionality of legislation designed to halt the spread of COVID-19. The relief sought was an order of certiorari rendering the COVID-19 legislation null and void on grounds of repugnancy to the Constitution.[1]

The framework of legislation was introduced following the World Health Organisation's (WHO) declaration of a pandemic in March 2020. The legislation at issue included the Health Act 2020, Emergency Measures in the Public Interest (Covid-19) Act 2020, and a number of statutory instruments issued by the first named respondent.[2] This resulted in restrictions on travel, the prohibition of events and allowed for the possible detention of persons suspected of being potential sources of infection. Moreover, persons were prohibited from leaving their place of residence without reasonable excuse.

B ARGUMENTS OF THE APPLICANTS

The applicants, who proceeded as lay litigants, contended that the measures adopted were disproportionate and that the Minister for Health had acted on 'fraudulent science'.[3] It was asserted that that no evidence was presented to the public that such measures had ever succeeded in any comparable situation.[4] The applicants alleged the arrival of a 'police state' and referred to criticisms of government-imposed lockdowns made by a former UK Supreme Court judge.[5]

The application mostly consisted of complaints of unconstitutionality. It was maintained that the COVID-19 pandemic did not amount to an emergency as per Article 28.3.3° which the

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[1] *O'Doherty & Anor v Minister for Health & Ors* [2020] IEHC 209, [2020] 5 JIC 1303 [9].

[2] Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020; Emergency Measures in the Public Interest (Covid-19) Act 2020.

[3] *O'Doherty* (n 1) [39].

[4] ibid [36].

[5] ibid [39].

applicants submitted is the only emergency provided for in the Constitution.[6] The applicants argued that constitutionally protected fundamental rights had been interfered with including the right to liberty, property rights, the inviolability of the dwelling and the right to assemble peaceably.[7] It was further contended that the constitutional rights of the family under Article 41 had been infringed in addition to the right to freedom of conscience and practice of religion under Article 44.[8] The applicants also raised Article 45 which deals with state policy and allowing citizens to earn an adequate means.[9] Moreover, the applicants referred to the EU Charter of Fundamental Rights and the ECHR which seek to protect similar rights.[10]

Furthermore, it was submitted that the regulations made by the Minister were unconstitutional as he had no power to legislate according to Article 15.2.1°.[11] Further constitutional concerns were raised in relation to the Court's restriction on capacity which denied members of the public access to the hearings.[12] The applicants insisted that the hearings were held contrary to Article 34.1 which provides that justice shall be administered in public, save in special and limited cases prescribed by law.[13]

In addition to the more obvious constitutional impacts, implications were identified concerning the Residential Tenancies Act 2004 and the Mental Health Act 2001. The applicants contended that the restrictions directly interfered with the rights of landlords and tenants and put the wellbeing of vulnerable people at grave risk.[14]

Finally, the applicants challenged the procedures of the Oireachtas in passing the legislation. It was alleged that the Ceann Comhairle had limited the number of deputies present in the Dáil for reasons of social distancing, and that there was an absence of any real debate in either house.[15] It was further contended that three Ministers were no longer members of Dáil Éireann at the time the legislation was passed, following the result of a general election in February, 2020.[16] The applicants challenged the legal standing of the government and argued that such

[6] ibid.
[7] ibid [40].
[8] ibid.
[9] ibid.
[10] ibid [42].
[11] ibid [41].
[12] ibid [14].
[13] ibid.
[14] ibid [37]-[38].
[15] ibid [61], [63].
[16] ibid [61].

issues were justiciable, relying on *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*.[17]

C ARGUMENTS OF THE RESPONDENTS

Counsel for the respondents initiated a defence that the applicants had adopted an incorrect procedure and that the application should have been brought by way of plenary summons.[18] Further, it was submitted that the applicants did not have sufficient interest or standing to challenge the legislation.[19] This is an essential requirement in order to be granted a judicial review.

An affidavit of the Principal Officer in the Department of Health was filed, outlining the background and reasons for the legislation in question.[20] It was asserted that the applicants had not provided any facts to support their argument that the measures taken were disproportionate.[21] The respondents further submitted that Article 28.3.3° was not being relied upon to achieve immunity from constitutional attack.[22]

Moreover, the respondents contended that it was well established that the making of regulations under statute was constitutional.[23] It was submitted that no case had been made that the Minister had gone beyond giving effect to the principles and policies of the parent Act.[24] Furthermore, the respondents submitted that the ECHR and EU law had no application.[25] Regarding the procedures of the Oireachtas, it was asserted that these were non-justiciable.[26]

D THE JUDGMENT

It was held by Meenan J that the burden is on the applicant 'to depose to such facts in his/her grounding affidavit which, if proven, could make an arguable case in law that has a prospect of success'.[27] The judge stated that the application for leave 'has a low threshold but it is,

[17] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.
[18] *O'Doherty* (n 1) [43].
[19] ibid [44].
[20] ibid [55].
[21] ibid [45].
[22] ibid [46].
[23] ibid [47].
[24] ibid.
[25] ibid [48].
[26] ibid [64].
[27] ibid [29].

nonetheless, a threshold'.[28] Despite the fact that the hearings were *inter partes*, Meenan J was of the view that the applicants did not face a higher threshold.[29]

The judge agreed with the respondents that an incorrect procedure was adopted.[30] However he allowed for the proceedings to continue as if they had begun by plenary summons.[31] It was held that the COVID-19 restrictions were designed to affect every person residing in the state and therefore the applicants had standing to bring a constitutional challenge.[32] However, Meenan J held that the applicants had no standing to bring a challenge in relation to the Mental Health Act 2001 and or the Residential Tenancies Act 2004 as no claim had been made that the applicants corresponded to the categories of persons affected.[33]

Regarding the internal procedures of the Oireachtas, O'Doherty's complaints were dismissed and held to be non-justiciable.[34] Meenan J ruled that the reliance on *Miller/Cherry* was misplaced given the different constitutional position and factual background.[35] It was held that the government operated lawfully given that Article 28.11 allows for a caretaker government to act until a new government is formed.[36]

Concerning the constitutional issues raised by the applicants, Meenan J held that the Minister had not acted unconstitutionally and affirmed that no argument had been made that the regulations went beyond giving effect to the principles and policies of the parent legislation.[37] Meenan J dismissed reliance on the ECHR as it is not directly effective.[38] Similarly, it was held that the applicants were not entitled to rely on the EU Charter of Fundamental Rights or other EU law could not be used to invalidate domestic law.[39] Furthermore, it was held that the refusal to allow members of the public access to the Court did not fall fowl of Article 34.1 as members of the media were facilitated.[40] This sets a precedent that so long as members of the media are present, justice is deemed to be administered in public.

[28] ibid.
[29] ibid [33].
[30] ibid [49].
[31] ibid.
[32] ibid [50].
[33] ibid [57].
[34] ibid [70].
[35] ibid [73].
[36] ibid [71].
[37] ibid [58].
[38] ibid [59].
[39] ibid.
[40] ibid [76].

Pertaining to fundamental rights, Meenan J recognised an interference with normal family life arising from the legislation.[41] However, it was held that this did not amount to a breach of Article 41.[42] The judge dismissed reliance on Article 45 on the grounds that it is not cognisable by any court as stated by the provision.[43] Regarding the personal rights of citizens, Meenan J held that it was clear that such rights are not absolute and may be restricted.[44] The judge recognised that the legislation restricted people's constitutional rights.[45] However, he was not satisfied that there was a prima facie case that such measures were disproportionate.

It was held that in order make an arguable case of disproportionate interference, the applicants would have to put on their affidavit some facts which, if proven, could support such a view.[46] Meenan J noted that there was an absence of any factual basis or expert opinion provided by the applicants.[47] It was stated that 'unsubstantiated opinions, speeches, empty rhetoric and a bogus historical parallel are not a substitute for facts'.[48] Ultimately, Meenan J dismissed the application and held that the applicants had not made an arguable case.

E COMMENTARY

This case illustrates that it may not be enough for an applicant to demonstrate an interference with their constitutional rights. The applicant also bears the burden of presenting some evidence which, if proven, could show that the interference was disproportionate. The applicant cannot base such a case on opinion alone.

It is notable that while proportionality was raised, the *Heaney v Ireland* test was not run.[49] Perhaps this would have been engaged with later at the judicial review had the application been successful. The *Heaney* case dealt with conditions that must be met in order for the state to lawfully impair a constitutional right. Crucially, such an impairment must have a legitimate goal and must restrict the right to the least extent possible.

However, in this case it is possible that the state's interference would not fall fowl of the *Heaney* requirements. Such restrictions could be justified by legitimate goals, such as the right to life which the state is obliged to protect. The Supreme Court has confirmed that the right to

[41] ibid [52].
[42] ibid.
[43] ibid.
[44] ibid [53].
[45] ibid [77(4)].
[46] ibid.
[47] ibid [77(6)].
[48] ibid [56].
[49] *Heaney v Ireland* [1994] 3 IR 593 (HC).

life is at the top of the hierarchy of constitutional rights, followed by the right to health.[50] Thus, these competing rights take precedence over other rights such as the right to liberty.

This challenge also brings to mind *Ryan v AG*, where Kenny J recognised the unenumerated right to bodily integrity.[51] Similarly, Ryan failed to produce enough scientific evidence to counter the state's water fluoridation policy. The limitation on the right to bodily integrity was justified on grounds of the common good. It is notable that unenumerated rights were not raised in *O'Doherty*. Potentially the unenumerated right to earn a livelihood is one right which could have been used to ground a prima facie case of disproportionate interference. This right was severely impacted by COVID-19 restrictions. However, the applicants would have to show that their right to work and earn a living was impeded.

In *AG v Paperlink,* it was recognised that the state's monopoly on the postal service had restricted the defendant's right to earn a living.[52] In a similar manner, Glynn suggests that the forced closure of a person's life business is possibly a disproportionate interference with property rights.[53] It is asserted that a traditional publican may have a prima facie case, having in good faith invested their life savings in their property.[54] In addition to the right to earn a livelihood, it is also conceivable that the right to seek work may have been infringed.[55]

In *O'Doherty*, perhaps owing to an absence of legal advice, the applicants appeared to struggle with some aspects of the case. For example, it was very predictable that the challenge against the Minister would fail because no argument was made that he had gone beyond the principles and policies of the Act.[56] Another slip-up was the reliance on Article 45, which is not cognisable by any court.[57] This could have been remedied by relying instead on the unenumerated right to earn a livelihood.

O'Doherty may also suggest that many of the enumerated constitutional rights are not as watertight as some would hope. It appears that the state could potentially act in arbitrary ways so long as it is backed by legislation and the judiciary continue to assert that constitutional

[50] *Heeney v Dublin Corporation* [1998] IESC 26 [16].
[51] *Ryan v Attorney General* [1965] IESC 1, [1965] IR 294.
[52] *Attorney General v Paperlink* [1983] IEHC 1, [1984] ILRM 373.
[53] Brendan Glynn, 'COVID-19: The Constitutionality of the Emergency Legislation in Response to the COVID-19 Outbreak' [2020] 38(14) Irish Law Times (ns) 214.
[54] ibid.
[55] *NHV v Minister for Justice* [2017] IESC 35, [2018] 1 IR 246.
[56] *Cityview Press v An Chomhairle Oiliúna* [1980] IR 381 (SC).
[57] Although Kenny J appeared to accept there was reliance on Article 45 in *Murtagh Properties v Cleary* [1972] IR 330 (HC).

rights are not absolute. The phrase 'save in accordance with law' continues to be a concern and arguably negates the inalienable purpose of constitutional rights.[58]

In a recent House of Lords Constitution Committee inquiry into the 'constitutional implications of COVID-19', former president of the UK Supreme Court, Baroness Hale remarked that she was surprised that 'there don't seem, as far as I know, to have been many cases brought by individuals claiming that their Convention rights have been violated'.[59] Hale indicated that the judiciary may weigh in on such human rights issues and on the legal validity of COVID-19 regulations. She noted: 'the normal orderly process of scrutinising delegated legislation has not taken place'.[60] In September 2020, Hale had been critical of the way in which health regulations were imposed on the public with little or no parliamentary scrutiny.[61] She remarked 'My plea is that we get back to a properly functioning constitution as soon as we possibly can'.[62] It seems that impacts on constitutional and Convention rights may demand more attention from the courts if restrictive measures persist.

F CONCLUSION

It is possible that more litigation will follow if another lockdown is on the horizon, and reliance on the unenumerated right to earn a livelihood could prove to be persuasive. The *O'Doherty* challenge was perhaps premature and subsequent cases could see more success if the application is backed by solid factual evidence of a disproportionate interference with constitutional rights. *Locus standi* will also be a prerequisite. To conclude, it is necessary that an applicant comes fully equipped with law and fact to overcome the hurdles presented when making a constitutional challenge.

[58] The Irish Constitution, Article 40.
[59] CJ McKinney, 'Corona-Vires: Lord Sumption Gets His Case Law on as He and Lady Hale Blast Pandemic Regulations' (*Legal Cheek,* 2 December 2020) <https://www.legalcheek.com/2020/12/corona-vires-lord-sumption-gets-his-case-law-on-as-he-and-lady-hale-blast-pandemic-regulations/> accessed 29 March 2021.
[60] ibid.
[61] Owen Bowcott, Heather Stewart and Andrew Sparrow, 'Parliament Surrendered Role Over Covid Emergency Laws, Says Lady Hale' *The Guardian* (London, 20 September 2020) <https://www.theguardian.com/world/2020/sep/20/parliament-surrendered-role-over-covid-emergency-laws-says-lady-hale> accessed 29 March 2021.
[62] ibid.