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Eva Feldbaum | Stefanie Kisgen | Werner G. Faix (Eds.)

INTERNATIONAL BUSINESS LAW PROJECTS

VOLUME 2

SCHOOL OF INTERNATIONAL BUSINESS AND ENTREPRENEURSHIP
STEINBEIS UNIVERSITY

Eva Feldbaum | Stefanie Kisgen | Werner G. Faix (Eds.)

International Business Law Projects. Volume 2

Steinbeis-Edition

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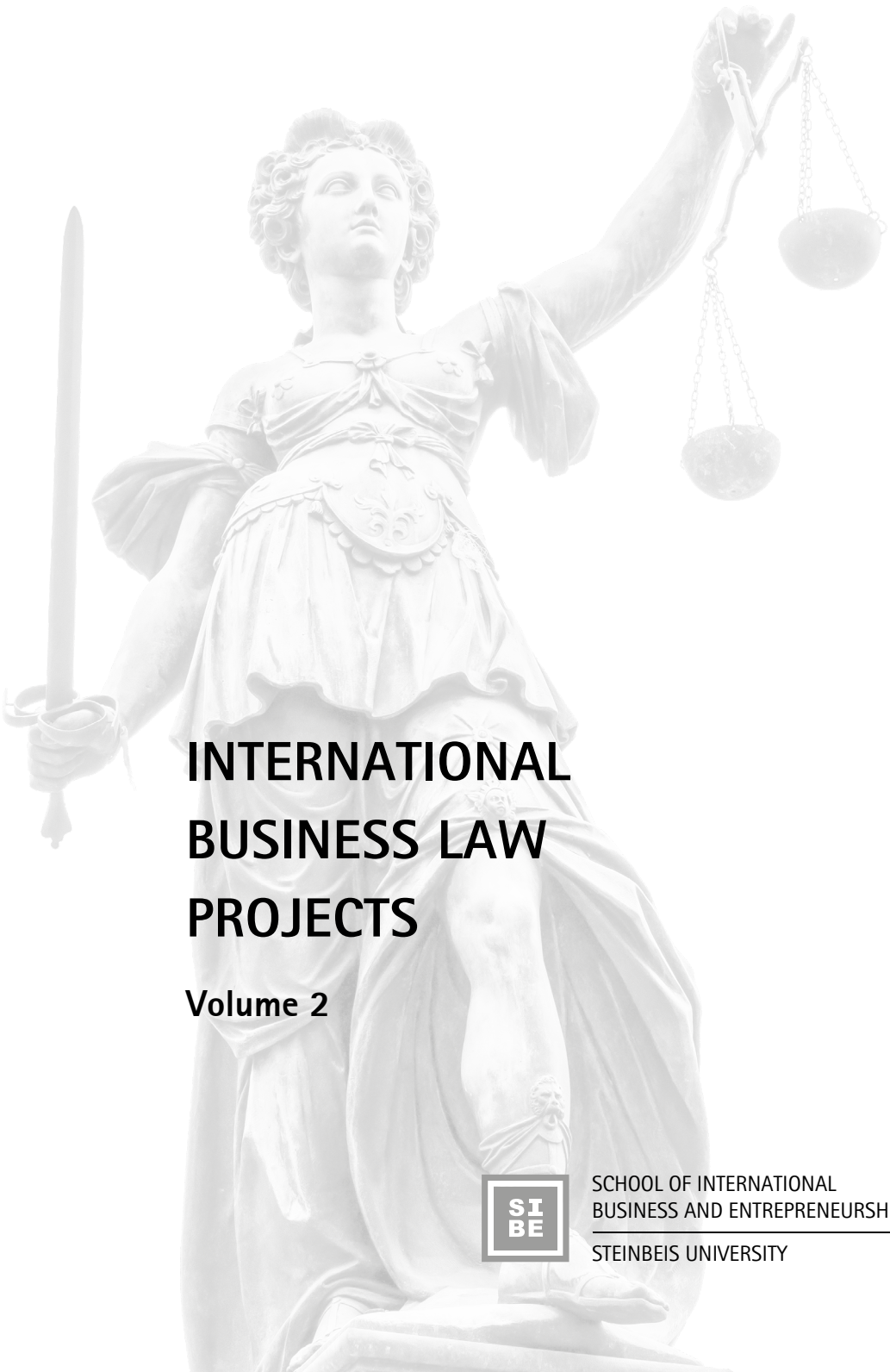

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Steinbeis-Stiftung für Wirtschaftsförderung | Steinbeis-Edition, Adornostraße 8, 70599 Stuttgart, DE | edition@steinbeis.de

Imprint

Eva Feldbaum, Stefanie Kisgen, Werner G. Faix (Eds.)
International Business Law Projects | Volume 2

1st edition, 2025 | Steinbeis-Edition, Stuttgart
ISBN 978-3-95663-328-7

Editorial staff: Eva Feldbaum, Katharina Helm
Layout and cover design: Katsiaryna Kaliayeva
Cover picture: Frank Wagner / stock.adobe.com
Publishing house: Steinbeis-Edition | Steinbeis-Stiftung, Adornostraße 8, 70599 Stuttgart

234010-2025-11 | www.steinbeis-edition.de | edition@steinbeis.de

FOREWORD

We at the Department of Legal Division and Law Studies at the Steinbeis School of International Business and Entrepreneurship (SIBE) are delighted to present this volume of exceptional LL.M. projects on various current topics of international business law. We would also like to recognize the several years of successful and fruitful cooperation in our LL.M. in International Business Law with the renowned University for Continuing Education Krems, Austria (UCE). Several of the works included in this volume are the result of that strong academic partnership between SIBE and UCE.

The topics covered, such as the EU's Green Deal, smart contracts in the context of compliance and the overall legal order, data security and its potential for abuse, media pluralism in EU law, and effective banking regulation, exemplify the broad range and specialization opportunities within our LL.M. program. They also highlight the dynamic and evolving nature of international business law.

The contributors to this volume were selected from an exceptional pool of talents who recently completed our LL.M. program. They worked on their individual topics academically while managing full-time roles in companies and law firms during their one-year studies in international business law. Their dedication and hard work are commendable, and they should be very proud of their achievements.

The findings of their Master's theses presented here not only demonstrate our graduates' professional and personal development but also make a significant contribution to their respective fields.

We extend our heartfelt thanks to all our contributors and everyone who helped make this remarkable book possible!

Eva Feldbaum, Stefanie Kisgen, Werner G. Faix (Eds.)
November 2025

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MAG. HARALD HÜGEL, CTE, LL.M.
GRADUATE LL.M.07

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1 INTRODUCTION, BACKGROUND AND OBJECTIVES

After the financial crisis, authorities started to discuss the key principle of rules-based versus principle-based regulatory standards. While at the beginning of setting the standards after 2008, clear rules on capital requirements were necessary and needed appropriate and detailed instructions and documentations, the question immediately comes up how to deal with the proper implementation of the complex standards. This required an "armada" of hundreds of regulatory specialists, quants, and change managers to properly implement it in the banking industry. One of the drivers of complexity has been financial innovation, e.g., from sub-prime mortgages to credit default swaps, complex OTC derivatives and sophisticated quantitative models for measuring and managing risk. The speed of new product innovation has left financial regulators chronically behind the curve. Identifying the optimal policy response is vitally important in terms of the delivery of effective financial regulation.[1] The financial crisis has resulted in a big challenge of principle-based regulation, as it leaves too much leeway for banks to interpret and implement according to their own assessment.[2] However, rules also have their limitations, as "the drafters of rules are invariably afflicted by cognitive and temporal constraints."[3] The "Too big to fail regime" is also a good example of how time consuming rules-based legislation developed over multiple years did not help on a bailout of the systematically relevant bank Credit Suisse. To sum up, regulation has significantly increased since the financial crisis and the resolution of the dialectic between rules-based and principle-based approaches applied by different authorities around the globe play a key role in effective execution. The objective of this book chapter is to outline the principles of effective regulation by comparing the concrete example of most current regulatory standards regarding operational resilience in Switzerland and the European Union and reflecting the dialectic between rules- and principle-based regulation.

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1 See Awrey, D. (2011). Regulating financial innovation: A more principles-based proposal? In: Brooklyn Journal of Corporate, Financial & Commercial Law, Spring 2011, Vol. 5, Issue 2, p. 273-315, p. 273.

2 See ibid, p. 274.

3 See ibid, p. 277.

2 EVER MORE LAWS, REGULATIONS, AND LEGAL COMPLEXITY

2.1 INCREASED NUMBER OF LAWS IN THE US AND EUROPE

Societal developments, such as technological progress, globalization, and changing social norms, have contributed to a more complex legal landscape. Governments need to respond to these changes by enacting new laws to control emerging issues and regulate increasingly interconnected systems. While subjectively everyone perceives this phenomenon on an individual basis in private and professional life, there are unfortunately still very few statistics on the number of laws and rules released. The law of the European Union is published and captured in its entirety in the Eur-Lex database, which also contains a basic statistical module. This module, however, only includes limited information and does not allow to further drill-down into specific subject matter (e.g., relevant capital market publications). One of the countries which traces the amount and cost of regulations is the United States. The so-called "Ten Thousand Commandments" report provided by the Competitive Enterprise Institute on a yearly basis[4], provides an overview, critique, and statistics on US-Code of Federal Regulations. The following chart shows the development of total pages of US Federal law as well as the total number of legislative acts in the European Union including other legislative acts published by the Council. It is interesting to see that in both regions, the US as well as the European Union, the number of legislations has stabilized at quite a high level and is not further increasing despite the opposite subjective perception. However, these statistics do not show the breakdown into specific financial regulations. If we only look into the relevant legislative acts on ESG in banking services, which comprises the EU Taxonomy Regulation ((EU) 2020/852), the EU Disclosure Regulation ((EU) 2019/2088), the Corporate Sustainability Directive ((EU) 2022/2464), the EU Prudential Regulation CRR ((EU) 2019/876) and also the EU Prudential Directive CRDV ((EU) 2019/878), we end up with about 400 pages

[4] See Crews, C. W. JR. (2022). Ten Thousand Commandments. An Annual Snapshot of the Federal Regulatory State.

of acts without even considering implementation guidelines. So, in total this will be between 500-1000 pages.

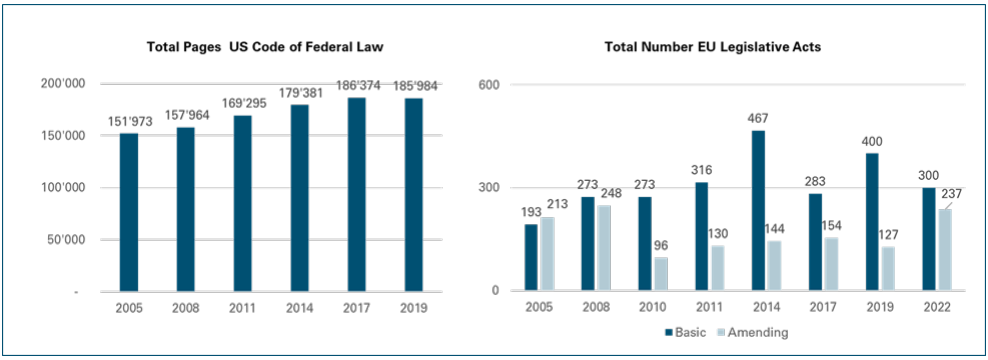

Figure 1 | Total Pages US Code of Federal Law and EU legislative Acts (Source: Eur-Lex and Crews, 2022)

2.2 INCREASED LEGAL COMPLEXITY

One major concern is the sheer volume of legislation as shown in the graph above, which makes it difficult for individuals and businesses to keep up with and understand their legal obligations. The complexity of legal language and the interplay between different regulations further aggravate this problem, leading to confusion and potentially compliance issues. According to Feess complexity is defined as “entirety of all interdependent features and elements that are in a diverse but holistic relationship structure. Complexity is understood to mean the variety of possible behaviors of the elements and the variability of the course of effects.”[5] While the phenomenon of complexity has been analyzed in business economic literature and science since a long time as it is a major cost driver, the analysis of this aspect in legal sciences just started. Thereby, the research focus is in particular on the complexity of society which is one of the drivers of the complexity of the law system.[6] It is worth to look at manufacturing industry in this context, because this has been the first branch were those issues were addressed properly. Complexity thereby is generated by the

[5] See Feess, E. (2023). Komplexität. In: Gabler's Wirtschafslexikon.

[6] See Katz, D. M. et al. (2020). Complex societies and the growth of the law.

variety of customers, products, services, processes, and suppliers.[7] Empirical studies from industry show that doubling the number of variants increases unit costs by up to 35%.[8] This could also be an indicator for the cost rise through increased regulation, although empirical research is missing in this context. Below the author summarizes the core drivers in the legal area:

1. Evolving societal and technological landscape[9]: as societies further evolve, new technologies emerge and change the way of living and new legal challenges occur. A good example is new legislation on Digital Assets, which are completely new financial products, and the EU Artificial Intelligence Act which was the response to the rising use of Artificial Intelligence in daily life of society.

2. International relations and interconnectivity: due to the rapidly globalizing economic world, the matter of international economic law, cross-border litigations and arbitrations play an increasingly important role, but further increase ambiguity. There is a clear debate about the rising density of regulation.[10]

3. The "huge bureaucracies of the myriad of regulators and government agencies around the world"[11]: the regulatory agencies have grown over the past decade and reached significant levels of expertise due to increased necessary regulation post the Financial Crisis in 2008. While the regulatory authorities needed to react to be able to issue the necessary legislation, this evolution to some extent also created a "perpetuum mobile" with ever-rising laws, principles, and regulatory acts. So, for example the US Securities Agency (SEC) employed 4,547 employees in 2022 only[12] and the UK Financial Services Authority (FSA) employed 4,027[13] full time employees in 2022. This is quite massive if we only look at those two public regulators, although the staff in the FSA has slightly declined.

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7 Wildemann, H. (1997). Bestände-Halbe. Leitfaden zur Senkung und Optimierung des Umlaufvermögens. München, p. 42; Wildemann, H. (2019): Finanzdienstleister. Leitfaden zur Implementierung schlanker Prozesse und Strukturen. München, p. 92.

8 Wildemann, H. (1997). Bestände-Halbe. Leitfaden zur Senkung und Optimierung des Umlaufvermögens. München, p. 47.

9 See Katz, D. M. et al. (2020). Complex societies and the growth of the law, p. 1ff.

10 See also Raustiala, K. (2013). Institutional Proliferation and the International Legal Order. The Debate over Density. In: Dunoff, J. L./Pollack, M. A.: Interdisciplinary Perspectives on International Law and International Relations: The State of the Art. Cambridge.

11 Kurer, P. (2015). Legal and Compliance Risk. A Strategic Response to a Rising Threat for Global Business. New York, p. 37.

12 See SEC Financial Report 2022, p. 7.

13 See FCA Annual Report 2021/2022, p. 91.

In conclusion, this chapter highlighted the escalating complexity of legal systems and the challenges it poses, especially for financial institutions. By recognizing the causes of this trend, and through efforts to simplify regulations, it is possible to navigate the legal landscape more effectively. Also, these mentioned trends would clearly favor a more principle-based regulatory regime, which is discussed in detail in the following chapter.

3 PRINCIPLE VERSUS RULES-BASED REGULATIONS IN FINANCIAL SERVICES

3.1 BACKGROUND AND INTRODUCTION

The differentiation between rules and principles is not straightforward and subject to discussion amongst legal academics. In his paper, Sunstein differentiates amongst other elements between (1) rules, (2) rules with excuses and (3) principles. Thereby, rules are defined as "specific outcomes before particular cases arise" (ex-ante character of law). Rules with "excuses" are those that apply in emergency situations.[14] A good example for that is the mentioned application of Article 185 (3) of the Swiss Federal Constitution to safeguard the bailout of Credit Suisse. Many constitutions allow special state interventions in case of emergency. Principles are considered to be deeper and more general than rules.[15] Principles are meant to be the basics to justify rules. In some cases, academics see "rules" versus "principles" quite black and white. So, for example Frantz and Instefjord in their essay make the following statement: in a principle-based system, banks must document to the regulator how their actions achieve the expected outcomes. The authors classify this process as imperfect, leading to regulatory failures. In contrast, in a rules-based system the

[14] See Sunstein, C. R. (1994). Rules and Rulelessness. The University of Chicago Law School. Coase-Sandor Institute for Law & Economics Working Paper No. 27, p. 4ff.

[15] Ibid, p. 9.

regulators define specific rules and decide what set of rules best achieves the regulatory objectives. There is no ambiguity about the regulatory process, but some when it comes to the assessment whether the objectives are met.[16]

The fundamental interest of any regulating agency around the world is sound regulation. The key question is which "toolset" to apply, i.e., rules versus principles or a hybrid model to get to an efficient and effective market regulation.[17] Regulatory frameworks are designed to guide the behavior and actions of supervised financial institutions. Their aim is to strike a balance between innovation, growth, societal well-being, and mitigating risks. Supervising authorities publish such types of vision statement in a similar form on their web pages. [18] But how does effective regulation really look like? This will be elaborated in the following chapters by providing a comprehensive analysis of rules-based and principle-based regulation as well as exploring their characteristics in different contexts. By correctly applying, policymakers and regulators have a huge impact on cost, efforts and benefits that can be realized in the banking industry.

3.2 RULES-BASED REGULATION AND WHERE IT HAS BEEN APPLIED

According to Lucas et al. regulatory rules "are the laws, regulations, judicial decisions, and other policies that originate from and are codified and enforced by public actors." [19] In a nutshell it comprises explicit, detailed, and prescriptive rules to govern the behavior of regulated entities. This type of regulatory framework has some obvious advantages:[20]

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16 See Frantz, P./Instefjord, N. (2018). Regulatory competition and rules/principles-based regulation. In: Journal of Business Finance & Accounting, Jul/Aug 2018, Vol. 45, Issue 7/8, p. 818-838, p. 819.

17 See Tarbert, H. P. (2020). Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation. In: Harvard Business Law Review, p. 1ff.

18 See for example the webpage of FCA: FCA Webpage..

19 Lucas, D. S./Fuller, C. S./Packard, M. D. (2022). Made to be broken. A theory of regulatory governance and rule-breaking entrepreneurial action. In: Journal of Business Venturing, November 2022 37(6), p. 4.

20 See Tarbert, H. P. (2020). Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation. In: Harvard Business Law Review, p. 9ff.

1. Clarity and predictability: it is easier for the regulated entities to understand their obligations and comply with them. There is practically "no left or right", but in an extreme case a determined mathematical formula which is commonly used across industry. As an example, to be mentioned here are the BIS rules for Counterparty Credit Risks (CCR).[21] The rules are clearly determined and specified which does not allow for much room of interpretation when it comes to the measurement of counterparty risks.

2. Ease of enforcement: there are specific criteria against which compliance can be objectively assessed. Violations can be more easily identified by the regulator and corrective actions mandated. A relevant example to be mentioned is the Financial Actions Task Force (FATF) rule set on anti-money laundering in the Digital Assets area. Virtual Asset Service Providers (VASPs) are required to "obtain, hold, and transmit required originator and beneficiary information, immediately and securely, when conducting virtual asset transfers. This is a key AML measure that enables VASPs and financial institutions to conduct effective sanction screening and detect suspicious transactions."[22]

3. Legal certainty: clear rules can be seen as a "safe harbor" from litigation. Where regulated parties can demonstrate that they have strictly applied the law, they have a strong defense against litigation or imposition of a fine. An example in the banking context is the strict application of General Data Protection Rules (GDPR).

3.3 PRINCIPLE-BASED REGULATION AND WHERE IT HAS BEEN APPLIED

Principles in contrast to rules are not setting out legal consequences that follow automatically when the conditions provided are met. A principle describes a reason that argues in a certain direction but does not prescribe a definitive decision.[23] It means getting away from detailed, prescriptive rules to high-level standards and boundaries within which regulated firms must operate.[24] The principle-based approach allows for

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21 See https://www.bis.org/basel_framework/chapter/CRE/51.htm, 18.07.2023.

22 See FATF AML (2023). Standards, p. 10.

23 See [Braithwaite, 2002, p. 50].

24 See Tarbert, H. P. (2020). Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation. In: Harvard Business Law Review, p. 5ff.

maximum of flexibility, is focused on outcomes, contains qualitative elements and can be further detailed with rules and implementation guidelines.[25] Principles are by far not just "light touch", but they are specifically important regarding an alignment on a global level. So, for example there is a clear need to define common principles to regulate G-SIBs. What are now the key advantages of a principle-based regulatory approach?[26]

1. Simplicity and flexibility: it provides flexibility for regulated entities to adapt their approaches based on their circumstances, innovative technologies, or changing market conditions. Also, the number of pages of the regulatory order is very limited. A good example for this is the Swiss FINMA Circular 2023-1 which addresses Operational Resilience matters and only contains 15 pages in total (!) versus the EU Digital Operational Resilience Act where only the regulation contains about 100 pages, and the Regulatory/ Implementation Technical Standards are not yet included.[27]

2. Driving innovation: by concentrating on outcomes rather than prescribing specific methods, principle-based regulation can foster innovation. Regulated entities have the freedom to explore new approaches and technologies that achieve the desired results, thus promoting experimentation. An excellent example in this regard is the EU "Distributed Ledger Technology Pilot Regime." The regulation (EU) 2022/858 was published in 2022 and is directly effective across all member countries of the European Union. The specialty of this regulation is that it allows prototyping innovative financial solutions in the securities trading area based on Distributed Ledger Technology (DLT) in a controlled environment, the so-called "sandbox approach". The entire regulation is relative to its innovative character simple, crisp, and only contains 33 pages.[28] While there are also clear rules formulated, this regulation relies clearly on the principle that it enables a framework within which banks and FinTechs can experiment new technologies and regulators and can also learn. It can also be regarded as a "hybrid approach".

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25 Ibid.

26 Ibid, p. 7ff.

27 See Eur-Lex Database, https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A52020PC0595 and FINMA https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2023-01-20221207.pdf?sc_lang=en&hash=1529FC7CCFD70F24BCC75C4D1B033ECF, 18.07.2023.

28 See also Eur-Lex Database, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0858&qid=1681131326463, 18.07.2023.

3. The approach can help to create a better supervisory model, further facilitate international collaboration, and reduce overall compliance complexity and thus cost. Unfortunately, the economic aspect of regulation based on empirical studies on cost and cost drivers is missing.

3.4 REGULATORY FRAMEWORK DESIGN

What is now the best way for regulators to design policy frameworks? Obviously and based on the elaboration from the previous sections, there is no clear answer to this question. In reality it is more useful to view rules and principles as two end points on a spectrum.[29] That means that in practical design work there is rather not one extreme or the other, but a hybrid model which contains elements of both[30]. The use case in the following chapter takes two examples from both ends into account and will show their limitations in practical implementation of regulation. Also, the following factors need to be taken into consideration: (a) the role of technology and data, as technology and Artificial Intelligence can facilitate data-driven risk assessment, efficient compliance monitoring and real-time reporting independent of whether a policy is rules- or principle-based; (b) regulatory oversight: even the most detailed rules-based regulation and its implementation do not replace regulatory audits and controls. Taking up the previous example of the Counterparty Credit Risk Control framework, this should also be carefully monitored. For example, the model might be perfectly implemented in a bank, but the governance, data sources and risk appetite setting are completely inadequate. With its publication of the sound practices in counterparty credit risk governance and management, the European Central Bank (ECB) is setting a standard on supervision in the European Union.[31] And finally (c) regulatory impact assessment and evaluation is crucial to determine the framework design of the future. Schiele et al.[32] present a framework to assess effectiveness and efficiency of regulatory frameworks to define major improvements. The European

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29 See Awrey, D. (2010). Regulating Financial Innovation. A More Principles-Based Alternative. Working Paper, University of Oxford. Legal Research Paper Series No. 79/2010, p. 4.

30 See Tarbert, H. P. (2020). Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation. In: Harvard Business Law Review, p. 10.

31 See ECB report June 2023 on Counterparty Credit Risk.

32 Schiele, C./Döring, B./ Kleinow, J. (2018). Zehn Jahre Regulierung nach der Finanzmarktkrise.

Commission conducted an "Economic Review of the Financial Regulation Agenda" in 2014. The format was a descriptive qualitative and indication-based analysis. It did not include quantitative data in the design.[33] The conclusion was that through the regulatory reforms post the financial crisis increased stability has been reached. The better way to assess the concrete effectiveness and efficiency of a regulatory framework design is the analysis of case studies and use cases. So, for example Awrey in his scientific paper is analyzing MPBR (more principle-based regulation) with a case study in OTC Derivative Markets.[34] To conclude, the design of regulatory frameworks requires careful consideration of various factors. Hybrid approaches that consider elements from both rules-based and principle-based regulation can offer a flexible and adaptive framework. The role of technology and advanced data analytics is pivotal in enhancing regulatory effectiveness. Also, experienced staff with the regulatory authorities play a key role. Further exchange between banks, consultancies and authorities helps to improve the regulatory framework significantly. Regulatory oversight and accountability mechanisms ensure consistent implementation and build public trust. Therefore, regulatory audits by authorities are not "overhead", but a must for more stability and confidence in financial markets. Finally, conducting regulatory impact assessments and evaluations enables ongoing improvement and optimization of the regulatory framework.

3.5 USE CASE: THE PRINCIPLE BASED SWISS FINMA CIRCULAR 2023-1 VERSUS THE RULES-BASED DIGITAL OPERATIONAL RESILIENCE ACT IN THE EUROPEAN UNION

Regulatory design matters. In her scientific draft paper Cristie Ford points out that regulators are not familiar with innovation processes and culture. However, at the same time they heavily influence the innovation process in banks. She also fosters the importance of the way the regulatory regime operates. For example, an ex-ante compliance-oriented model or an ex-post enforcement-oriented model will influence

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[33] See also https://ec.europa.eu/commission/presscorner/detail/de/MEMO_14_352, 18.07.2023.

[34] See Awrey, D. (2010). Regulating Financial Innovation. A More Principles-Based Alternative. Working Paper, University of Oxford. Legal Research Paper Series No. 79/2010, p. 33ff.

its engagement with the banking industry in multiple ways. Other factors that count are, whether the authority follows a principles-based and risk-oriented, whether it anticipates a cooperative relationship with industry players, whether it is disclosure-oriented or tightly prescriptive, and whether and how it relies on threshold mechanisms.[35] In the same direction goes an essay published by Ferran which specifically concludes on enforcement in the following way: "a successful principle-based regulatory strategy that relies heavily on ex-ante compliance promoting strategies can reasonably be expected to produce fewer formal enforcement actions than a system that emphasizes the deterrent effect of ex-post sanctions".[36] Also, it should be kept in mind that besides the instrument of sanctions, there are other measures regulators can apply, which include (a) civil liability of individual bank managers (e.g., imposing a professional ban for a bank manager), (b) corrective taxation (e.g., imposing specific tax on products or certain businesses), or (c) criminal sanctions (which is mostly related to insider trading or money-laundering related issues).[37] In the following chapter, the author looks at those aspects when comparing two regulations in Europe with different regional relevance. While the FINMA circular 2023-1 is relevant in Switzerland, the EU Digital Operational Resilience Act is valid in all member countries of the European Union. For some cross-European financial institutions and banks this creates a challenge because they are operating in all countries and differences in regulation impose further complexity. Key questions that come up are:

- Do we need to assess FINMA 2023-1 and DORA differently and in separate projects?
- Do we have synergies?
- Which regulation comes first, and how do we tackle potential contradictions?
- Do we need to set up different governance structures etc.?

To start with, the author will reflect the key objectives and background of both regulations.

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35 See Ford, C. (2021). A Regulatory Roadmap for Financial Innovation. Working Paper, p. 4 and p. 9.

36 Ferran, E. (2009). Principle-based, risk-based regulation and effective enforcement. In: Tison, M. et al.: Perspectives in Company Law and Financial Regulation. Cambridge, p. 431.

37 See also Hellgardt, A. (2014). Comparing Apples and Oranges? Public, Private, Tax, and Criminal Law Instruments in Financial Markets Regulation. In: Ringe, W.G./ Huber, P. M.: Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation. Oxford, p. 161.

3.5.1 KEY OBJECTIVES OF BOTH REGULATIONS

The new EU regulation Digital Operational Resilience Act (DORA)[38] came into force on January 16, 2023, and will be applied from January 17, 2025, onwards. It is important to note that it is a regulation which by nature is directly valid and applicable in the European Union Member States (see Art. 288.2 TFEU).[39] There are two major objectives of DORA:

1. Mitigate cyber-attacks and other (IT) risks and strengthen operational resilience.
2. Improve risk requirements for information and communication technology (ICT) across the financial services sector in the European Union.

The so-called FINMA circulars are part of the regulator's supervisory practice. The regular updates addressed to banks and insurance groups "explain how it applies financial market legislation in carrying out its supervisory duties."[40] FINMA is adapting the circular on banks' operational risks to new technological developments and integrating the principles of the Basel Committee on operational resilience. The Circular 2023-1 comes into force on January 1, 2024. Increased digitalization and new technologies enhance operational risks in banks which FINMA wants to mitigate accordingly.[41] While it is obvious that there are similar objectives, other factors like timelines, contents and approaches of the two regulations are different.

3.6 DETAILED COMPARISON OF CONTENT ELEMENTS AND TIMELINES

The following table compares the FINMA circular 2023-1 with the EU Digital Operational Resilience Act. In addition, the author comments on the different aspects from his perspective.

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[38] See Eur-Lex Database, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0595&tqid=1671371446567, 19.07.2023.

[39] See Arnold, R. (2015). Basics of European Law. Introduction to General Structures of EU Law, EU Institutions, EU Legal Order and Fundamental Freedoms. In: Arnold, R. et al. (Eds.). International Business Law. Stuttgart, p. 74.

[40] FINMA, https://www.finma.ch/en/documentation/circulars/, 19.07.2023.

[41] See also https://www.swissbanking.ch/de/medien/news/insight-1-23-de-neues-finma-rundschreiben-2023-1-operationelle-risiken-und-resilienz-banken, 19.07.2023.

Table 1 | Comparison of Digital Operational Resilience Act (DORA) with FINMA Circular 2023-1 (Source: Harald Hügel)

No.	EU Digital Operational Resilience Act (DORA)	FINMA Circular 2023-1 on Operational Risks & Resilience	Comment
1	Rules-based including Regulatory and Implementing Technical Standards	Principle-based	100 versus 15 pages (!); the clear advantage of the principle-based approach becomes obvious in terms of flexibility and simplicity
2	Fully applicable January 2025 in all EU member states	Fully applicable January 2024 in Switzerland	For Swiss banks operating also in the EU there is a clear recommendation to start working on gaps regarding FINMA circular 2023-1 first and then leverage the resilience concept towards the EU
3	Scope of institutions is broader than FINMA circular; practically all players in the financial service industry including ICT third-party service providers	Scope of institutions is focused on banks only (!)	Interestingly, the FINMA circular does not cover insurance companies (yet?)
4	No explicit chapter on operational risk management, however there are existing national regulatory frameworks, e.g., BA IT in Germany	Overarching operational Risk Management, Chapter A which includes risk appetite setting, monitoring, and key controls	The operational risk appetite setting is crucial, and a sound resilience framework should integrate this aspect also in the EU countries
5	ICT Risk Management and Governance (Art. 4-5) includes detailed requirements on governance, ICT risk management framework and accountabilities	ICT Risk Management, Chapter B: describes high-level requirements regarding IT strategy, governance, change management, ICT operations & incident management	The FINMA circular stays very high-level and includes only 2-3 sentences per topic. The risk here clearly is that one bank might assess it as adequate, and another defines actions and improves resilience. This example clearly shows the big advantage of rules-based regulation which is predictability, clarity, standardization, and legal certainty

Continuation of table 1

No.	EU Digital Operational Resilience Act (DORA)	FINMA Circular 2023-1 on Operational Risks & Resilience	Comment
6	Harmonized reporting of important ICT incidents, Art. 16-19 including detailed description of sound and comprehensive digital operational resilience testing program and reporting to relevant competent authorities	No detailed chapter, part of chapter B "ICT risk management". "The institution shall have procedures, processes and controls in place for dealing with significant ICT incidents, including those resulting from dependencies on external service providers and outsourcing operations."	The EU regulation is very detailed regarding incident reporting. By doing so, it will ensure that this process is really harmonized across the EU and its financial institutions. Also, RTS and ITS will provide details on execution, automation, and structure of reports. The FINMA circular leaves the execution totally at the bank's discretion
7	Digital Operational Resilience Testing Procedures Art. 21 24 including vulnerability assessments/ scans, network security assessments, scenario-based testing, E2E testing, and threat led penetration testing	This aspect is embedded in Chapter C, Cyber Risk Management. Interesting is the formulation "The executive board shall arrange for vulnerability assessments and penetration tests to be conducted regularly." On the cyber topics the Circular refers to internationally recognized standards	The EU regulation is very prescriptive already in the law text when it comes to execution of testing, periodicity, and reporting. So, for example, Art. 23 (1) says "Financial entities identified in accordance with paragraph 4 shall carry out at least every 3 years advanced testing by means of threat led penetration testing"
8	ICT Third-party risk management of outsourced providers Art. 25-27 requires ensuring a comprehensive management of ICT risks related to 3rd party providers and specifically capturing relevant documentation in a "register of information"	All these aspects are addressed high-level in chapter B ICT risks	As the ECB and national competent authorities such as BaFIN monitor outsourcing of IT infrastructure and critical incidents since many years[42], this was a key focus area of DORA. The topic is not less critical in Switzerland. It has been addressed in different circulars already[43]

[42] ECB (2020). SREP IT Ris.

[43] See FINMA (2023). Outsourcing Banks and Insurers.

Continuation of table 1

No.	EU Digital Operational Resilience Act (DORA)	FINMA Circular 2023–1 on Operational Risks & Resilience	Comment
9	Information sharing across entities, Art. 40; main idea is to support defense capabilities in the financial sector and a knowledge exchange in trusted communities	Not mentioned at all; however, the Swiss Banking Association is fostering such types of exchange	Information sharing amongst entities is a critical success factor for execution, as such this article makes sense
10	Not captured in an explicit article, but mentioned across various articles (e.g., specifically 6, 8, 9, 11, 25 and 27, third-party risk management)	Critical data risk management, chapter D: "The institution shall identify its critical data in a systematic and comprehensive way, categorize it on the basis of its criticality and define clear responsibilities"	Critical data is mentioned explicitly in the policy of FINMA, as apparently based on regulatory insights there is still need for action even in systemically relevant banks which implemented BCBS 239 data standards[44]
11	Business Continuity Management policy is a must have under article 4 (2) lit d	Business Continuity Management, Chapter E: reaffirms importance of BCM plans and testing	Business Continuity is clearly an important aspect of Operational Resilience
12	Cross-border services not mentioned	Management of risks from cross-border services, chapter F includes mainly legal & compliance risks regarding cross-border activities	Cross-border topics play an important role for Swiss banks, however, this aspect should have been rather integrated in a circular covering AML and cross-border tax risks rather than operational resilience
13	Regulatory fines: Article 44 ff. define (administrative) penalties in case of non-fulfilment of the regulation	The circular does not contain specific fines. The FINMA can impose sanctions based on its supervisory power	Imposing regulatory fines, per definition, requires a more rules- based regulation

3.6.1 CONCLUSION – WHICH TYPE OF REGULATION IS BETTER?

At first sight, principle-based regulation seems much better and is fully based on trust between the regulator and the regulated party. Integrating regulatory fines already in the legislation which is the case of the Digital Operational Resilience Act (see

[44] See BCBS 239 standards under https://www.bis.org/publ/bcbs239.htm, 21.07.2023.

Art. 44ff.) makes a big difference. This issue is confirmed by Schwarcz in his paper on the "Principles Paradox". He points out that "the extent to which principles more closely approximate normative goals can depend on the enforcement regime."[45] Furthermore, he specifically describes as an example the anti-money laundering principles of the FINCEN (Financial Crimes Enforcement Network), which require a bank to de facto file all suspicious transactions in order to be on the safe side.[46] This means that once the regulator decides on harsh enforcement, it automatically needs to provide more rules-based regulation. This is also because banks follow a clear "zero tolerance principle" in their organizations these days. If we look into the EU Digital Operational Resilience Act (DORA) and its implementation in Germany, we could think of a "light-touch" approach based on BA IT 2021 ("Bankaufsichtliche Anforderungen an die IT"). BA IT is a fully principle-based policy issued by the German competent regulatory authority BaFIN.[47] The paper summarizes a lot of requirements that are similar to the DORA regulation in 34 pages. Now German banks have to tackle the topic again and carry out an extensive gap analysis based on DORA, which is quite inefficient. Also, the fact that DORA has a stringent enforcement regime requires banks to take this regulation fully seriously and focus on the details of the implementation guidelines (Regulatory Technical Standards, Implementation Technical Standards).

What we learn from all those examples is that the regulatory authorities have a massive influence on the efficiency and effectiveness of banks, when it comes to regulatory implementation. If regulators have such a big importance, it is pivotal that they engage the best legal, compliance and technical expertise on the market and consider in a full range the broad expertise of banks. One additional key question that arises is whether there is somehow guidance which allows the regulatory authorities to define when to use which approach? Tarbert in his paper developed a checklist which allows to identify which type of regulation on a continuum of rules- and principle-based should be chosen.[48] The author has summarized and amended this in the following key messages:

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45 Schwarcz, S. L. (2008). The 'Principles' Paradox. In: European Business Organization Law Review 10, https://scholarship.law.duke.edu/faculty_scholarship/2083/.

46 Ibid, p. 179.

47 See BAFIN https://www.bundesbank.de/de/aufgaben/bankenaufsicht/einzelaspekte/risikomanagement/bait/bankaufsichtliche-anforderungen-an-die-it-598580, 22.07.2023.

48 See Tarbert, H. P. (2020). Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation. In: Harvard Business Law Review, p. 17f.

1. Regulatory objectives: when it comes to prudential supervision by the regulatory authority a more principle-based regulation is of advantage. This is also the case when quick action, involvement of senior management on the bank's side as well as multiple compliance alternatives are possible.

2. The more stringent the regulatory enforcement and penalties are, the more rules-based regulation should be. Otherwise, uncertainty is too high (see also the points mentioned above).

3. Financial versus non-financial risks: financial risk measurement will contain clearly defined rules up to mathematical formula to ensure comparability between institutions (examples: Basel 3 and 4; Capital Regulatory Requirements, Counterparty Credit Risk Rules etc.). Non-financial risk areas such as Operational Resilience, ESG, AI and Digital Assets would instead favor more principle-based regulations.

4. Stability and consistency clearly favor rules over principles.

5. Rapidly changing technology and innovation require a principle-based regulation. This is especially the case in the area of "digital assets" and explicitly mentioned by Tarbert.[49] As the technology change especially in AI and Analytics is advancing so fast, this plays a key role in regulation of the future. According to a recent study, more than 53% of bank managers consider AI of critical strategic importance for the transformation of the industry in the next 2 years.[50]

6. Attributes of market participants: the better and larger the compliance department, the more principle-based policies can be applied. However, "complex regulations make it difficult for market participants to understand what is prohibited, what is allowed, and what process can be followed to secure best-compliance outcomes."[51]

7. The nature of regulatory relationships plays a vital role. Self-regulation is an important aspect in this sense and creates a positive mood and motivation on the side of the regulated institution.[52] The way regulators collaborate with the regulated parties is decisive. In Switzerland, for example banks have in general co-operated well with the national authority FINMA, which has clearly favored principle-based regulation.

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[49] See Tarbert, H. P. (2020). Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation. In: Harvard Business Law Review, p. 22.

[50] See Sohail, O. et al. (2021). Artificial Intelligence. Transforming the future of banking, p. 1.

[51] Avgouleas, E. (2015). Regulating Financial Innovation. In: Moloney, N./ Ferran, E./Payne, J. (Eds.): The Oxford Handbook of Financial Regulation. Oxford, p. 660-687, p. 685.

[52] Ojo, M. (2016): Designing Optimal Models of Financial Regulation in a Changing Financial Environment. New York.

8. The principle of proportionality[53] forms the fundamental basics of any law regime on an international basis and thus has to be applied by every regulatory authority in the world as well. Thereby, suitability, necessity and proportionality in the narrow sense must be given. Alexy points out: "Optimization relative to the factual possibilities consists in avoiding avoidable costs"[54] The key issue around cost is extremely important. The example mentioned above around BAFIN rules and DORA shows how crucial the close collaboration between the different regulatory authorities is.

9. "Cross-border banking and finance requires cross-border rules."[55] This is also the reason why the EU has fully harmonized the rule set for financial institutions across its member countries.

4 KEY LESSONS LEARNED ON EFFECTIVE BANKING POLICY DESIGN AND REGULATION

Designing effective banking regulation is a difficult task for regulators around the world. Considering the following lessons learned will help to improve effectiveness:

- Policymakers and regulators should carefully consider the objectives and contextual factors when designing frameworks.
- A nuanced approach allows regulators to strike the right balance between specificity and flexibility. This aspect also has been discussed intensively in the expert interviews which revealed that there is no right or wrong of rules- versus principles-based regulation. In general, everyone prefers the principle-based way, but if the interpretation of those between the regulatory authorities and the banks is too different, this imposes additional challenges. There is one major argument today which clearly favors a principle-based approach which is technological ad-

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53 Alexy, R. (2017). Proportionality and Rationality. In: Jackson, V.C./Tushnet, M.: Proportionality: New Frontiers. New Challenges, New York, p. 14f.

54 Ibid, p. 16.

55 Wehinger, G. (2009). Lessons from the Financial Market Turmoil: Challenges ahead for the Financial Industry and Policy Makers. In: OECD Journal: Financial Market Trends, Vol. 2008, Issue 2, p. 64.

vancement (see also next bullet point). For instance, in the case of DORA there will be approximately five years of time distance between initial drafting of the regulation and effective application. In the meantime, processes and technology change significantly.

- Considering technological advancements, especially in Artificial Intelligence, will significantly enhance regulatory effectiveness, efficiency, and transparency.
- Robust oversight mechanisms should be in place to ensure consistent implementation and build public trust. This allows also to better use principle-based regulatory approaches as preferred by many regulators such as the Swiss FINMA, but also the UK FCA.
- Evaluations and impact assessments are to be conducted to identify areas for improvement. Therefore, close collaboration between banks and their authorities is pivotal.
- As a key lesson learned from expert interviews, more stringent and detailed regulations will not prevent a next potential financial crisis. Regulation in future must consider more elements of culture, values and conduct which includes incentives.
- There is in general a strong trend towards principle-based policy making on an international level, especially amongst the following regulators: Swiss FINMA, UK FCA, Singapore MAS, Hong Kong HKMA, US FED and OCC. The question discussed in expert interviews is whether certain regions such as the EU with its current “gold plating” regulatory approach create a competitive disadvantage for their banking industry.

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2 THE GUARANTEE OF MEDIA FREEDOM AND MEDIA PLURALISM IN EU LAW

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1 INTRODUCTION

At the beginning of the 21st century Internet-based media services have gained considerably in importance.[1] It is difficult to imagine life without media services such as YouTube, Facebook, Instagram or Netflix. Their development is moving into the realm of the amazing and their reach is now unimaginable. However, in addition to the positive effects these media services have on our society, the negative effects are becoming increasingly apparent.

Independent and diverse media are essential to uphold the principles of the rule of law and democracy. This is the only way to ensure critical reporting and a free formation of opinion. The media order is based on the fundamental building blocks of media freedom and media pluralism, which must be protected at all costs. Union law can help to guarantee media freedom and media pluralism in the EU through harmonized rules.

But what makes harmonized rules so important? Most media services are no longer limited by national borders. Instead, they are becoming increasingly blurred. Different rules in the individual Member States lead to different treatments of facts. In addition, the threat to the media and journalists has steadily increased in recent years.[2] In 2023 alone, 691 attacks on media freedom were recorded in the EU in which journalists and media actors were subjected to various types of attacks, such as physical or verbal assaults.[3] These restrictions on media freedom and media pluralism cannot be allowed to increase and must therefore be stopped as soon as possible. Wherever there is state control over media content and repression of the media industry, public opinion is in the hands of a few actors, and media freedom and media pluralism are at particular risk.[4]

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1 Kühling, J. (2020). Medienfreiheit. In: Heselhaus S. / Nowak C. (Hrsg). Handbuch der Europäischen Grundrechte. München, § 28 para 2.

2 Vidal Marti, N. (2023). The key to ensure media pluralism in the EU? A unified framework.

3 European Federation of Journalists et al. (2024). Media Freedom Rapid Response. Mapping Media Freedom – Monitoring Report 2023, p. 8 f.

4 Reporter ohne Grenzen (2024): Medienpluralismus.

2 EUROPEAN MEDIA POLICY

Looking at European media policy, the dynamics are unmistakable. In the last century, this sector has undergone unprecedented developments. A well-organized European media policy is therefore indispensable to protect and promote media-related values and objectives.

Over the years, European media policy has developed more than any other area. Media such as print products, radio and television have been around for quite a while, but they did not come into the European spotlight until much later. Initially, it was exclusively up to the Member States to take over media regulation with regard to the press and broadcasting.[5] At the European level, the ECJ first dealt with media-related issues in 1974.[6] In the case *Sacchi* the ECJ ruled that television should be considered a service.[7] Since the freedom to provide services, as one of the fundamental freedoms, is one of the basic building blocks of the European internal market, it was possible for the European Commission to deal with cross-border television regulation from there on.[8] It was not until the 1980s that the European Commission first addressed the issue of European media regulation, presenting in 1984 the Green Paper on the establishment of a common market for broadcasting, especially by satellite and cable.[9] This gave rise to the Television without Frontiers Directive[10], adopted in 1998, as the first European media regulation. In the years that followed, increasing digitalization posed more and more challenges to European media policy. This meant that more and more efforts had to be made to take account of the advancing age. For this reason, numerous other rules have been enacted since the Television without Frontiers Directive. Two other significant developments worthy of final mention are, first, the political agreement in 2022 on the policy program for the Digital Decade to promote the digital transformation in Europe.[11] This is intended

5 Ibid.

6 Schwarze, J./ Hesse, A. (2000). Rundfunk und Fernsehen im digitalen Zeitalter. Baden-Baden, p. 91.

7 Case 155/73 Sacchi [1974] ECR I-409 para 6.

8 Holtz-Bacha, C. (2016). Europäische Medienpolitik.

9 Commission of the EC, Television without frontiers - Green paper on the establishment of the common market for broadcasting, especially by satellite and cabel COM (84) 300 final.

10 Directive 89/552/EEC [1989] OJ L 298/23.

11 European Commission (2022). Commission welcomes political agreement on the Digital Decade policy programme driving a successful digital transformation in Europe.

to ensure that all aspects of technology and innovation benefit people by 2030.[12] Second, as part of the European Digital Decade, the Declaration on Digital Rights and Principles was signed in December 2022.[13] This aims to achieve a secure and sustainable digital transformation that puts people first while respecting European values and the rights and freedoms enshrined in the EU's legal framework, both online and offline.[14]

3 DANGER OF MEDIA CONCENTRATION FOR MEDIA FREEDOM AND MEDIA PLURALISM

Questions surrounding media concentration not only arise in national areas, but now affect the entire world. With the advance of the digital world, borders are becoming increasingly blurred. Media concentration can have a particularly strong impact on the freedom of competition in the EU. As media pluralism and competition are closely linked, advancing media concentration may also pose a problem for the protection of media freedom and media pluralism.

3.1 THE MEDIA MARKET

The media market in the EU is characterized by rapid digitalization. This is revolutionizing the traditional media landscape, creating new opportunities, but also posing threats to media freedom and pluralism. Due to strong developments in the field of digitalization, it is a dynamic but also diverse sector that plays an important role in the opinion-forming process. Technological developments therefore create significant competitive dynamics.[15] Free competition is one of the most important factors

[12] European Commission (2022). Digital rights and principles: Presidents of the Commission, the European Parliament and the Council sign the European Declaration.

[13] Ibid.

[14] Ibid.

[15] Trafkowski, A. (2002). Medienkartellrecht: die Sicherung des Wettbewerbs auf den Märkten der elektronischen Medien. München, p. 5.

for the economic market. The aim of competition in the media market is to create competition between media companies, but at the same time to prevent certain media companies from gaining economic power compared to other media companies. To ensure that media companies have equal access to the market and to be able to offer their products freely, freedom of competition must be maintained. On the one hand, competition gives media companies the opportunity to constantly develop their business and thus influence opinion formation, but also to make profits. On the other hand, competition rules help to prevent distortions of competition because market power control occurs. Competition law also indirectly promotes journalistic diversity on the media market by ensuring a diverse media landscape through free market access. Nevertheless, its control regulations are usually not sufficient to ensure diversity of opinion and to prevent the power of opinion.

In contrast to conventional competition, the competitive situation on media markets does not relate solely to the economic competition between media companies.[16] Rather, media companies pursue a dual objective: generating profits (economic competition) on the one hand and aiming to win the recipients' favor (journalistic competition) on the other.[17] There is a dynamic relationship between journalistic and economic competition. This can be explained by the fact that both can influence each other.[18] For this reason, it only seems reasonable to consider both objectives of media competition in harmony.[19]

To sum up, the media market in the EU is in a constant state of change due to digitalization, as mentioned at the beginning. The influence that large media companies can exert on the media market is enormous, so it is important to safeguard media pluralism in order to ensure an uninfluenced opinion-forming process in society.

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16 Trafkowski, A. (2002). Medienkartellrecht: die Sicherung des Wettbewerbs auf den Märkten der elektronischen Medien. München, p. 5.

17 Müller, U. (2014). Medienkartellrecht. In: Wandtke, A./Ohst, C. (Hrsg.). Praxishandbuch Medienrecht. Berlin, p. 75 – 228, p. 125 para 132.

18 Trafkowski, A. (2002). Medienkartellrecht: die Sicherung des Wettbewerbs auf den Märkten der elektronischen Medien. München, p. 8f.

19 Ibid.

3.2 THE PROBLEM OF MEDIA CONCENTRATION

Media markets are dynamic, meaning that competition moves in different directions. The resulting squeezing out of individual companies from media markets significantly impacts competition. This raises the question of whether media freedom and media pluralism can still be guaranteed by media concentration.

Media concentration is both a development and a condition.[20] Due to developments in recent years, media concentration is a dynamic issue and will become more important. Basically, media concentration is caused by the freedom of competition. Freedom of competition allows media companies to conduct their business according to their own free will. Mergers and expansions of individual media companies contribute to media concentration. The concept of media concentration is linked to economic market power and journalistic opinion power.[21] While economic market power describes a change in the relevant market structure leading to a decrease in the number of independent competitors, journalistic concentration refers to the emergence of a dominant power of opinion.[22] Economic market power and journalistic opinion power are closely related. When economic market power is present, there is a decrease in the supply of content on the market, which leads to an increase in journalistic concentration and a minimization of opinion.[23]

In addition to competition problems, media concentration can have significant effects on media freedom and media pluralism. The media sector has an important role to play in promoting media pluralism and diversity of opinion, both of which may be incompatible with private media companies' profit expectations.[24] However, a balance must be struck between the two. Media concentration can lead to a situation where media independence and objectivity can no longer be guaranteed. But this is precisely what media freedom is designed to protect. If media concentration develops in the direction of a few large media companies, they may exploit their dominant position to promote their own interests. If independent reporting is no longer

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20 Die Medienanstalten (2022). Zukunftsorientierte Vielfaltssicherung im Gesamtmarkt der Medien, p. 32.

21 Müller, U. (2014). Medienkartellrecht. In: Wandtke, A./Ohst, C. (Hrsg.). Praxishandbuch Medienrecht. Berlin, p. 75 – 228, p. 45 para 11.

22 Paal, B. (2018). Medienkonzentration zwischen Kartell- und Medienrecht. In: Eifert, M./Gostomzyk, T. (Hrsg.). Medienföderalismus. Baden-Baden, p. 87 – 120, p. 88.

23 Ibid.

24 Paal, B. (2017). Current Issues and Recent Developments on Media Concentration in the Context of Competition Law and Media Law. In: GRUR Int., p. 481 – 486.

possible, this has a significant impact on media freedom. Smaller media companies and reporters covering critical topics can be massively suppressed as a result. Media concentration can have a negative impact not only on media freedom, but also on media pluralism. Media pluralism ensures that there are a variety of different media outlets with different points of view on economic, political and social issues. Through critical reporting on the one hand and hard-hitting views on the other, individuals are given the greatest possible chance to form their own opinions without running the risk of not grasping everything.

If the media market contains only a few large media companies, restricted reporting is the result. This is because these companies can use their market power to decide what information is presented to society. In addition, they can suppress opinions that contradict their interests. A media market controlled by a few large companies makes it difficult for smaller companies to enter the market, thus depriving them of the opportunity to promote the opinion-forming process in society.

Media concentration threatens both media freedom and media pluralism at the same time. Freedom of competition has a significant impact on this, as it opens the door to media concentration. Accordingly, the components are in a never-ending cycle. This is because media concentration has a negative impact on free competition as well as on media freedom and media pluralism. However, it derives from freedom of competition for media companies, which is guaranteed under European law. Taking regulatory measures therefore seems essential to guarantee media freedom and media pluralism.

4 EUROPEAN MEDIA REGULATION

4.1 THE NEED FOR MEDIA REGULATION

The need for media regulation under Union law can be justified above all by the fact that national borders in the media sector have become increasingly blurred in recent years. As new media have increasingly appeared on the market, media offerings no longer stop at borders. In this respect, media regulation must ensure that media freedom and media pluralism are nevertheless guaranteed. Through a diverse media

landscape, society can inform and educate itself and thus develop different points of view. Only a broad spectrum of viewpoints ultimately contributes to a diverse society, in which constructive discussions can take place that advance society as a whole. Furthermore, media regulation protects society. Here, above all, the minor protection also plays a major role. Hate speech, cybercrime and the spreading of misinformation are no longer uncommon. Regulation can prevent society from obtaining information from inappropriate sources or becoming a victim of cybercrime. Society must be adequately protected from the negative influence of harmful content. Otherwise, it could have a dramatic impact on the development of society. Such protection can be ensured mainly through certain quality requirements for media content. Finally, fair competition also plays an important role. All media companies must be given access to the market.

While media regulation seems necessary, it is important to remember that media regulation can also limit media freedom and media pluralism. Therefore, it is significant that the fine line between balanced regulation and overregulation is observed. In this regard, a balance must be struck between the interests of the general public in media regulation on the one hand and freedom and pluralism of the media on the other hand.

4.2 COMPETENCE FOR MEDIA REGULATION

In the area of the EU‘s legislative competence, there are basically three principles to be observed, which are laid down in Article 5(1) TEU. It states that the principle of conferral governs the limits of the Union competences. Furthermore, according to sentence 2, the principles of subsidiarity and proportionality govern the use of Union competences.

According to the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to obtain the objectives set out therein, Article 5(2)1 TEU. All competences not conferred upon the Union in the Treaties remain with the Member States, Article 5(2)2 TEU. This means that, in principle, the Member States are responsible for legislation, unless the EU’s legislative competence is explicitly regulated. The principle of subsidiarity states that the Union shall take action in areas which do not fall within its exclusive competence only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level,

but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level, Article 5(3) TEU. Finally, in accordance with the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties, Article 5(4) TEU.

The various competences are described in Articles 2 ff. TFEU. A general distinction is made here between exclusive and shared competence. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, Article 2(1) TFEU. The areas in which the EU has exclusive competence are regulated by Article 3 TFEU. Under shared competence, both the EU and the Member States can legislate, Article 2(2)1 TFEU. However, the Member States will only act if the EU has not exercised its competence, Article 2(2)2 TFEU. The Union shall share competence with the Member States where the Treaties confer on a competence which does not relate to the areas referred to in Articles 3 and 6, Article 4(1) TFEU. Article 4(2) TFEU lists the main areas of shared competence. Apart from exclusive and shared competence, Article 6 TFEU contains supporting jurisdiction in the areas specified therein.

Looking at the catalogues of competences just mentioned, as well as at other places in the Treaties, it becomes clear that the media as such are not explicitly mentioned.[25] Nor can anything else be inferred from the CFR. On the one hand, it is clear from Article 51(2) CFR that the CFR does not create any new competences. On the other hand, this is confirmed by the wording of Article 11(2) CFR. There it is stated that the freedom and pluralism of the media shall be respected. The fact that the wording was changed from “guaranteed” to “respected” in the final phase of the CFR makes clear that Article 11(2) CFR is not intended to create any competences.[26]

A competence rule is essential for enacting secondary legislation in the media sector, following the principle of conferral. The EU‘s competence for media-specific laws may arise from its internal market authority, outlined in Article 114(1)2 of the TFEU. This allows to adopt measures to facilitate the internal market‘s establishment and function. However, any legislation must prioritize the internal market as its primary

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[25] Hain, K. (2007). Sicherung des publizistischen Pluralismus auf europäischer Ebene? In: AfP, p. 527 – 534, p. 527, 531. Cole, M./Ukrow, J./Etteldorf, C. (2021). On the Allocation of Competences between the European Union and its Member States in the Media Sector - An Analysis with particular Consideration of Measures concerning Media Pluralism. Baden-Baden. p. 70.

[26] Bernsdorff, N. (2019). In: Meyer, J./Hölscheidt, S. (Eds.). Charta der Grundrechte der Europäischen Union. Baden-Baden, Article 11 CFR para 20.

objective to comply with the principle of conferral.[27] While media regulation could be justified under this competence to ensure freedom of services and goods movement, it must prioritize realizing the internal media market to be valid under Article 114 TFEU. Otherwise, there is no possibility to regulate media freedom and pluralism purely based on the internal market competence.

However, something else could result from the supporting competence of Article 6 TFEU. Article 6c) TFEU grants the EU competence in culture to support, coordinate, or supplement Member States' measures. Article 167(1) TFEU elaborates on this, emphasizing the Union's role in flowering Member States' cultures while respecting their diversity. However, it does not allow the EU to counteract or replace Member States' cultural policies, because its competence is subsidiary to theirs.[28] Article 167(5) TFEU prohibits cultural harmonization but does not estrict other bases of competence.[29] Hence, it does not preclude EU measures in culture if based on other competences and not primarily relevant to culture.[30] Conversely, Article 167 TFEU cannot establish a competence to harmonize rules to ensure media freedom and media pluralism in the EU.[31]

Finally, the EU can derive competence for media regulation from competition law, governed by Articles 101 ff. TFEU. Exclusive legislative competence in this area is crucial for ensuring media pluralism.[32] While competition law generally promotes media pluralism, it can also lead to content standardization and market concentration, limiting pluralism.[33] Thus, the EU must balance competition and media pluralism concerns when designing competition policy to safeguard media pluralism alongside free competition.[34]

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27 Schröder, M./Niedobitek, N. (2018). In: Streinz, R./Michl, W. (Eds.). Beck'sche Kurz-Kommentare EUV/AEUV. München.

28 Blanke H. (2022). In: Callies, C./Ruffert, M. (Eds.). Kommentar EUV/ AEUV - Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. München, Article 167 para 1.

29 Blanke, H. (2022). In: Callies, C./Ruffert, M. (Eds.). Kommentar EUV/ AEUV - Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. München, Article 167 para 20.

30 Schröder, M./Niedobitek, N. (2018). In: Streinz, R./Michl, W. (Eds.). Beck'sche Kurz-Kommentare EUV/AEUV. München, Article 167 para 55.

31 Kraetzig, V. (2023). Europäische Medienregulierung – Freiheit durch Aufsicht. In: NJW, p. 1485, 1487.

32 Cole, M./Ukrow, J./Etteldorf, C. (2021). On the Allocation of Competences between the European Union and its Member States in the Media Sector - An Analysis with particular Consideration of Measures concerning Media Pluralism. Baden-Baden. p. 101, 102.

33 Ibid, p. 102.

34 Ibid.

In conclusion, it can be said that the EU's competition regime does not give it explicit competence to regulate the media. However, the fact that competition policy can have an impact on this means that the media landscape may be indirectly regulated as a result of competition law provisions.

5 GUARANTEE OF MEDIA FREEDOM AND MEDIA PLURALISM IN THE EU

5.1 EU PRIMARY LAW RELATED TO MEDIA

Media regulation is primarily established in the CFR and indirectly through fundamental freedoms, ensuring media freedom and pluralism. While there is no independent media regulation under primary law, it is anchored in it. Article 11(2) CFR explicitly guarantees media freedom and pluralism, making it a fundamental aspect within the EU. Complying with Article 11(2) CFR is necessary for secondary legislation, since the CFR has primary legal character. Member States are also bound by the CFR when implementing Union law, Article 51(1)1 CFR.

While the ECHR does not have a primary legal character, it can interpret the CFR based on Article 52(3) CFR. However, this applies only when the CFR corresponds to a right of the ECHR. Article 10 ECHR, concerning freedom of expression, parallels Article 11(1) CFR but does not explicitly regulate media. Nonetheless, Article 10 ECHR implies media freedom under freedom of expression.[35] Also media pluralism is addressed under Article 10(2) ECHR by the ECtHR.[36] The CFR explanations note equivalence between Article 11 CFR and Article 10 ECHR, supporting media freedom alignment.[37] Thus, interpreting Article 11(2) CFR in light of Article 10 ECHR is necessary.

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[35] Bernsdorff, N. (2019). In: Meyer, J./Hölscheidt, S. (Eds.). Charta der Grundrechte der Europäischen Union. Baden-Baden, Article 11 CFR para 16.

[36] Groppera Radio and others v Switzerland App no 10890/84 (ECtHR, 28 March 1990) para 69.

[37] Explanations relating to the Charter of Fundamental Rights, OJ C 303/17 (21, 33).

Furthermore, media regulation indirectly appears within the fundamental freedoms of the TFEU. These freedoms only apply to Member State if there is no harmonization under Union law.[38] Secondary laws consistent with primary law and transposed directives take precedence over these freedoms.[39] If secondary laws lack conclusive regulation or allow Member States flexibility, the fundamental freedoms must be observed.[40] In areas lacking secondary legislation, the freedom of movement of goods under Article 34 TFEU and the freedom to provide services under Article 56 TFEU are crucial, with other freedoms playing a lesser role.

5.2 EU SECONDARY LAW RELATED TO MEDIA

Various regulations illustrate the EU's attempt to regulate the media market through directives and regulations. Looking at the developments in this regard, the AVMSD[41], which replaced the Television without Frontiers Directive in 2007 and was ultimately reformed in 2018[42], is particularly worthy of mentioning.[43] The aim of the directive is to create a uniform framework for audiovisual media services in general.[44]

Another regulation with media relevance is the Open and Free Internet Regulation, adopted by the EU in 2015.[45] Its purpose is to ensure non-discriminatory data transport, Article 1(1) of the Open Internet Regulation.

In addition, two new pieces of legislation have recently come into force to keep pace with the rapid development of the media and to create regulation for the digital space. These are intended to improve the rules governing digital services in the European Union. One of these is the DSA[46], which entered into force on 16 November 2022

38 Ferreau, F. (2019). In: Spindler, G./Schuster, F. (Eds.). Recht der elektronischen Medien. München, Part 1 B para 33.

39 Ehlers, D. (2014). Europäische Grundrechte und Grundfreiheiten. Berlin, § 7 para 8.

40 Ehlers, D. (2014). Europäische Grundrechte und Grundfreiheiten. Berlin, § 7 para 8; Ferreau, F. (2019). In: Spindler, G./Schuster, F. (Eds.). Recht der elektronischen Medien. München, Part 1 B para 33.

41 Directive 2010/13/EU (Audiovisual Media Services Directive) [2013] OJ L 95/1.

42 Directive (EU) 2018/1808 (Audiovisual Media Services Directive) [2018] OJ L 303/69.

43 Holznagel, B./Hartmann, S. (2022) In: Hoeren, T./Sieber, U./Holznagel, B. (Eds.). Handbuch Multimedia-Recht - Rechtsfragen des elektronischen Geschäftsverkehrs. München, chapter 3 para 19.

44 Stender-Vorwachs, J./Theissen, N. (2007). Die Richtlinie für audiovisuelle Mediendienste. In: ZUM, p. 613 - 620, p. 613, 615.

45 Regulation (EU) 2015/2120 (Open and Free Internet Regulation) [2015] OJ L 310/1.

46 Regulation (EU) 2022/2065 (Digital Services Act) [2022] OJ L 277/1.

and will apply from 17 February 2024. According to Article 1(1) DSA the aim is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonized rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected. The DMA[47], on the other hand, entered into force on 1 November 2022 and has been applicable since 2 May 2023. The DMA complements competition law and limits the market power of companies in the digital media sector.[48] The purpose is to contribute to the proper functioning of the internal market by laying down harmonized rules ensuring for all businesses, Article 1(1) DMA.

Finally, the European Commission proposed the SLAPP Directive[49] on 27 April 2022 and the EMFA[50] on 16 September 2022 as new media regulations.[51]

6 EUROPEAN MEDIA FREEDOM ACT AS A BEACON OF HOPE

The EU‘s plan to enact a Media Freedom Act is seen as a new hope for guaranteeing media freedom and media pluralism in the EU.

47 Regulation (EU) 2022/1925 (Digital Markets Act) [2022] OJ L 265/1.

48 Die Bundesregierung (2022). Gesetz über digitale Dienste und Märkte.

49 Proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) COM (2022) 177 final.

50 Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU COM (2022) 457 final.

51 European Commission (2022). Commission tackles abusive lawsuits against journalists and human rights defenders ‘SLAPPs’’ (2022). European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU.

6.1 GENERAL

The new regulations of the EMFA were adopted by the European Commission on 16 September 2022, to protect pluralism and independence of the media in the EU.[52] The draft builds on the existing AVMSD.[53] However, unlike the AVMSD, the proposed law is a regulation, which means that once it enters into force, it will be directly applicable in all Member States and they will be bound by its provisions, Article 188(2) TFEU. The planned EMFA responds to attacks against media freedom in some EU Member States such as Poland, Hungary and Slovenia.[54] The fact that such attacks are possible has shown that there is a need for action in this regard and that media freedom and media pluralism are not yet adequately guaranteed. Up to now, media services in the individual Member States have not been subject to the same regulations and the same level of protection, resulting in different treatment of media services operating across borders, Recital 1 of the EMFA proposal. The EMFA therefore has the very fundamental objective of improving the functioning of the internal media market.[55] In this context, the main objectives are to promote cross-border activities and investments, to improve regulatory cooperation and convergence, to facilitate the provision of high-quality media services and to ensure a transparent and fair allocation of economic resources.[56] The EMFA aims to support the media sector in seizing opportunities within the internal market while safeguarding common Union values, Recital 2 of the EMFA. Media‘s crucial role in shaping public opinion and democratic participation underscores the EMFA‘s democratic importance, Recital 40 of the EMFA.

The European Parliament and Council of the EU are invited to provide feedback according to Article 294 TFEU, with both bodies publishing draft reports.[57] The Council has agreed on a negotiating mandate, aiming to conclude negotiations on the EMFA

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52 European Commission (2022). European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU.

53 European Commission. Explanatory Memorandum to the proposal of the EMFA. COM (2022) 457 final, 4.

54 European Parliament (2021). Media freedom under attack in Poland, Hungary and Slovenia.

55 European Commission. Explanatory Memorandum to the proposal of the EMFA. COM (2022) 457 final, 3.

56 Ibid.

57 As the draft reports have changed several times during the negotiations, the contents will not be presented and only the original Commission draft will be discussed.

before the next European Parliament election in June 2024, ensuring alignment with existing legislation and respecting national competences.[58]

6.2 CONTENT OF THE DRAFT LEGISLATION

The EMFA proposal, as outlined in Article 1(1), establishes common rules for the internal market of media services and establishes the European Board for Media Services while upholding media service quality. A media service includes according to Article 2 No. 1 of the EMFA proposal providing programs or press publications to the public, under a media service provider's editorial responsibility. Recital 7 specifies coverage of television or radio broadcasts, on-demand audiovisual media services, audio podcasts, and press publications, excluding corporate communication and distribution of promotional materials. Article 1(3) of the EMFA proposal clarifies that Member States can adopt more detailed or stricter rules.

The EMFA proposal, outlines in Articles 3 ff., rights and obligations for media service providers and recipients. Article 3 of the EMFA proposal guarantees recipients the right to a variety of news and current affairs content. Article 4 of the EMFA proposal details media service providers' rights, emphasizing economic activity freedom and editorial independence. Prohibitions on interference are listed under Article 4(2).

Article 5 of the EMFA proposal focuses on public service media providers, emphasizing impartiality, transparent management appointments, and adequate funding for their mission.

Transparency requirements are detailed in Articles 6(1), 23, and 24 of the EMFA proposal. Providers must ensure accessible information, ownership transparency, and transparent audience measurement systems.

The establishment of a new European Board for Media Services, according to Article 8 of the EMFA proposal, aims to enhance cooperation among national media authorities. The body's independence shall be emphasized, Article 9 of the EMFA proposal. The Boards rules of procedure shall be adopted in agreement with the Commission, Article 10(8) of the EMFA proposal.

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[58] European Council, Council of the European Union. (2023). European Media Freedom Act: Council secures mandate for negotiations; on 7 September 2023 (day of submission of the thesis) the Committee on Culture and Education will voted on its final position. The status of this contribution refers to the period before.

Rules for media service providers on very large online platforms are introduced in Article 17 of the EMFA proposal, including requirements for declaration, complaints mechanisms, and respect for freedom of expression.

Finally, rules for preventing media concentration, as outlined in Article 21 ff. of the EMFA proposal, require Member States to establish assessment rules to prevent concentration that could impact media pluralism or editorial independence. In addition, the final provisions in Article 25 of the EMFA proposal set out monitoring rules. According to Article 25(3)(a) of the EMFA proposal, monitoring includes a detailed analysis of the resilience of all Member States' media markets, including as regards the level of media concentration and the risks of foreign information manipulation and interference.

6.3 EVALUATION OF THE DRAFT

The EMFA is intended to strengthen the internal media market and to protect media freedom and media pluralism in the EU. This is to be ensured, among other things, by a functioning internal market for media service providers and counteracting media concentration through harmonized regulations. However, the EU's plan to adopt the EMFA has also been the subject of much criticism. The EMFA is discussed not only by media associations and the literature, but also by the Member States themselves, who have reservations about it.[59]

The debate centers the question of the EU's competence to enact regulations like the EMFA, governed by the principle of conferral under Article 5(1) TEU, which requires a legal basis for each measure.[60] The European Commission justifies its competence based on Article 114 TFEU, citing the need to address fragmented national regulations on media pluralism and editorial independence.[61] This aims to promote a unified approach, enhance coordination at the EU level, ensure the internal market's smooth functioning for media services, and prevent future obstacles for media service providers across the EU.[62]

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[59] In this context the German reservations are explicitly addressed.

[60] Ory, S. (2023). Medienfreiheit – Der Entwurf eines European Media Freedom Act. In: ZRP, p. 26 – 29, p. 26, 28.

[61] European Commission. Explanatory Memorandum to the proposal of the EMFA. COM (2022) 457 final, 7.

[62] Ibid.

For the European Commission to invoke Article 114 TFEU, the primary focus of regulations must be on realizing the internal market.[63] While there is a link between economic and media freedom, Article 114 TFEU does not automatically apply to media regulation solely because it impacts the economy.[64] The core aim of the EMFA is to ensure media freedom and media pluralism, making the internal market realization a secondary objective.[65] While protecting fundamental rights and achieving a free internal market are essential, fundamental rights protection cannot be used as a pretext for extending EU competences beyond what the Treaties allow.[66] Thus, the EMFA cannot be adopted under Article 114 TFEU without exceeding EU competences outlined in the Treaties, as this would contradict the principle of conferral.

German constitutional bodies support the notion that the EU lacks competence to regulate the media in this manner. Article 114 TFEU is rejected as a suitable basis for competence.[67] Additionally, a violation of the subsidiarity principle outlined in Article 5(1)2 TEU is assumed.[68] This principle dictates that the EU should only act in areas not under its exclusive competence if the objectives of the proposed action cannot be adequately achieved by Member States at central, regional, or local levels, as per Article 5(3) TEU.

Since the Member States have a fundamental legal obligation to ensure pluralism of opinion and media[69], they must also gear their media regulations to this.[70] While exercising cultural sovereignty, they must also adhere to the fundamental freedoms of the internal market.[71] Many Member States have already established effective regulations promoting diverse media landscapes and independent media aligned with European values, standards, and objectives.[72]

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63 See section 4.2 page 7.

64 Ory, S. (2023). Medienfreiheit – Der Entwurf eines European Media Freedom Act. In: ZRP, p. 26 – 29, p. 26, 29.

65 Ibid.

66 Case C-401/19 Poland v EU Parliament and Council [2022] ECLI:EU:C:2022:297 para 66; Malferrari L. (2023). Der European Media Freedom Act als intra-vires-Rechtsakt. EuZW 49 (50).

67 Federal Council DRs. 514/1/22 para 3.

68 Ibid para 7.

69 Centro Europa 7 S.R.L. and Di Stefano v Italy App no 38433/09 (ECtHR, 7 June 2012) para 73, 2.

70 Federal Council DRs. 514/1/22 para 10.

71 Ibid.

72 Ibid.

In addition, it is crucial to ensure that Member States retain adequate autonomy to independently pursue European objectives within their own competencies and structures, even when media regulation falls under their cultural sovereignty.[73] This approach aligns with the principles outlined in Article 167 TFEU.[74] Centralizing media supervision, unilaterally designating competent national bodies through EU legal acts, and imposing detailed European requirements significantly infringe upon Member States‘ competencies.[75]

Moreover, criticism is directed towards the choice of legal form for the EMFA, which employs a regulation, potentially overshadowing Member States.[76] This approach risks conflicts with national legislation, requiring adjustments to comply with European laws.[77] Alternatively, adopting the EMFA as a directive with minimum harmonization, as with the AVMSD, could better integrate it into national media laws while ensuring media pluralism.[78] Splitting the EMFA into a regulation for economic aspects and a directive for critical provisions, aligning with Article 167(4) TFEU, could provide clarity and flexibility.[79] Currently, the proposal as a regulation contains varying degrees of harmonization, raising concerns over its compatibility with Article 167(4) TFEU.[80] A division into directive and regulation would better suit the differing needs for full harmonization and Member States’ autonomy.

In conclusion, the objective of the proposed EMFA to protect media freedom and media pluralism in the EU is the right starting point for the progress of a digital world in which borders are blurred and it is difficult to keep track of everything. In principle, the instrument of a regulation can achieve a high degree of harmonization at the EU level and ensure uniformity in all Member States. However, the concern that the EU simply does not have the authority from the Treaties to regulate the media in the way it did with the EMFA has to be acknowledged. By choosing a directive, such as the

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73 Ibid para 17.

74 Ibid.

75 Ibid para 17 f.

76 Federal Council DRs. 514/1/22 para 17, 18; Ory S. (2023). Medienfreiheit – Der Entwurf eines European Media Freedom Act. In: ZRP 26 (29); APR et al. (2023). Media associations support splitting the European Media Freedom Act. P. 1.

77 Ory, S. (2023). Medienfreiheit – Der Entwurf eines European Media Freedom Act. In: ZRP, p. 26 – 29, p. 26, 29.

78 Ory, S. (2023). Medienfreiheit – Der Entwurf eines European Media Freedom Act. In: ZRP, p. 26 – 29, p. 26, 29; APR et al. (2023). Media associations support splitting the European Media Freedom Act, p. 1.

79 European Parliament (2023). Research for CULT Committee - European Media Freedom Act: Policy Recommendations, p. 3.

80 Ibid.

AVMSD, the EU could harmonize its objectives to a minimum and would at the same time give the Member States the opportunity to shape their existing national media laws and possibly also to enact stricter rules. Another option would be to split certain provisions into a regulation and a directive, as suggested above.

In view of the close cooperation with the European Commission, the newly established European Board of Media Services alone gives the impression that complete independence cannot be guaranteed. The close link with the European Commission can be seen in Article 10(5)4, (6), (8) of the EMFA proposal where it is stated that the preparation of the work programme, the invitation of experts and observers and the rules of procedure shall be agreed with the European Commission. This leads to the fact that the planned intensive cooperation with the national media authorities carries the risk that the European Commission will intervene at the national level. This would deprive the currently independent Member State regulatory authorities of their independence. In particular, the AVMSD, especially since its modernization in 2018, regulates the safeguarding of national independent media regulatory authorities in detail in Article 30 AVMSD. All of this could be annulled by the EMFA.

Furthermore, some of the content raises concerns about whether media freedom and media pluralism can actually be guaranteed. In particular, concentration rules must be designed to be especially effective in this regard in order to prevent media concentration. It should be noted here that the EMFA proposal contains very precise harmonization provisions in some cases, but leaves the Member States a lot of leeway in others what has already been negatively noted from the point of view of the used instrument. This is the case regarding the provisions on media concentration. According to Article 21(4), (6) and Article 22(1) of the EMFA proposal, the Administrative Board and the Commission have the opportunity to issue an opinion in order to show the national authorities a way forward. By the choice of words “pointing out a way” it becomes clear that the Board is not obliged to indicate a possible legal consequence for the merger of the media companies in the context of the opinion. Such a consideration is thus left to the Member States. In addition to different interpretations by the Member States, this could also mean that facts at the national level are assessed differently about their legal consequence in individual countries. This could lead to the thought that with these provisions on the assessment of concentration law, the EMFA actually wanted to counteract concentration tendencies and thereby promote media pluralism, and not leave the Member States alone through imprecision in the choice of their legal consequences.

Nevertheless, the basic idea of the EMFA is certainly capable of promoting the freedom and pluralism of the media. In the end, the only question is how much the Member States will be affected by European media regulation. With the right instrument, the EMFA would have the potential to guarantee media freedom and media pluralism in the EU, while at the same time allowing the Member States to exercise their media and cultural sovereignty without hindrance.

In the end, there is nothing to do but wait and see what the EMFA will look like, if it enters into force. Hopefully, the necessary changes will be made to ensure that the proposed legislative initiative does not fail to guarantee media freedom and pluralism in the EU.

7 SUFFICIENT GUARANTEE OF MEDIA FREEDOM AND MEDIA PLURALISM IN THE EU

7.1 SYNOPSIS OF EU PRIMARY AND SECONDARY LAW

Secondary legislation within the EU must align with primary law, which takes precedence. Article 11(2) CFR establishes the foundation for media freedom and pluralism, making it imperative for all legal provisions to adhere to it, even if they are unrelated to media law. This ensures that any legislation posing a threat to media freedom or pluralism violates primary law. The ECHR further aids in interpreting fundamental rights, enhancing the Union‘s legal framework in media-related matters, Article 52(3) CFR. Overall, the CFR and ECHR provide robust primary law support for the Union in the media sector.

The secondary legislations discussed also have a high degree of relevance to media law and they mostly indirectly ensure media freedom and media pluralism in the EU. In doing so, they remain in line with Article 11(2) CFR and, while each covers a different area of media law, together they form part of the bigger picture. The only

secondary legislation which could have direct impact on the guarantee of media freedom and media pluralism is the EMFA which has not yet entered into force.

The interplay between EU primary and secondary legislation shows that they complement each other and together form the basis for ensuring media freedom and pluralism in the EU.

7.2 EVALUATION

Are the rules as a whole actually sufficient to guarantee media freedom and media pluralism in the EU and thus to meet the current challenges of the digital age?

This question needs to be answered conclusively. After all, only sufficient rules can guarantee media freedom and media pluralism in the EU. The numerous existing rules and, most recently, the proposed EMFA are intended to guarantee media freedom and media pluralism in the EU.

While EU primary law explicitly guarantees media freedom and media pluralism, it is striking that EU secondary law, with the exception of the proposed EMFA, only indirectly guarantees media freedom and media pluralism. This does not change the fact that the interplay between the two, forms the foundation for guaranteeing media freedom and media pluralism in the EU. The EU has issued new legal secondary legislations in the form of regulations, which do not require implementation, rather than in the form of directives like the AVMSD. On the one hand, this may be due to the fact that some Member States have not yet transposed the AVMSD into national law and the EU wants to ensure that no further problems arise here. On the other hand, it may also be an expression of the EU's power to emphasize the importance of these new regulations in the age of digitalization by making them immediately applicable. Media change is rapid and unstoppable. A lot can happen between the EU's deadline for implementation and the actual implementation by Member States. Therefore, the regulation with its immediate validity can already have an effect and achieve its intended goal as soon as it enters into force.

In this respect, the adoption of legislation in the form of regulations should be supported in principle. By enacting the DSA and the DMA as regulations, the rise of digital platforms is taken into account in order to regulate large social media and other large media companies as quickly as possible. The instrument of the regulation is

helpful because it is tailored to the current situation and can be reformed if necessary, which has in turn immediate effect.

However, the regulation should take sufficient account of the problem of the distribution of competences within the EU. In particular, the planned EMFA has been sharply criticized on account of the EU's possible overstepping of competences. The question that ultimately arises in connection with the EMFA is therefore not so much whether the regulations are sufficient, but rather whether they do not constitute over-regulation in view of the overstepping of competences.

The EMFA serves as a response to the increasing state control of the media in some European countries, which shows that media freedom and media pluralism are not yet sufficiently guaranteed under EU law and that regulation is therefore necessary.

The problem is that media services in the different Member States are not subject to the same rules and the same level of protection, so that media services operating across borders are treated differently, Recital 1 of the EMFA proposal. In this respect, it is important to achieve harmonization. The only question is at what cost. It will be difficult to strike a balance between the objective of guaranteeing media freedom and media pluralism and the corresponding to the competences assigned. The approach taken by the EMFA is to be supported, so there is no need to change the objective. However, the cultural and media sovereignty of the Member States must be adequately taken into account.

As part of the implementation of the AVMSD, some Member States have already adopted more and stricter rules. Therefore, care must be taken that the pronounced media regulation in some member states is not destroyed by European legal acts. The fact that other countries have not done so and that a restriction on media freedom and media pluralism is becoming more and more apparent puts the EU in a dilemma. After all, it must do justice to all countries and, above all, not lose sight of the goal of guaranteeing media freedom and media pluralism, especially in countries where the trend is towards state control. Conversely, however, this means that countries with stricter rules are more likely to be restricted as a result.

As evident from what has been said, it is not easy to find the right balance. In view of the rapidly growing and transnational power, it will probably be difficult for all Member States to limit this effectively, so that on the one hand a thought could be given about giving the EU extended competences in the area of the media. On the other hand, in order to do justice to the distribution of competences, the instrument of

directives could possibly be considered in the future. Thus, in case of doubt, even if a regulation in the dynamic area of the media appears to be more effective, the goal of strengthening media freedom and media pluralism does not fail completely. This must be avoided at all costs.

8 CONCLUSION

This contribution aimed to comprehensively explore the legal framework for safeguarding media freedom and pluralism in the EU. It highlighted the threat posed by media concentration to these freedoms and emphasized the need for regulations to prevent excessive media concentration and uphold media independence. Article 11(2) CFR explicitly guarantees media freedom and pluralism, serving as a constitutional basis for their protection. However, existing secondary Union law does not yet sufficiently ensure comprehensive protection, as indicated by the prevalence of state-regulated media in some EU Member States, which undermines media independence. A diverse and independent media landscape is crucial for an informed society and upholding democracy, a core EU principle.

For this reason, the proposed EMFA has been widely discussed as a beacon of hope. The aim is to achieve a functioning free internal media market through harmonized rules and to enact rules that help to ensure media freedom and media pluralism in the EU. The main criticism of the proposed draft is the EU‘s lack of competence. So far, there is no recognizable basis for the competence of the proposed EMFA. The influence of the European Commission is also problematic in this context. Although the EMFA is supposed to create an independent European Board for Media Services and also to strengthen cooperation between the independent national regulatory authorities, the European Commission is nevertheless also granted a great deal of influence. This can lead to massive interference in the affairs of the Member States, which tailor their rules to the specifics of their country.

However, these concerns should not cause the planned EMFA to fail. The objective of the EMFA is undoubtedly to be supported. In order to achieve the desired link between the EU and media regulation, the proposal should be amended to address the concerns. Adopting a directive with minimum harmonization would mean that the EU does not exceed its competence and that Member States are given the necessary leeway. At the same time, it would help to discourage Member States that are

critical in guaranteeing media freedom and media pluralism. Otherwise, it cannot be ruled out that the EMFA, if it enters into force as planned, will constitute an ultra vires act and open the door to ultra vires controls by Member States. The EU is on a very good path, the only thing missing at the moment is the right transposition. The planned EMFA, with the right implementation, could actually end up being able to guarantee media freedom and media pluralism in the EU.

Ultimately, the challenge will be to achieve the guarantee of media freedom and media pluralism in line with the evolving media landscape. One thing is certain: the guarantee of media freedom and media pluralism is more important than ever in today's world and essential for a functioning democracy.

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3 THE CHALLENGES OF SMART CONTRACTS FOR THE GERMAN LEGAL ORDER:

TRANSFERABILITY OF EXISTING LEGAL CONCEPTS OR NECESSITY OF LEGAL REFORM

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ABBREVIATIONS

AI	*Artificial Intelligence*
DeFi	*Decentralized Finance*
EU	*European Union*
GDPR	*General Data Protection Regulation*
IoT	*Internet of Things*
QES	*Qualified Electronic Signature*

A INTRODUCTION

Real change, enduring change,
happens one step at a time.
Ruth Bader Ginsburg

The maxim of continuously developing technology into established legal frameworks, is an incremental process that raises legal paradigms.[1] The integration of gradual change applies to the dynamic field of smart contracts, an evolving technology that is not only disrupting various industries but also fundamentally challenging multifaceted challenges.[2]

The present article can be classified into the context of legal-tech, representing a dynamic and interdisciplinary field of research that is increasingly gaining international relevance.[3] The objective of this article is to provide a scientific examination of the transferability of existing German legal concepts to smart contracts. The focus lies on basic principles of EU law, German civil law, contract law, employment law and dispute resolution.

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1 Reiling: Technology for Justice, 2009, p. 16 f.

2 Szabo: Smart Contracts, 1996; Szezerbowski: Place of smart contracts in civil law, 2017, p. 333, 334; Corrales: Legal Tech, Smart Contracts and Blockchain, 2019, p. 17 ff.

3 Schrepel: Smart Contracts and the Digital Single Market Through the Lens of a „Law + Technology" Approach, 2021, p. 1 ff.

I. MOTIVATION AND RESEARCH PROBLEM

While smart contracts offer numerous advantages such as streamlined processes, enhanced transparency, and a significant contribution to achieving EU's climate objectives, their adoption also presents challenges to the traditional legal order.[4] Particularly in Germany issues concerning enforceability, liability, dispute resolution, data protection, and security remain unsolved.[5] A decision by the German Federal Court of Justice (XII ZR 89/21, dated December 26th, 2022) illustrates how existing legal principles can impede innovation, even within the legal domain. Despite addressing key legal issues such as ambiguity in contract language, regulatory compliance, and increased efficiency in legal proceedings, the legal status of smart contracts within civil law remains a subject of debate.[6] The complexity of this research problem is further compounded by the multidisciplinary nature of the legal-tech field. Thus, a holistic approach integrating both legal and technological considerations is imperative for addressing the implications of smart contracts for the German legal landscape. A regulatory response is urgently required to sustainably facilitate the adoption of smart contracts.

II. METHODOLOGY AND STRUCTURE

To address the multidisciplinary research problem effectively, the structure of this article follows the V-Model VDI 2206 for Software and System Development, as shown in F. Appendix, adapting it to the context of legal research. The adaptation of the V-Model is limited to the System Design phase, encompassing requirements capture, analysis, specification, and drafting. The article is divided into five chapters, pursuant to *Figure A*.

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4 Wilkens: Smart Contracts, 2019, p. 3 f.

5 Woebbeking: The Impact of Smart Contracts on Traditional Concepts of Contract Law, 2019, p. 106, 108 f.

6 European Commission, A European strategy for data, 19.02.2020, p. 25; European Commission, Call for Tenders Smart 2018/0038: Study on Blockchains: legal, governance and interoperability aspects.

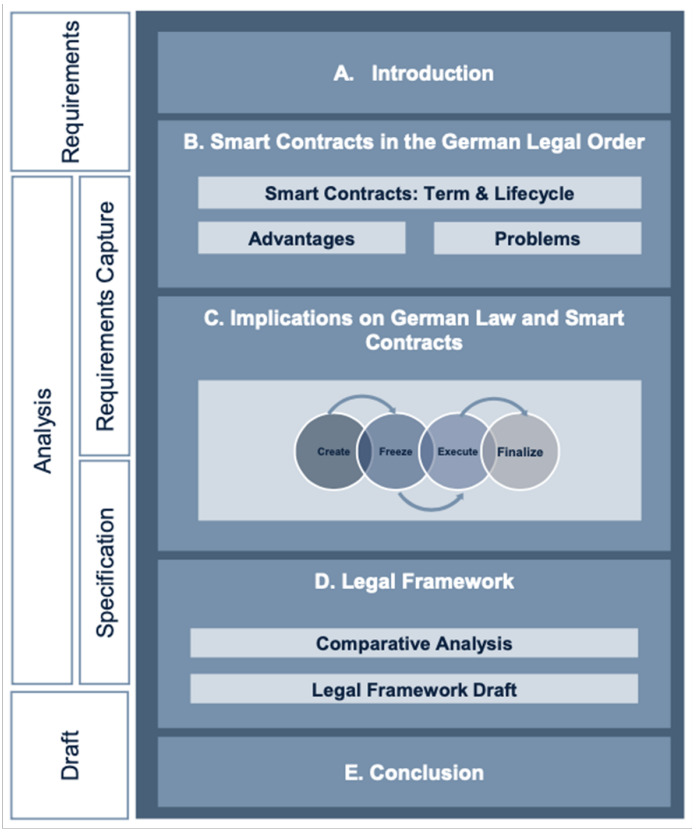

Figure A | Structure following the V-Model for Software Development VDI 2206

Chapter B starts with a critical discussion of the term „smart contract", thus addressing the ambiguity surrounding their legal status. On basis of a critical discussion of advantages and problems of smart contracts, regulatory gaps are identified. Building on the problem analysis, implications and requirements for the German legal order are addressed in **chapter C**. In **chapter D** a comparative analysis sheds light on legal frameworks in other jurisdictions. Based on the derived implications and the comparative analysis, this chapter concludes with a proposal for a smart contract German legal framework. Finally, in **chapter E** a response to the research question and recommendations for further research are provided.

In general, this article primarily employs qualitative methods, including a review of primary and secondary sources, as well as a comparative analysis. In general, a deductive approach in conjunction with legal methodologies is applied.

B SMART CONTRACTS IN THE GERMAN LEGAL ORDER

„Smart Contracts" are
neither smart
nor contracts.[7]

Smart contract is a term that paradoxically challenges conventional understandings. The ongoing debate concerning the definition of smart contracts underscores the fundamental ambiguity inherent in this research field. According to criticism in the legal doctrine, the terminology „smart contract" is wrongly, used since smart contracts lack both intelligence and the essential characteristics of traditional contracts.[8] In the following, the terminology will be clarified, and advantages and problems will be critically discussed.

I. SMART CONTRACTS: A MISLEADING TERMINOLOGY?

Opinions on whether smart contracts qualify as legally binding **contracts** vary widely.[9] While traditional contracts involve mutual declarations of intent under German Civil Code, smart contracts are automated transactions executed on blockchain based on predetermined conditions, often following a „when… then" logic.[10] Some argue that smart contracts, being automated and code-based, lack the essential elements of traditional contracts.[11] However, others view them as legitimate contracts, comparable to traditional contracts.[12] Partially smart contracts are regarded as being

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7 Mik, Eliza: Smart Contracts, 2019, p. 72; Levi: An Introduction to Smart Contracts, 2018; Woebbeking: The Impact of Smart Contracts on Traditional Concepts of Contract Law, 2019, p. 106, 108 f.

8 Mik, Eliza: Smart Contracts, 2019, p. 72; Levi: An Introduction to Smart Contracts, 2018; Woebbeking: The Impact of Smart Contracts on Traditional Concepts of Contract Law, 2019, p. 106, 108 f.

9 Groschopf: Smart Contracts for Sustainable Supply Chain Management, 2021, p. 3 ff.; Ernst: Münchener Kommentar zum BGB, 9th Edition 2022, Introduction to Contract Law, Section 69.

10 Li et al: Leveraging Standard Based Ontological Concepts, 2019, p. 152, 152 ff.; Wilkens: Smart Contracts, 2019, p. 3 f.

11 Niyazova: Legal Nature of Smart Contracts, 2022, p. 143, 144 f.; Marchenko: On Determining the Legal Nature of Smart Contract, 2021, p. 175, 177 f.

12 Capocasale, Standardizing Smart Contracts, 2022, p. 91203, 91205 f.; Durovic: The Enforceability of Smart Contracts, 2019, p. 493, 494; ; Gyung-Young: A Legal Study on the Smart Contract based on Blockchain, 2017, p. 4 f.

law independent.[13] Art. 2 (6) of the Data Act defines smart contracts as computer programs stored on an electronic ledger. [14]

Moreover, there is debate over whether smart contracts should be describes as „**smart**“, given that they do not necessarily incorporate artificial intelligence („AI“). However, proponents argue that the term correctly describes their efficiency.[15] The opinion that the term accurately reflects the efficiency of smart contracts is in line with the definition coined by the smart contract pioneer Nick Szabo in 1994.[16] The present article follows the opinion of Nick Szabo that the term „smart“ implies the decisive characteristic that distinguishes smart contracts from traditional contracts: their efficiency and functionality.[17]

Despite being executed automatically, smart contracts fulfill legal rights and obligations, with their imperative and declarative nature influencing their legality.[18] The execution of a contract - irrespective if manually or automatically executed - is a fulfillment of rights and obligations and thus a legally relevant act. The fact that pursuant to Art. 2 (6) of the Data Act smart contracts are defined as computer programs written in code and not in human language does not preclude their qualification as legally valid contracts under German law.[19] A smart contract can be qualified as a contract in a special form according to Art. 2 I Basic Law for the Federal Republic of Germany. In conclusion, smart contracts establish legal effect and can be qualified as a unique form of contracts that are driving efficiency.

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13 Li et al: Leveraging Standard Based Ontological Concepts, 2019, p. 152, 152 ff.

14 Data Act, 2021, p. 3.

15 Jünemann: Can Code be Law?, 2021, p. 6.

16 Szabo: Smart Contracts, 1996; Niyazova: Legal Nature of Smart Contracts, 2022, p. 143, 144 ff.

17 Szabo: Smart Contracts, 1996; Scherk: Die Blockchain, 2017, p. 27 f.

18 Niyazova: Legal Nature of Smart Contracts, 2022, p. 143, 144 ff.; Governatori: On legal contracts, 2018, p. 377, 378 f.

19 Cannarsa: Smart Interpretation or Interpretation of Smart Contracts? 2018, pp. 773, 774 f.; Filatova: Smart Contracts from the Contract Law Perspective, 2020, p. 217, 220 f.

II. SMART CONTRACT LIFECYCLE

Smart contracts adhere to a defined lifecycle, with implications for German law occurring in each phase. The phases of the lifecycle are shown in *figure B* and described in the following.[20]

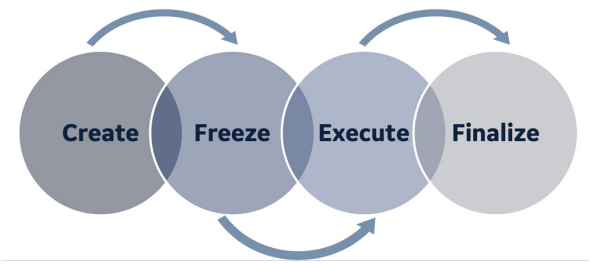

Figure B | Smart Contract Lifecycle

- **Create:** A smart contract is created by coding terms and conditions that were agreed upon by the contracting parties.[21] Once the code is finalized, it is uploaded to the decentralized blockchain and cannot be modified.[22]
- **Freeze:** In the so-called freeze phase transactions on blockchain are validated by nodes. In this phase smart contracts and the contracting parties become public on the decentralized ledger.
- **Execute:** Once the agreement is integrated and validated, the smart contract is automatically executing on blockchain. To ensure secure execution, the process is overseen by mechanisms such as Proof of Work („PoW") and Proof of Stake („PoS").[23]

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20 Sillaber: Life Cycle of Smart Contracts in Blockchain Ecosystems, 2017, p. 497, 497 ff.

21 Jani: Smart Contracts: Building Blocks for Digital Transformation, 2020, p. 4; An Overview on Smart Contracts: Challenges, Advances and Platforms, 2019, p. 4f.

22 Jani: Smart Contracts: Building Blocks for Digital Transformation, 2020, p. 4.

23 Sillaber: Life Cycle of Smart Contracts in Blockchain Ecosystems, 2017, p. 497, 497 ff.; Jani: Smart Contracts: Building Blocks for Digital Transformation, 2020, p. 4.

- **Finalize:** Once the smart contract has been executed, the new states of the contracting parties are updated and stored in the distributed ledger of the blockchain.[24]

III. LEGAL AND REGULATORY ADVANTAGES OF SMART CONTRACTS

Smart contracts have transformative potential across industries and for the legal system. They automate processes, enhance efficiency, and reduce costs while ensuring transparency, trust, and security. Additionally, smart contracts address key legal issues by reducing ambiguity in contract language, ensuring regulatory compliance, streamlining legal proceedings, and positively impacting sustainability.[25]

1. CODE AS LAW: AVOIDANCE OF AMBIGUITY

While traditional contracts and smart contracts share specialized terminology and concepts, their impact differs significantly.[26] While traditional contracts are expressed in complex human language, a smart contract normally consists of simple „if… then…" conditions.[27] Smart contracts operate on a „code is law"-principle, meaning they execute exactly immutable code without the possibilities of change.[28] This principle not only ensures the proper fulfillment of rights and obligations but also mitigates misunderstandings and disputes inherent in traditional contracts.[29] Conclusively, smart contracts have the potential to significantly enhance contractual relationships by reducing ambiguity in contract language.[30]

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[24] Sillaber: Life Cycle of Smart Contracts in Blockchain Ecosystems, 2017, p. 497, 497 ff.; Jani: Smart Contracts: Building Blocks for Digital Transformation, 2020, p. 4.

[25] Wolter, Modul Paper I, 2023, p. 2 ff.

[26] Onufreiciuc: Regulation of the Smart Contract in (Romanian) Civil Law, 2021, p. 95, 97; Cannarsa: Smart Interpretation or Interpretation of Smart Contracts? 2018, pp. 773, 774 f.

[27] Allen: Smart Legal Contracts, Oxford, 2022, p. 342 f.; Nissl: Towards Bridging Traditional and Smart Contracts with Data-based Languages, 2022, p. 68, 77.

[28] Szabo: Smart Contracts, 1996; Szezerbowski: Place of smart contracts in civil law, 2017, p. 333, 334.

[29] Upadhyay: Paradigm Shift from Paper Contracts to Smart Contract, 2021, p. 1; Nissl: Towards Bridging Traditional and Smart Contracts with Datalig-based Languages, 2022, p. 68, 68 f.

[30] Woebbeking: The Impact of Smart Contracts on Traditional Concepts of Contract Law, 2019, p. 106, 110 f.; Green: Smart contracts, interpretation and rectification, 2018, p. 234, 239 ff.

2. COMPLIANCE WITH REGULATIONS AND STANDARDS

In comparison to traditional contracts, which rely on manual adherence to regulations and monitoring, smart contracts can be programmed to automatically enforce compliance with regulations and standards. This not only reduces the potential for human error but also minimizes the risk of non-compliance. Ensuring compliance with various regulations, different jurisdictions, and applicable laws may be necessary in the context of interoperability[31] which is of major importance for the effective implementation of smart contracts.[32] Nevertheless, smart contracts streamline regulatory compliance, automated monitoring processes, and significantly reduce the risk of non-compliance.

3. DISPUTE RESOLUTION: ARBITRATION

Integrating smart contracts into arbitration, recognized as an efficient alternative dispute mechanism, has the potential for further advancing arbitration procedures.[33] By automating the dispute resolution process through blockchain technology, parties involved can expedite decision-making and focus on substantive issues rather than administrative tasks.[34] This does not only accelerate the arbitration process but also enhances accountability among the parties. Moreover, smart contract disputes can effectively be resolved via arbitration proceedings. In decentralized environments, arbitration facilitates cross-border dispute resolution across multiple jurisdictions; which is in line with the interoperability feature of smart contracts.[35] In conclusion, smart contracts offer several advantages for arbitration processes, including enhanced efficiency, faster decision-making, cross-border applicability, reduced administrative burden, and increased accountability among the parties.

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31 Interoperability is generally defined as the ability of a system that effectively interacts with another system whereby data is shared. In the present legal-tech article the term interoperability is also used in context of cross-border legal issues.

32 Staples/Chen: Risks and opportunities for systems using blockchain and smart contracts, 2017, p. 50; Allen: Smart Legal Contracts, 2022, p. 355.

33 Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 116 ff.; Schmitz: Making Smart Contracts „Smarter" with Arbitration, 2022, p. 2 f.

34 Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 116 ff.; Wolter: Modul Paper III, 2023, p. 3 f.

35 Buchwald: Smart Contract Dispute Resolution, 2020, pp. 1369, 1377 ff; Ortolani: The impact of blockchain technologies and smart contracts on dispute resolution, 2019, pp. 430, 442.

4. IMPACT ON SUSTAINABILITY

To effectively measure the sustainability impact of smart contracts, a holistic approach also the energy consumption of a smart contract themselves is crucial. A sustainability matrix, as shown in figure C, highlights the effectiveness of smart contract-induced sustainability effects in conjunction with the sustainability performance of smart contracts, emphasizing both the purpose and performance of smart contracts in driving positive sustainability outcomes.[36]

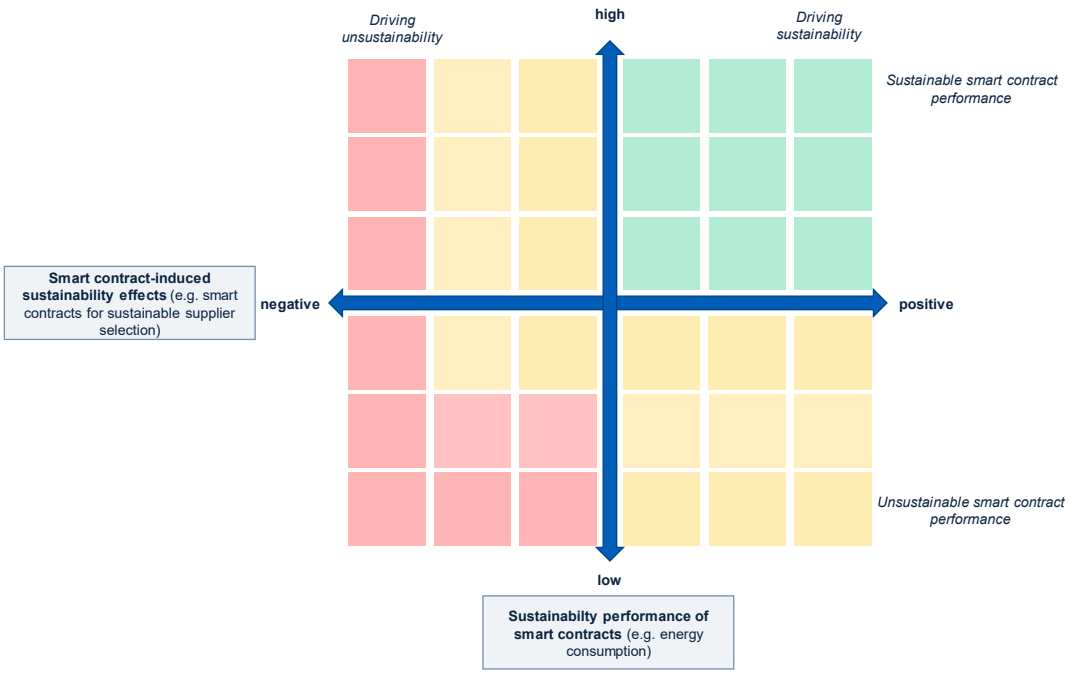

Figure C | Semi-structured assessment framework for sustainability effects of smart contracts.

The adoption of smart contracts within a legal framework has the potential to positively contribute to sustainability mainly the following three dimensions:[37]

[36] Groschopf: Smart Contracts for Sustainable Supply Chain Management, 2021, p. 9 f.

[37] European Parliament, draft report on fair working conditions, rights and social protection for platform workers – new forms of employment linked to digital development (2019/2186); Recitals P., 4, 14 f.; Mauerhofer: The Role of Law in Governing Sustainability, 2021, p. 2 ff.

- **Environment:** Smart contracts play a significant role in supporting the achievement of EU's climate objectives, as outlined in the Climate Change Act 2021 released by the German Federal Government.[38] By facilitating peer-to-peer energy trading and decentralized energy systems, smart contracts promote the adoption of sustainable energy sources.[39]
- **Society:** Smart contracts also enhance sustainability in society by facilitating a global market in line with EU's Digital Strategy, promoting equitable access to resources enabling a diverse global labor market.[40] In employment law, the use of smart contracts can contribute to sustainable working relationships.[41]
- **Economy:** By employing smart contracts, business processes can be streamlined and transactions can be expedited resulting in costs reduction and efficiency increase.[42]

5. CONCLUSION

Smart contracts offer transformative potential across various dimensions within the German legal landscape. They streamline operations, reduce ambiguity in contract language, ensure compliance, accelerate dispute resolution processes, and contribute to achieving EU's climate targets.[43] Nevertheless, challenges remain regarding their legal status and regulatory framework.

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38 https://www.bundesregierung.de/breg-de/schwerpunkte/klimaschutz/climate-change-act-2021-1936846, accessed on 10.09.2023.

39 Vieira: Peer-to-Peer Energy Trading in a Microgrid Leveraged by Smart Contracts, 2021, p. 1 ff.; World Economic Forum 2022, Digital solutions can reduce global emission by up to 20%#.

40 Groschopf: Smart Contracts for Sustainable Supply Chain Management, 2021, p. 2 ff.; De Stefano: Negotiating the algorithm": Automation, artificial intelligence and labour protection, 2018, p. 17 f.

41 Raihan: Reshaping the Future of Recruitment through Talent Reputation and Verifiable Credentials using Blockchain Technology, 2022, pp. 212, 220 f.; Koncheva: Blockchain in HR, 2019, p. 787, 787 ff.; Lorraine: Digitalization and Employment, ILO, 2022, pp. 27 f.

42 Mauerhofer: The Role of Law in Governing Sustainability, 2021, p. 5 ff.

43 Alabdukarim, Yazeed: Managing Expatriate Employment Contracts with Blockchain, 2023, p. 1, 4 ff.

IV. LEGAL AND REGULATORY PROBLEMS OF SMART CONTRACTS

Smart contracts pose significant challenges to the German legal system, particularly in the context of recognition, enforceability, dispute resolution, and cross-border legal issues.[44]

1. RECOGNITION, LACK OF LEGAL CLARITY AND ENFORCEABILITY

The recognition and legal status of smart contracts have become subjects of controversial debate in the legal doctrine, creating hurdles for their enforceability and legal clarity. Divergent opinions range from recognizing smart contracts as pure technological constructs to substitutes for traditional contracts.[45] This disparity underlines not only the complexity of this interdisciplinary field of research, but also the necessity for a holistic approach that integrates legal and technological perspectives to establish a clear and harmonized legal framework. Legal uncertainty can prevent businesses from adopting smart contracts. Especially in the field of employment law, the likelihood of disputes and uncertainty are relatively high due to the fact that labour law is based on various frameworks, including different statutes, collective bargaining agreements and case law.[46] In summary, the recognition and legal status of smart contract are problematic for the effective implementation of smart contracts and require a regulatory response.

2. PRIVACY CONCERNS IN EMPLOYMENT LAW

Smart contracts raise privacy concerns, particularly regarding the storage and processing of data on publicly accessible blockchains.[47] Adherence to the European Union's General Data Protection Regulation („GDPR") is thus problematic. Due to

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44 Koncheva: Blockchain in HR, 2019, p. 787, 787 f.; Bini: Introduction to Blockchain: Between Autonomisation and Automatization, Challenges and Risks for Labour Law, 2022, pp. 124, 138.

45 Wolter: Modul Paper II, 2023, p. 1 ff.

46 Bini: Introduction to Blockchain: Between Autonomisation and Automatization, Challenges and Risks for Labour Law, 2022, pp. 124, 135 ff.; European Parliament, draft report on fair working conditions, rights and social protection for platform workers – new forms of employment linked to digital development (2019/2186); Recital 12.

47 De Stefano: Negotiating the algorithm: Automation, artificial intelligence and labour protection, 2018, 13 ff.

the sensitivity of personal data employment law will be the focus of the following discussion.[48]

A major concern is the **violation of the principle of equal treatment** and non-compliance with the General Equal Treatment Act and German Basic Law in terms of discrimination of employees by implementing smart labour contracts.[49] Data sets often reveal patterns that include personal characteristics such as race, gender, age are included. These patterns can influence smart contract driven decision-making processes and violate the principle of equal treatment.[50]

Yet another problem is the **violation of the principle of employee participation**. Using smart contracts in employment might lead to an imbalance in the negotiation power of employees and can thus violate the freedom of contract and employee participation principles in line with the German Works Constitution Act.[51] In employment law employees and employers are generally free to individually agree on terms and conditions of their employment contract.[52] However, smart contracts terms and conditions are often predetermined, not negotiable and unchangeable due to the nature of smart contracts. For these reasons, employees may experience limitations in their negotiation power, and bargaining power may be shifted to the employer.

3. DISPUTES

Even though smart contracts can increase transparency and trust, they can give rise to disputes, especially concerning technical, commercial, and legal matters. Disputes can occur in connection with coding errors, conflicting terms or unforeseen circumstances.[53] Effectively resolving these multidimensional disputes requires expertise in both law and blockchain technology.[54]

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48 Alabdukarim, Yazeed: Managing Expatriate Employment Contracts with Blockchain, 2023, p. 1, 12 f.

49 European Parliament, draft report on fair working conditions, rights and social protection for platform workers – new forms of employment linked to digital development (2019/2186); Recital 24 f.

50 Lorraine: Digitalization and Employment, ILO, 2022, pp. 28; De Stefano: Negotiating the algorithm: Automation, artificial intelligence and labour protection, 2018, 7 ff.

51 Rainen: Beyond Employment Status: Insights from the Competition Law Guidelines on collective Bargaining, 2022, pp. 167, 184 f.

52 Alabdukarim, Yazeed: Managing Expatriate Employment Contracts with Blockchain, 2023, p. 1, 15 f.

53 Gilcrest/Carvalho: Smart Contracts: Legal Considerations, 2018, pp. 3277, 3279 ff.

54 Marchenko: On Determining the Legal Nature of Smart Contract, 2021, p. 175, 177 f.; Buchwald: Smart Contract Dispute Resolution, 2020, pp. 1369, 1413 f.; Schmitz: Making Smart Contracts „Smarter" with Arbitration, 2022, p. 5 f.

Smart contracts can also be deployed in dispute resolution mechanisms, such as arbitration or mediation.[55] However, the implementation of smart contracts into the arbitration process may face challenges due to the unclear enforceability of smart contracts. Additionally, the enforceability of arbitral awards has not been clarified yet.[56] Yet another aspect to consider is confidentiality due to the transparency of smart contracts and their operation on public blockchain.[57]

4. CROSS-BORDER LEGAL ISSUES

Moreover, interoperability of smart contracts leads to cross-border legal issues. In this context jurisdictional problems such as conflict of laws issues, compliance with international treaties and agreements and non-compliance with diverse regulatory requirements raise problems and need to be addressed. Parties involved in a smart contract transaction may be in different countries and their rights and obligations can be subject to conflicting laws. Determining the governing law of smart contracts across diverse jurisdictions requires careful consideration. This may necessitate international agreements and treaties for the enforcement of smart contracts.

5. CONCLUSION

Smart contracts raise various problems, especially in terms of enforceability, privacy, dispute resolution and cross-border legal issues. Addressing these issues is crucial for harnessing the full potential of smart contracts.

V. CONCLUSION

In conclusion, the analysis highlights the significant potential of smart contracts to address key legal issues, ranging from resolving ambiguity in contract language to ensuring automatic compliance with regulations and enhancing sustainability.

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55 Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 116 ff.; Schmitz: Making Smart Contracts „Smarter" with Arbitration, 2022, p. 5 f.; Schmitz: Online Dispute Resolution for Smart Contracts, 2019, p. 103, 110 f.

56 Katsh: Digital Justice, 2017, p. 14 ff.

57 Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 90 ff.

However, to fully leverage the advantages of smart contracts, it is imperative to establish legal certainty by implementing regulatory measures that effectively address key challenges, including recognition, privacy concerns, smart contract disputes, and cross-border legal issues. Moreover, given the continuously evolving nature of the development of smart contracts, the regulatory framework needs to be dynamic to foster an inclusive and legally secure environment.

Ultimately, a robust regulatory framework is essential for fostering trust, promoting innovation, and facilitating the widespread adoption of smart contracts.

C IMPLICATIONS AND REQUIREMENTS FOR GERMAN LAW AND SMART CONTRACTS

The questions are the same, but
the answers have changed.

Albert Einstein

In accordance with the advantages and problems discussed in the previous sections B. III and B. IV., in this chapter implication are derived in the following. This chapter follows the process steps of the smart contract lifecycle (B. II.) to ensure that the implications cover all phases of smart contracts, whereby the focus lies on the creation phase. In order to fulfill the need for a holistic approach (A., I., B. IV. 1.), both perspectives are assessed: German law and smart contracts.

I. CREATION AND FREEZE

In accordance with the phases of the smart contract lifecycle (B. II. 2.), implications concerning the phases „creation“ and „freeze“ are derived in the following.

1. FULFILLMENT OF WRITTEN FORM REQUIREMENT

To be legally enforceable under German law, smart contracts must adhere to the form requirements pursuant to German civil law.[58] Typically, contracts like employment leases and consumer loan agreements require a written form as per Art. 126 of the German Civil Code. However, smart contracts, operating on blockchain and code, do not satisfy these requirements and risk being deemed invalid. Consequently, solutions could either include having a separate written agreement related to the smart contract or adapting German civil law to accommodate smart contracts. While Art. 126a of the German Civil Code allows the substitution of written form with a qualified electronic signature (QES) in accordance with the Electronic Signature Act, smart contracts related declarations of will are logged on distributed ledgers, precluding the possibility of QES integration.[59]

In this context it is imperative to recognize the underlying intent and purpose of the written form requirement anchored in German law within the context of smart contracts. The purpose of the written form is to ensure a high degree of security and to avoid interchangeability of contract pages or contract regulations.[60] Given the inherent security and unalterable nature of smart contracts, it can be argued that the essence and intent of the written form requirement are upheld in the context of smart contracts.

A potential solution could involve considering smart contract identifiers on the blockchain as fulfilling the digital form requirement. The documentation is recorded on the distributed ledger technology in form of a unique identifier.[61] In a regulation for smart contracts the qualified electronic signature could therefore be replaceable with a unique identifier such as the account address deposited in the blockchain. This is fulfilling the purpose of the digital form requirement: unambiguous identification of the issuer and security.[62]

Another option is to classify smart contracts operating on distributed ledger under Art. 41 (1) of the EU Regulation No. 910/2014 as an electronic time stamp. This

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58 Durovic: The Enforceability of Smart Contracts, 2019, p. 493, 506 ff.; Heckelmann: Zulässigkeit und Handhabung von Smart Contracts, 2018, 504.

59 Guggenberger: Handbuch Multimedia-Recht, 2022, Rn. 13.

60 Heckelmann: Zulässigkeit und Handhabung von Smart Contracts, 2018, 504.

61 Durovic: The Enforceability of Smart Contracts, 2019, p. 493, 505 f.; Onufreiciuc: Regulation of the Smart Contract in (Romanian) Civil Law, 2021, p. 95, 100 f.

62 Durovic: The Enforceability of Smart Contracts, 2019, p. 493, 505 f.

approach would facilitate harmonization within the EU by adhering to the EU Regulations No. 910/2014. Pursuant to Art. 41 (1) of the EU Regulation No. 910/2014 an electronic time stamp shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements of the qualified electronic time stamp. Electronic time stamps thus have legal effect and are deemed to fulfill the qualified electronic time stamp as a legally valid piece of proof.

2. DATA PROTECTION AND PRIVACY

The protection of personal data pursuant to Art. 7, 8 of the Charter of the Fundamental Rights of the European Union is another major topic. Operating within decentralized ledger technology frameworks, smart contracts often involve the access and processing of sensitive data, especially in the field of employment law (B. IV. 2.) and finance. Compliance with principles like equal treatment and employee participation is essential in employment law. Thus, a harmonized framework for smart contracts must consider compliance with existing privacy regulations while ensuring transparent execution.

3. SMART CONTRACT CONCLUSION

In assessing the conclusion of a legally valid contract in terms of smart contracts, it is crucial to distinguish between two types: (a) smart contracts that are executing terms of an underlying agreement, and (b) smart contracts that are forming a contract without an underlying agreement.

In case of (a) the contract conclusion process aligns with traditional law principles and will not be discussed further in this article. However, in case of (b), the contract conclusion becomes more complex. Here, the start and end of the execution of the contract's code can be regarded as analogous to the offer and acceptance stages of contract formation.[63] As the smart contract automatically generates and transmits declarations of intent, it can thus be argued that these actions constitute an implicit contract conclusion.[64] The interpretation of these declarations must follow general legal principles pursuant to Art. 133, 157 German Civil Code while taking into account the objective horizon of the recipient.[65]

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[63] Levi: An Introduction to Smart Contracts, 2018; Gyung-Young: A Legal Study on the Smart Contract based on Blockchain, 2017, p. 4 f.

[64] Durovic: The Enforceability of Smart Contracts, 2019, p. 493, 494; Levi: An Introduction to Smart Contracts, 2018.

[65] Guggenberger: Handbuch Multimedia-Recht, 2022, Rn. 11 ff.

4. GENERAL TERMS AND CONDITION

The validity of general terms and conditions in the context of smart contracts presents intriguing questions.

A) EXISTENCE OF GENERAL TERMS AND CONDITIONS

The code of a smart contract, or parts thereof, may be considered as general terms and conditions as per Art. 305 I German Civil Code and could thus be subject to content control reviews. If the code of a smart contract incorporates standards that are predefined and are included in multiple smart contracts, it may qualify as general terms and conditions under Art. 305 I of the German Civil Code. Also the fact that according to Art. 305 I sentence 2 German Civil Code general terms and conditions exist irrespective of form and font, supports the thesis that the code can represent general terms and conditions.

In considering consumer protection, it is essential to ensure that consumers are protected against unilaterally disadvantageous conditions, particularly given the technical complexities of smart contracts.[66] Contracting parties may not always possess the expertise to discern all terms and conditions embedded within the code of a smart contract, thereby potentially violating transparency principles as per Art. 307 I S. 2 of the German Civil Code.[67]

Nonetheless, consumer protection becomes even more critical in the context of smart contracts, as their automated execution and inability to be stopped increase the risk of unilateral and disadvantageous transactions. Consequently, measures must be in place to mitigate these risks.

B) DECISION XII ZR 89/21 DATED DECEMBER 26TH, 2022

Decision XII ZR 89/21, dated December 26th, 2022, issued by the German Federal court of Justice, addresses the inclusion of general terms and conditions in smart contract execution, subjecting them to content control review on a case-by-case basis.

In this decision the Federal Court of Justice examined the validity of a clause within general terms and condition that entitled the blocking of an e-car battery recharging

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66 Guggenberger: Handbuch Multimedia-Recht, 2022, Rn. 16 f.

67 Guggenberger: Handbuch Multimedia-Recht, 2022, Rn. 14 ff.

option under certain conditions. The clause was rendered invalid by the Federal Court of Justice since it unreasonably disadvantages the tenant and since a clause to this effect in general terms and conditions is inadmissible due to its one-sided contractual arrangement. Consequently, the automatic blocking feature facilitated by smart contracts was nullified.

This decision by the German Federal Court of Justice does not only limit the enforceability of smart contracts but also its innovative potential. While the ruling does not directly address the implications of automatic smart contract executions, it renders a key functionality of smart contracts - automatic execution of terms and conditions when certain criteria are fulfilled - void. By grounding its decision in the specifics of the individual case and German legal principles, the court shows that evolving technologies must still adhere to existing legal principles, imposing limitations on the effective implementation of smart contracts.

The result of the judgement illuminates the urgent necessity to establish a legal framework for smart contracts.

5. ARBITRATION

While disputes can occur in connection with smart contracts, smart contracts can also be used as effective means for resolving disputes.[68] Thus, in the following a dual perspective assessment is conducted: (a) arbitration for smart contract disputes, and (b) dispute resolution via smart contracts - so-called on-chain arbitration.

A) ARBITRATION FOR SMART CONTRACT DISPUTES

In general, arbitration is a suitable alternative dispute mechanism for addressing the complexity of smart contract disputes.[69] However, implications need to be addressed with regard to the arbitration agreement, the choice of arbitrators, and the arbitral award.

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[68] Schmitz: Making Smart Contracts „Smarter" with Arbitration, 2022, p. 2 f.

[69] Wolter: Module Paper IV, 2023, p. 1 ff.; Bantekas: An Introduction to International Arbitration, 2015. pp. 218, 218 ff.; Papeil: Conflict of overriding mandatory rules in arbitration, 2010, pp. 341, 360 ff.

Clear and unambiguous **arbitration agreements** are essential for enforceable dispute resolution via arbitration.[70] To enable arbitration in connection with smart contracts, the contracting parties must agree on arbitration as the dispute resolution mechanism as part of the smart contract.[71] A customization of arbitration terms, including the applicable rules, procedures, the seat of arbitration for determining the jurisdiction, and governing law needs to be agreed for ensuring an effective resolution process.[72]

The expertise of arbitrators in both law and distributed ledger technology is recommended for smart contract disputes.[73] Taking this requirement into account during the **arbitrator selection process** ensures informed and effective resolution of smart contract disputes.[74]

Arbitral awards are generally enforceable in different jurisdictions and address the complexity of cross-border disputes, which naturally challenges national legal systems in terms of smart contracts as a result of to their interoperability nature.[75] Arbitration is preferable for resolving cross-border disputes due to its flexibility and enforceability and due to the fact that arbitral awards are enforceable across borders.[76] Adherence to international conventions and legal frameworks ensures enforceability across jurisdictions, addressing the interoperability challenges of smart contracts.[77]

B) ON-CHAIN ARBITRATION

Smart contracts are also drivers for innovating the arbitration process, particularly through so-called on-chain arbitration. This method automates the execution of arbitration proceedings using smart contracts. When arbitration agreements are directly incorporated into the code of the smart contract, the parties establish a predetermined dispute resolution mechanism which serves as a trigger to automatically

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70 Ali: Power of Arbitration Agreement, 2019, pp. 71, 71 ff.; Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 120; Schmitz: Online Dispute Resolution for Smart Contracts, 2019, p. 103, 122 f.

71 Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 120.

72 Ali: Power of Arbitration Agreement, 2019, pp. 71, 73 f.

73 Borges: Law and Technology, 2022, p. 340 ff.; Buchwald: Smart Contract Dispute Resolution, 2020, pp. 1369, 1389 ff.; Wolter: Modul Paper IV, 2023, p. 11.

74 Papeil: Conflict of overriding mandatory rules in arbitration, 2010, pp. 341, 343 ff.

75 Moses: International Commercial Arbitration, 2017, pp. 225, 226 ff.

76 Moses: International Commercial Arbitration, 2017, pp. 225, 226 ff.

77 Papeil: Conflict of overriding mandatory rules in arbitration, 2010, pp. 341, 343 ff.

initiate arbitration proceedings resulting in streamlined decisions and increased accountability.[78]

In the absence of a harmonized framework for smart contracts and specifically for on-chain arbitration, the contracting parties need to ensure that an **arbitration agreement** for utilizing smart contracts within arbitration is reached during contract conclusion.[79] By effectively incorporating smarts contracts in arbitration clauses - even as part of the smart contract itself - efficiency will be enhanced.[80] However, compliance with applicable laws and jurisdictions, arbitrator selection, and form requirements are necessary for enforceability.

Incorporating **arbitral awards** into smart contract code enables automatic execution of the agreement.[81] Nevertheless, the enforceability of arbitral awards under on-chain arbitration is subject to jurisdictional considerations. To render arbitral awards that are included in smart contracts enforceable, implications for German law arise.[82] Internationally harmonized arbitration rules for on-chain arbitration are essential for their enforceability. An example is the so-called Codelegit Certified Blockchain Arbitration Library, in which standard codes for Blockchain arbitration are available and can be used for an effective incorporation into smart contracts.[83] This way not only enforceability is ensured but the library also offers standardization and harmonization in die field of on-chain arbitration.[84]

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78 Wiegandt: Blockchain and Smart Contracts and the Role of Arbitration, 2022, p. 671, 671 f.; Buchwald: Smart Contract Dispute Resolution, 2020, pp. 1369, 1384 ff.; Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 119 ff.; Katsh: Digital Justice, 2017, p. 14; Kasatkina: Dispute Resolution Mechanism for Smart Contracts, 2022, pp. 143, 151 ff.

79 Schmitz: Online Dispute Resolution for Smart Contracts, 2019, p. 103, 115 f.

80 Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 120; Schmitz: Online Dispute Resolution for Smart Contracts, 2019, p. 103, 122 f.

81 Howell: Uncertainty and dispute resolution for blockchain and smart contract institutions, 2021, pp. 545, 553 ff.; Buchwald: Smart Contract Dispute Resolution, 2020, pp. 1369, 1380 f.; Michaelson: Arbitrating Disputes Involving Blockchains, 2020, pp. 89, 120 ff.

82 Ustun: Smart Legal Contracts & Smarter Dispute Resolution, 2022, p. 111, 112 ff.; Buchwald: Smart Contract Dispute Resolution, 2020, pp. 1369, 1380 f.; Schmitz: Online Dispute Resolution for Smart Contracts, 2019, p. 103, 110 f.

83 Michaelson: Blockchain and Smart Agreement Disputes Call for Arbitration's Strengths, 2021, p. 91, 91 f.; Jünemann: Can Code be Law?, 2021, p. 6.

84 Schmitz: Online Dispute Resolution for Smart Contracts, 2019, p. 103, 110 f.

II. EXECUTION

Also, during the execution phase of the smart contract lifecycle (B. II.) challenges arise. Issues such as liability in case of non-performance or defects as well as modifications are integral part of the execution phase and require legal consideration.

1. LIABILITY FOR NON-PERFORMANCE AND DEFECTS

The allocation of responsibility for the operation of machines has been a longstanding debate, especially in the era of automation and robotics.[85] Similarly, in the realm of smart contracts, determining liability for non-performance or defects is a critical issue. The equation arises as to how liability for unintended errors in the code, resulting in damages, should be assigned.

Traditional legal frameworks typically assign responsibility to the party responsible for the error causing the damages.[86] However, in the context of distributed, decentralized ledger structures like blockchain, attributing data errors to a single party becomes a challenge.[87] This ambiguity makes it difficult to establish clear liability in the context of smart contracts.[88] Therefore, effective implementation of smart contracts necessitates clarity in liability allocation.

Some legal scholars argue that liability should be attributed to the human closest to the error.[89] Following this approach, the software engineer responsible for programming the smart contract code could be directly liable for any errors. However, this approach may hinder innovation and thus a balanced approach is needed to limit software engineers' liability for code errors while adequately addressing potential damages.

Hence, for smart contracts a solution that limits liability of software engineers for errors in the software code on the one hand and sufficiently covers potential damages of the involved parties on the other hand must be established. A first solution could be a clear division of liability for parties involved in smart contracts including

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85 Cvetkovic: Liability in the context of Blockchain-Smart Contract, 2020, p. 83, 93.

86 Capocasale, Standardizing Smart Contracts, 2022, p. 91203, 91209 f.

87 Cvetkovic: Liability in the context of Blockchain-Smart Contract, 2020, p. 83, 93 ff.

88 Heckelmann: Zulässigkeit und Handhabung von Smart Contracts, 2018, 504.

89 Cvetkovic: Liability in the context of Blockchain-Smart Contract, 2020, p. 83, 93 ff.; Onufreiciuc: Regulation of the Smart Contract in (Romanian) Civil Law, 2021, p. 95, 104 f.

an approach that is based on reasonable-care and best efforts. Also insurance coverage for coding errors might be an additional vehicle that can facilitate the liability requirements for smart contracts.

2. MODIFICATIONS

Further implications may arise in connection with Art. 2 I of the Basic Law for the Federal Republic. In today's rapidly evolving business landscape, contracts often require modifications during their execution phase to adapt to changing interests and needs.[90] However, modifying smart contracts presents unique challenges due to their immutable nature on blockchain.[91] Thus, the possibility to modify smart contracts is an essential criterion to ensure the enforceability. This ensures that smart contracts comply with Art. 2 I of the Basic Law for the Federal Republic.

III. FINALIZATION

The final phase of the smart contract lifecycle involves termination, which may be necessary in cases of non-performance or mutual agreement. However, terminating smart contracts presents both technical and legal challenges, as smart contracts cannot be stopped once initiated.[92]

Establishing a safe termination option for smart contracts is thus essential to comply with legal requirements and ensure enforceability, as identified at EU level and stipulated in Art. 30 (1) (b) of the Data Act. This may involve incorporating predefined termination clauses or negotiating termination terms between parties.

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90 Bielefeld: Basics Building a Contract, 2018, p. 31.

91 Meyer: Stopping the Unstoppable: Termination and Unwinding of Smart Contracts, 2020, p. 19 f.; Onufreiciuc: Regulation of the Smart Contract in (Romanian) Civil Law, 2021, p. 95, 101 f.; Woebbeking: The Impact of Smart Contracts on Traditional Concepts of Contract Law, 2019, p. 106, 11f.

92 Meyer: Stopping the Unstoppable: Termination and Unwinding of Smart Contracts, 2020, p. 19 f.; Schrepel: Smart Contracts and the Digital Single Market Through the Lens of a „Law + Technology" Approach, 2021, p. 37 f.

IV. CONCLUSION

Thus, German law provides a foundation for the compatibility of smart contracts within the legal system. Nevertheless, challenges persist, particularly regarding enforceability, privacy concerns, disputes, cross-border legal issues and consumer protection.

The implications derived from fundamental legal principles highlight the necessity for a proactive response within German law to accommodate smart contracts. Establishing legal certainty and ensuring enforceability demand the development of an internationally harmonized legal framework. Critical aspects to consider include data protection, form requirements, jurisdiction, liability, and the ability to modify and terminate smart contracts.

Consequently, addressing the necessity for an adaptable legal framework that actively responds to the rapid development of smart contracts while safeguarding rights of individuals and obligations is no longer sufficient. As smart contracts and national legislation continue to evolve accordingly, it is essential to ensure the development of a harmonized legal framework for the legally certain operation of smart contracts. To accommodate the multidisciplinary complexity, a holistic approach linking legal and technological aspects is required for developing a harmonized clear legal framework.

D LEGAL FRAMEWORK FOR SMART CONTRACTS

The best way to predict the future
is to invent it.

Alan Kay

This chapter serves as a response to the ongoing discussions regarding the transferability of German legal concepts to smart contracts. It includes a comparative analysis of existing legal frameworks in different jurisdictions and the development of a draft legal framework based on previous findings under B. and C.

I. COMPARATIVE ANALYSIS OF EXISTING FRAMEWORKS

While German law lacks a specific framework for smart contracts, investigations have started both at EU level and in various jurisdictions. In the following a comparative analysis is conducted to evaluate existing frameworks for smart contracts thus adding new perspectives.

1. EU REGULATORY FRAMEWORKS

Despite the identified need for harmonized standards, a comprehensive legal framework for smart contracts at EU level is still missing.[93] However, the necessity to establish such a framework is recognized, as evidence by its inclusion in the European Strategy for Data and in the Data Act.[94]

The **Data Act** outlines general requirements for smart contracts, focusing on robustness[95], safe termination, data archiving, continuity, and access control (Art. 30 (1) of the Data Act).[96] While the Data Act mainly takes a technical focus, its inclusion of smart contracts as legally valid and enforceable vehicles for data sharing demonstrates legal recognition.

EU initiatives on **Decentralized Finance** („DeFi"), a finance service utilizing smart contracts, also lack specific legal frameworks for blockchain technology.[97] While smart contracts are integral to DeFi, EU guidelines remain at a general level.[98] A current EU approach to DeFi emphasizes the importance of trust and use of existing principles for the deployment of smart contracts, but a clear and legally certain framework, particularly for finance transactions, is missing.

Hence, there is a recognized imperative for a harmonized legal framework at EU level, leading to the initiation of multiple investigations. However, currently the focus lies on the general need for defining requirements regarding a legal framework.

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93 In order to further strengthen EU Member states and to drive the digital transformation in the European Union, the European Commission has set the European Strategy for Data as a priority for the period 2019-2024.

94 European Commission, A European strategy for data, 19.02.2020, p. 7; Blockchain Strategy.

95 Robustness in software engineering is defined as: „The degree to which a system or component can function correctly in the presence of invalid inputs or stressful environment conditions." (610.12-1990 IEEE Standard Glossary of Software Engineering Terminology, 1990, p. 64.)

96 Wolter: Modul Paper I, 2023, p. 1 ff.; Podszun/Pfeifer: EU Data Act, 2022, p. 953, 959.

97 Schär, DeFi's Promise and Pitfalls, 2022, p. 33.

98 Meyer/Welpe/Sandner: ECIS 2022, p. 2.

2. COMMON LAW AND CIVIL LAW FRAMEWORKS

In the absence of a clear framework for smart contracts at supranational level, various countries have taken proactive measures to ensure the enforceability of smart contracts at national level.[99] These frameworks, found across jurisdictions such as Italy, the UK, Singapore, and the US, aim to address the enforceability of smart contracts while navigating challenges associated with automatic execution and immutability.[100] In the following smart contract frameworks developed under Italian and UK law will be focused, offering insights from civil law and common law perspectives respectively.

Italy has emerged as one of the pioneering **civil law** countries in establishing rules that provide a legal basis for smart contracts' enforceability.[101] Enacted in February 2019, Law No. 12/2019, which converted the Simplification Decree, Law Decree No. 135/2018, laid the groundwork for smart contract regulation. According to Law No. 12/2019, smart contracts are characterized as software programs operating on distributed ledger-based technologies, automatically binding two or more parties based on predefined terms. However, a central question that remains open in context of the definition of smart contracts under Law No. 12/2019 is whether smart contracts are recognized as contracts under Italian civil law or if smart contracts serve as transactions that are executing contracts only. Further it is stipulated that smart contracts satisfy the requirement of written form. For this, computer identification of the parties involved is ensured through a process which is having the requirements set by the Agency for Digital Italy with guidelines to be adopted within 90 days from the date of entry into force of the law converting the Law Decree No. 135/2018.[102]

Conversely, in the UK, a government advisory published in November 2021 concluded that the existing legal order adequately supports the implementation and use of smart contracts.[103] Leveraging the flexibility of **common law**, the UK legal system

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99 According to Italian Law smart contract shall comply with the rules applicable for any contract concluded in writing. Article 8 of Law no. 12/2019 defines smart contracts as "computer programs that operate on distributed registers-based technologies and whose execution automatically binds two or more parties according to the effects predefined by said parties".

100 Law Commission Reforming the Law: Smart legal contracts Advice to Government, 2021.

101 Durovic/Lech: The Enforceability of Smart Contracts, 2019, p. 563,565; Volos: The Technology of Blockchain and Smart Contract and Their Regulation under the Conflict of Laws of the European Union, 2020, p. 563, 564.

102 Law No. 12/2019, Art. 8 (2) Si definisce "smart contract" un programma per elaboratore che opera su tecnologie basate su registri distribuiti e la cui esecuzione vincola automaticamente due o piu' parti sulla base di effetti predefiniti dalle stesse. Gli smart contract soddisfano il requisito della forma scritta previa identificazione informatica delle parti interessate, attraverso un processo avente i requisiti fissati dall'Agenzia per l'Italia digitale con linee guida da adottare entro novanta giorni dalla data di entrata in vigore della legge di conversione del presente decreto.

103 Law Commission Reforming the Law: Smart legal contracts Advice to Government, 2021.

accommodates smart contracts without necessitating statutory law reforms. To clarify the legal status of smart contracts, the UK Law Commission introduced distinct categories: (a) Natural language contracts with automatic performance by code (b) Hybrid contracts with terms partially in traditional contracts and partially in code (c) Smart contracts recorded solely in code. However, aspects such as remedies for contractual breaches and interpretation of smart contracts require separate frameworks.

Conclusively, both the Italian and UK frameworks offer valuable insights into the evolving landscape of smart contract regulation. However, in civil law countries such as Germany, further development of a comprehensive legal framework is necessary to address specific nuances arising from smart contracts. To prevent a fragmented legal landscape and given the interoperability feature of smart contracts, a harmonized legal approach is necessary. This approach ensures a cohesive regulatory environment for smart contracts operating seamlessly across borders, fostering innovation and facilitating cross-border transactions with legal certainty.

II. DRAFT PROPOSAL FOR A GERMAN LEGAL FRAMEWORK

To address the need for accommodating a legally certain use of smart contracts within the German legal order, a first draft legal framework was developed by the author.[104]

The draft proposal for a German legal framework outlines measures to accommodate the use of smart contracts within the German legal system, ensuring legal certainty and fostering innovation. Key provisions include the definition of smart contracts focusing on automatic execution, categorization into three contract constructs (executing, hybrid, and pure), and stipulations regarding their recognition and enforceability. The framework emphasizes compliance with applicable laws and standards, including data protection regulations.

Additionally, the proposal addresses dispute resolution mechanisms, regulatory oversight, sustainability considerations, and the responsibility of smart contract en-

[104] Wolter, Master Thesis, 2023, p. 49 ff.

gineers. It highlights the importance of alternative dispute resolution methods and regulatory audits for compliance.

III. CONCLUSION

In conclusion, the absence of a legal framework in German law poses significant challenges to the seamless application and enforceability of smart contracts. While other jurisdictions are actively exploring the enforceability of such contracts, Germany's lack of specific legislation leaves it at a disadvantage in this rapidly evolving landscape. Common law principles offer a more adaptable foundation for smart contracts, benefiting from case law. Thus, there is a pressing need for Germany to develop a tailored legal framework to ensure the effective use and enforceability of smart contracts within its legal system. The developed draft framework shall serve as a clear response to the ongoing debates.[105]

E CONCLUSION

The end of law is not to abolish or restrain, but to preserve and engage freedom.
For in all the states of created beings capable of law,
where there is no law,
there is no freedom.

John Locke

The transformative potential of smart contracts across various sector is undeniable; however, their effective integration into the legal landscape requires clarity and certainty.

I. RESPONSE TO THE RESEARCH QUESTION

This analysis shows the need for a nuanced approach to establish legal certainty in the domain of smart contracts. While existing legal principles provide some guidance, they are only partially applicable to smart contracts. Structured along the

[105] Wolter, Master Thesis, 2023, p. 49 ff.

V-Model for Software and System Development, this article discusses the multidisciplinary challenges of smart contract technology within the German legal order.

While smart contracts offer benefits such as enhanced transparency, streamlined processes, and resolution of legal issues, they also pose challenges related to enforceability, privacy, fulfillment of form requirements, and cross-border legal issues. A critical examination of a German Federal Court of Justice judgment illuminates that new technologies still underly existing legal principles resulting in limitations for innovation, even in the legal domain. Thus, existing legal principles hinder innovation, even though smart contracts address key legal issues such as ambiguity in human contract language, automatic compliance with regulations, and increase of efficiency in legal proceedings. Furthermore, a comparative analysis of frameworks across different jurisdictions shows divergent approaches and underscores the risk of fragmentation of the legal landscape surrounding smart contracts, thus addressing the urgency to establish a harmonized legal framework for smart contracts. By providing a harmonized draft German legal framework for smart contracts, this article contributes to the ongoing discussions.

II. RECOMMENDATIONS FOR FURTHER RESEARCH

The field of smart contracts and law presents numerous research opportunities for short-term, mid-term, and long-term investigations. In the short term, efforts should be directed towards establishing a robust and harmonized legal framework supported by comparative analysis across jurisdictions. Additionally, there is a need for further exploration into standardization in on-chain arbitration. Mid-term research should focus on real-world case studies for gaining industry-specific insights, for assessing sustainability impacts, and for developing multidisciplinary education initiatives. In the long-term, investigations should explore the integration of emerging technologies like AI and IoT into smart contracts while continuously reviewing legal frameworks to ensure they remain adaptive to evolving technological landscapes.[106] Thus, the principle of gradual change continues to guide this dynamic field.

[106] Cvetkovic: Liability in the context of Blockchain-Smart Contract, 2020, p. 83, 93; Jünemann: Can Code be Law?, 2021, p. 6; Brownsword: Law 3.0, 2020, p. 1 f.; Borges: Law and Technology, 2022, p. 340 ff

F APPENDIX: V-MODEL VDI 2206

The V-Model as per *Figure Appendix-1* is a systematic and structured approach that is primarily used in software development and systems engineering. Its name is derived from the characteristic V-shape of the model, illustrating the parallel phases of system design and verification. The left side of the V represents the system design phase including requirements capture, analysis, specification, and draft. The right side of the V represents the verification including component test, integration, and validation. Key of the V-Model is that each phase in the system design is verified and validated with a corresponding test. This systematic and methodical approach helps to reduce errors, improve quality, and enhances project outcomes.

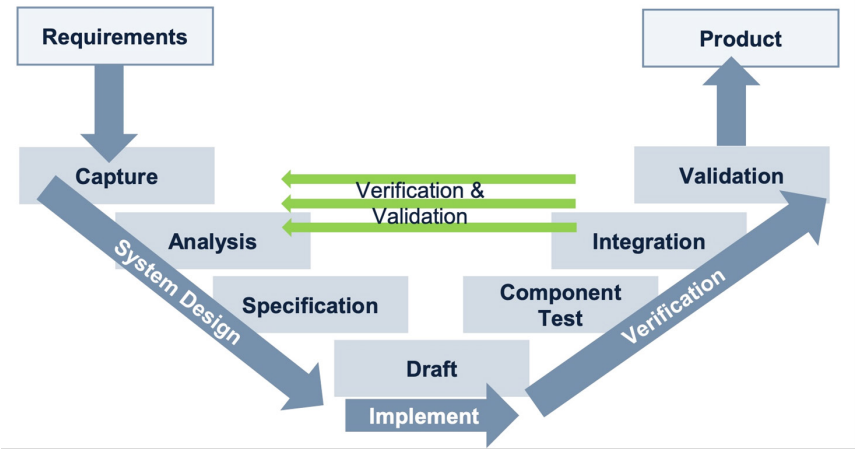

Figure D | Simplification of V-Model VDI 2206

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LIST OF FIGURES

4 COMMON VALUES OF THE EUROPEAN UNION AND THE MEMBER STATES AS AN ESSENTIAL ELEMENT OF THE SUPRANATIONAL LEGAL ORDER

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1 INTRODUCTION

The European Union (EU) is a unique process that has achieved outstanding successes of peace, the internal market, the community of values and self-reliance in world politics. The EU is also unique in its legal structure. It is an association of states in which the sovereign powers are divided between the Union and the Member States and among the respective sovereign bodies.[1]

In the fourth recital in the preamble to the Treaty on European Union, the Contracting Parties reaffirm their commitment to common fundamental values. These should not only be the basis of the respective state activities of the contracting parties; rather, the European Union should be committed to these fundamental values. The function of confirming the commitment of the Contracting Parties to common fundamental values is not only to demarcate the Union from the outside world to keep out non-candidate states. In addition, the emphasis on the fundamental common values and structural principles of the Parties should also underline the excellent importance of the principles mentioned. As common values for the EU, its different components and the Member States, these principles should also have a formative, legitimacy, and identity-building effect.

The EU is a community of values. Since the beginning, this has been part of European integration. With the entry into force of the Treaty of Lisbon, the first sentence of Article 2 TEU states that 'the values on which the Union is founded are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. All institutions of public authority in the EU must respect these fundamental values. This obligation does not only apply within a legal system. Rather, the legal systems mutually commit themselves to a constitutional core. This is most clearly set out in Articles 2, 6, 7 and 49 TEU.

With the Maastricht Treaty on European Union, the Member States introduced for the first time the normative obligation into European law that the systems of government of the Member States must be 'based on democratic principles'.

The values protected by Article 2 TEU are currently at risk in different ways in some Member States. Hungary and Poland are stubbornly violating the EU's fundamental values, jeopardizing its cohesion and prosperity. Since 1992, Article 2 of the EU

[1] Christian Callies in: Christian Calliess and Matthias Ruffert, EUV/AEUV (6th edn, C.H.Beck 2022) art. 2 paras 27-29.

Treaty states: 'The values on which the Union is founded are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Poland is under discussion and criticism regarding its handling of the rule of law. In the case of Hungary, it is the disregard for the values of the EU that leads to the two Member States leaving the community of values. They are accused of serious violations.

The rule of law affects every citizen. It guarantees that legal recourse is open; without them, the fight against corruption is hopeless. If, as in Poland, judges are to be prohibited from appealing to the European Court of Justice (ECJ), the entire legal edifice falters. The single market only works if companies can rely on the existence of independent courts across the EU to guarantee the security of their investments.

In many areas, the European legal system is based on the principle of mutual trust, i.e., on the recognition of legal acts of other Member States without in-depth legal review of their own. In its judgment in the Case of Portuguese Judges, the ECJ expressly invokes the principle of mutual trust and derives this from Article 2 TEU. 'The mutual trust between the Member States, and in particular between their courts', the Court of Justice continued, 'is based on the premise that member states share a set of common values based on as stated in Article 2 TEU, the European Union is founded'[2]. Where this trust is lacking, significant functional deficits arise.

The new EU accession candidate Ukraine also has serious reservations about EU accession regarding respect for the common values of the EU. Ukraine is committed to European values and defends them against Russia according to its own understanding. However, before the war, the country was quite far from meeting the EU's requirements for a democratic and corruption-free constitutional state. The Ukrainian economy is unlikely to be competitive within the EU.

The hitherto rather undisputed topic of the community of values as a common identity basis for the European Union is due to current developments.

Values are basic attitudes of society or individuals, which are characterized by a special firmness and conviction of correctness. They have a normative orientation and order function. They distinguish good from bad and right from wrong. The totality of values forms the value system of a society that uses it to construct its identity.[3]

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[2] Case C-64/16 Associação Sindical dos Juízes Portugueses (27 February 2018).

[3] Christian Calliess, ‚Europa als Wertegemeinschaft – Integration durch europäisches Verfassungsrecht' (2004) JuristenZeitung 1033.

Legally, values describe certain goods that a legal system recognizes as predetermined or abandoned. Each standard is therefore based on at least one value, which is concretized and converted by it. Values can serve as a guideline for interpretation and a standard of judicial review and can develop legitimating significance.[4]

A value has a high normative orientation and moves in the areas of law and morality. Values serve to make the world comprehensible. Values are fought for. This is particularly evident in the Ukraine war, in which the world community has taken up the cause of defending the values of the Western world and freedom. As basic values, values form the ultimate meaning of a person or a community. For this reason, it was important for the EU to anchor a foundation of values to present itself as a preserver of undisputed values. This is intended to secure their existence, but also a certain political dominance in the long term. Values affect people's lives and determine their existence.

Values were considered rational in modern times. Rationalized values are therefore characterized by their conscious and justifiable setting, the associated ability for self-reflection and self-criticism, which affect one's own values and by the constant attempt to arrange values logically and systematically.[5] Further characteristics of this are also the abstraction of value bids, the extensive renunciation of absolute values, the existence of different spheres of value and the containment of the consequences of harsh value judgments by transfer into the purpose-rational law.[6]

In the earlier case law of the Federal Court of Justice, values were regarded as an extra-legal phenomenon, as a social phenomenon, which was only recognized as legally significant by express references such as those to the Moral Law.[7]

Now what are these common values of the EU, on what basis have they developed and what protective mechanisms are there for the dangers identified? The answers to these questions are now to be shown in this work.

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4 Ibid.

5 Udo Di Fabio, ‚Grundrechte als Werteordnung' (2004) JuristenZeitung.

6 Ibid.

7 Ibid.

2 THE EUROPEAN UNION AS A COMMUNITY OF VALUES

The EU is a community based on common values. Its value horizon is outlined in fundamental documents (Articles 2 and 6 TEU) and substantiated by reference to the Charter of Fundamental Rights of the EU. The founding treaties of the European Communities and the EU did not contain a catalogue of fundamental rights comparable to the Basic Law. Initially, the protection of fundamental rights was mainly based on the case law of the ECJ, which for decades derived fundamental rights from the constitutional traditions of the member states and from the European Convention on Human Rights (ECHR).

The milestone of a European system of values is the fundamental rights of the Community. At the time of its entry into force, the EC Treaty did not have any protection of fundamental rights against measures taken by the EC institutions due to a lack of a catalogue of fundamental rights. This was problematic because, according to the case law of the ECJ, European Community law should also take precedence over national constitutional law in the case of Internationale Handelsgesellschaft[8], as well as over national fundamental rights. This would have created a gap in the rule of law if there had been no protection of fundamental rights at European level.[9] The Federal Constitutional Court had therefore also objected to this constitutional problem in its Solange I decision.[10]

The ECJ closed this gap, starting with its decision in the Stauder[11] case in 1969, initially by means of judicial legal training. The ECJ regarded fundamental rights as part of the unwritten general principles of the Community legal order and subjected them to the protection of that order. Those principles are the common values of national constitutional law, in particular of national fundamental rights, which must be observed as an unwritten part of Community law, to be determined by means of an evaluative comparative law.[12] In later rulings, the ECJ referred more and more to

8 Case 11/70 Internationale Handelsgesellschaft (1970) ECR 114.

9 Calliess (n 3).

10 BVerfGE 37, 271 Decision of 29 May 1974 - 2 BvL 52/71.

11 Case 29/69 Stauder v City Ulm (12 November 1969).

12 Ibid.

the European Convention on Human Rights.[13] With the Maastricht Treaty in 1992, this judicial protection of fundamental rights was also expressly codified in Article 6 II TEU.

Finally, paragraph 1 of the preamble to the Charter of Fundamental Rights defines the objective of the peoples of Europe 'to share a peaceful future on the basis of common values'. These common values are clarified in the second paragraph of the preamble, according to which the Union is founded on the 'indivisible and universal values of human dignity, freedom, equality and solidarity and is based on the principles of democracy and the rule of law". According to the preamble, the Charter of Fundamental Rights gave the EU a fundamental common foundation of values.

The Charter was originally drawn up by the first European Convention, chaired by Roman Herzog, and approved by the European Parliament and the Council of the European Union, among others. However, the Charter, which was solemnly proclaimed for the first time at the opening of the Nice Intergovernmental Conference on 7 December 2000, did not become legally binding – after the failure of the European Constitutional Treaty – until 1 December 2009, together with the entry into force of the Treaty of Lisbon.

The EU also exports its values by making its already mentioned 'internal' values, in particular those of Article 6 I TEU, in various forms an essential part of its external relations. In accordance with Article 11, the EU's foreign and security policy shall be guided by the objective of upholding common values in accordance with the principles of the Charter of the United Nations, maintaining peace and strengthening international security, and the objective of developing and strengthening democracy and the rule of law, as well as respect for human rights and fundamental freedoms.[14]

2.1 PRINCIPLES OF ARTICLE 2 TEU AND ARTICLE 6 TEU

The European Communities (EC, now the European Union) were originally founded as an international organization which was mainly active in the economic field. Therefore, there was no need for explicit rules on respect for fundamental rights, which for a long time were not mentioned in the Treaties and which were in any case

[13] Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary (15 May 1986).

[14] Calliess (n 3).

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed by the Member States in 1950.

However, after the ECJ confirmed the principles of the direct effect and primacy of European law but refused to examine the compatibility of decisions with the national and constitutional law of the Member States[15], some national courts began to raise concerns about the possible impact of this case-law on the protection of constitutional values, such as fundamental rights. If EU law could even take precedence over domestic constitutional law, it would be possible for it to violate fundamental rights. To counter this theoretical risk, both the German and Italian Constitutional Courts issued judgments in 1974 asserting their power to review EU law to ensure its compatibility with the rights enshrined in the Constitution[16].

Subsequently, the ECJ reaffirmed the principle of respect for fundamental rights through its case-law, arguing that the Treaties also protect fundamental rights, which result from the constitutional traditions common to the Member States as general principles of Community law[17]. These are based on the constitutional traditions common to the Member States[18] and on international conventions for the protection of human rights to which the Member States have acceded[19], to which the ECHR belongs[20].

With the gradual extension of the EU's competences to policies that have a direct impact on fundamental rights, such as Justice and Home Affairs, which have then developed into a fully-fledged area of freedom, security and justice, the Treaties have been amended to bind the EU firmly to the protection of fundamental rights. The Maastricht Treaty referred to the ECHR and the constitutional traditions common to the Member States as general principles of EU law. The Treaty of Amsterdam reaffirmed the European 'principles' on which the EU is founded (in the Treaty of Lisbon 'values' under Article 2 TEU) and introduced a procedure for suspending the rights contained in the Treaties in the event of a serious and persistent breach of fundamental rights by a Member State. The drafting of the Charter of Fundamental Rights and its entry into force, together with the Treaty of Lisbon, represent further

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15 Case 1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel Community (1959).

16 BVerfGE 37, 271 (n 10).

17 Case 29/69 (n 11).

18 Case 11/70 (n 8).

19 Case 4/73 Nold v Commission (14 May 1974).

20 Case 36/5 Rutili v Ministre de l'intérieur (28 October 1975).

developments in this codification process, which aims to ensure the protection of fundamental rights in the EU.

In many places, the Treaties refer to the constitutional traditions of the Member States or to the principles of law common to the Member States and thus recognize them as the basis of the Union legal order. The constitutional principles common to the constitutional systems of the Member States are also important for the constitutional association of the European Union, for example when it comes to determining the limits of integration. Numerous provisions of the Treaties on the constitutional traditions common to the Member States.[21] This applies, for example, to the finding in Article 2 TEU. Primary law requires recourse to the constitutional traditions common to the Member States in several places, in particular in the field of fundamental rights. Under Article 6 III TEU, fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States form part of EU law as general principles. Article 52 IV of the GRC also provides that fundamental rights of the Charter, in so far as they result from the constitutional traditions common to the Member States, are to be interpreted in accordance with those traditions.

Article 6 TEU summarizes the individual elements of the European protection of fundamental rights in one standard. It illustrates the evolution of the Union from an economic project to a genuine political community. Their far-reaching powers must also be juxtaposed with comprehensive guarantees of fundamental rights in order to comply with the standard of civilization in Europe.[22]

At the same time, fundamental rights are a subjective-legal criterion for the further development of the Union into an area of freedom, security, and justice (Article 3 II TEU). Mediated by Article 2 TEU, they are among the specially protected values within the meaning of Article 7 TEU. In this sense, one can speak of the EU as a community of fundamental rights.[23]

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21 Article 2, Article 4 II, Article 6 III, Article 48 IV (2), VI (2) sentence 3, Article 49 II, second sentence, Article 50 I TEU; Article 25 II, second sentence, Article 223 I (2) second sentence, Article 311 III, sentence 3, Article 340 II TFEU

22 Frank Schorkopf and others, Das Recht der Europäischen Union (76th edn, C.H.Beck) art. 6, para 14.

23 Armin von Bogdandy, ‚Grundrechtsgemeinschaft als Integrationsziel' (2001) JuristenZeitung 157.

3 FUNDAMENTAL VALUES – CONTENT AND DEFINITION

By the phrase in Article 2 I TEU, 'These values are applicable to all Member States (...) together', the standard explicitly involves the Member States and thus makes them jointly responsible for the pursuit of the values.[24] This means that the values are not only the values of the Union, but also the values of the Member States. In this way, the European union of states and constitutions becomes a set of values.[25] The reference to the Member States expresses their obligation to respect these values after the establishment of the Union or after accession to the Union. Thus, Article 2 TEU also underlines the close link with Article 7 TEU. The principles set out in Article 2 TEU are the structural characteristics of the liberal constitutional state.[26] The collection of common values places the human being at the center of the European Union. The values contain the essential elements in which every citizen of the Union can find himself,[27] and thus form the central core of the Union's identity.

3.1 RESPECT FOR HUMAN DIGNITY

Article 2 TEU puts the concept of human dignity first and foremost, ahead of all other eu fundamental values. Respect for human dignity is thus the central foundation of the values of the European Union. Thus, the Charter of Fundamental Rights, in its Title I in Article 1, also mentions human dignity in the first place. According to this, Article 1 of the Charter of Fundamental Rights, as well as Article 1 of the German Basic Law, stipulates that human dignity is inviolable. It must be respected and protected. But what exactly is meant by the concept of human dignity? The concept of human dignity ties in ties with different traditions of European thought.[28]

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24 Calliess (n 1) art 2 EUV, para 10.

25 Ibid.

26 Hilf/Schorkopf (n 22) art 6 EUV, para 9.

27 COM (2003) 606 final, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Safeguarding and promoting the fundamental values of the European Union, p. 3.

28 Stephan Rixen in: Sebastian Heselhaus and Carsten Nowak (editors), Handbuch der Europäischen Grundrechte (2th edn, C.H.Beck 2020), § 13 para 9.

According to modern conception, human dignity is, on the one hand, the value attributed to all human beings equally and regardless of their distinguishing features such as origin, gender, age, sexual orientation, or status, and on the other hand, the value with which man as a species places himself above all other living beings and things. As a legal concept, human dignity in German-language legal philosophy and legal theory encompasses certain fundamental rights and legal claims of people and is to be distinguished from the colloquial meaning of the term dignity. The idea of human dignity has deep historical roots. Precursors of what is now understood as 'human dignity' can be found in part as early as Roman antiquity, early Judaism and Christianity. The latter primarily include the idea of the godlikeness of man and the resulting fundamental equality of human beings.

However, the concept of human dignity was formulated into a comprehensive philosophical concept only during the European Enlightenment in the 17th and 18th centuries. Samuel von Pufendorf (1632–1694), a German philosopher of natural law and founder of the doctrine of rational law, defines human dignity as follows: 'Man is of the highest dignity because he has a soul that is distinguished by the light of the mind, by the ability to judge things and to decide freely, and which is knowledgeable in many arts.' Pufendorf thus combines the idea of human dignity with the idea of the soul, with the idea of reason and with the idea of (decision-making) freedom.

The philosopher Immanuel Kant defined respectability and human dignity in the broadest sense in his foundation for the metaphysics of customs. For him, the basic principle of human dignity is respect for the other, the recognition of his right to exist and in the recognition of a principled equivalence of all human beings. Kant assumes that man is a purpose in itself and must therefore not be subjected to a purpose that is foreign to him. This means that human dignity is violated when one person uses another merely as a means for his own ends, such as slavery, oppression, or fraud.

The constitutions of many democracies protect rights and freedoms in themselves, without reference to a principle of human dignity. The Bill of Rights of 1776, for example, identifies as inalienable rights 'the right to life and liberty and the ability to acquire and retain property and to seek and obtain happiness and security.' Human dignity is explicitly mentioned as partly the supreme principle of the constitutional order in various Member States of the European Union (such as Germany, Estonia, Greece, Portugal, Spain, Italy, Ireland, Finland, Sweden, and Belgium).

In the EU's legal area, on the other hand, it has not yet been fundamentally clarified what human dignity means, when it is violated, what it protects against and whom

it binds in what way.[29] There is no sufficiently consolidated and meaningful jurisprudence practice of the ECJ in this regard. Since the mid-2000s, the ECJ has referred more frequently to human dignity. However, the normative concept of human dignity has not been comprehensively clarified as a result.[30] In the so-called Stauder ruling[31], the ECJ had not yet ruled on human dignity as part of the EU legal order.[32] It is true that the German main proceedings concerned an alleged violation of human dignity. In this judgment, the ECJ referred only to 'the general principles of law of the Community legal order (...) contained fundamental rights of the person".[33] However, the ECJ did not address human dignity in this decision.

In the decision on the so-called Biopatent Directive[34], the ECJ states the following: 'It is for the ECJ to ensure respect for human dignity and the fundamental right of integrity of the person in the context of monitoring the conformity of the acts of the institutions with the general principles of Community law."[35] In this judgment, however, the ECJ does not explain what it means by the concept of human dignity. Rather, it refers to the protection of the human body. Thus, it is not possible to draw a clear boundary of human dignity to the guaranteed content of the right to the integrity of the person. It cannot be inferred from the decision that human dignity is also to be understood as a subjective right.[36] Even in later decisions, it is not clear whether human dignity is to be understood as a subjective right and thus as a fundamental right or as a principle for interpretation.[37]

To what extent Article 1 of the German Basic Law, which has become the model standard for the first article of the Charter of Fundamental Rights, the ECJ tries to clarify in its judgment on the European arrest warrant.[38] The basis for this was a reference by the Higher Regional Court Bremen in the context of preliminary ruling

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29 Rixen (n 28) § 13 para 3.

30 Rixen (n 28) § 13 para 3.

31 Case 29/69 (n 1).

32 Rixen (n 28) § 13 para 3.

33 Case 29/69 (n 11).

34 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213, 13.

35 Case C-377/98 Netherland v Parliament and Council (9 October 2001).

36 Rixen (n 28) § 13 para 3.

37 Rixen (n 28) § 13 para 3.

38 Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen (5 April 2016).

proceedings under Article 267 TFEU. This concerned extradition on the basis of a European arrest warrant in the event of a risk of detention conditions in the requesting state in violation of human rights. The ECJ's decision on this referral was interesting not only against the background of the concept of human dignity, but above all on the relationship between national constitutional law and European constitutional law. The interesting question here was how the ECJ would position itself on the Solange case law of the Federal Constitutional Court. The Federal Constitutional Court had previously ruled in an extradition case to Italy, stating that Article 1 I of the Basic Law on the lever of identity control, regardless of the general standard for the protection of fundamental rights in the EU, always took precedence over conflicting obligations under EU law.[39] The background of these case was, that a citizen of the United States of America was sentenced to 30 years of imprisonment in Italy – in absence and without notice or representation by a lawyer. The German Higher Regional Court allows his extradition from Germany to Italy, relying on a European arrest warrant and considering it to be sufficient that a new evidentiary hearing for him in Italy is 'at least not impossible".

This could not go unchallenged by the ECJ, because the Federal Constitutional Court not only claimed the last word in the European protection of fundamental rights, but also declared this to be in conformity with European law with reference to the protection of national identity by the Union under Article 4 II TEU. It was not only about the respective material standard of protection in the case of multiple ties, but these problems also represented institutional conflicts, because different courts struggled for control claims and thus also for their respective spheres of influence. In its decision on the reference procedure, the ECJ emphasized that the Framework Decision on the European arrest warrant and the decisions of the courts of the Member States taken on the basis of it are bound by fundamental rights. From the point of view of EU law, however, these are the fundamental rights of the EU. In its decision, however, the ECJ was not concerned with whether the fundamental rights of the Member States could also be applied. The decisive factor for the ECJ was that, in any event, a parallel application of national fundamental rights does not affect the primacy of EU law. Rather, the ECJ was decisive for the following: Instead of the national special path of unconditional protection of human dignity outlined by the Federal Constitutional Court, the protection of human dignity and other fundamental rights by EU law takes the place of the protection of human dignity and other fundamental rights by EU law, whereby this path may have to be taken with the involvement of the ECJ.

[39] BVerfG, Decision from 24 November 2005 - 2 BvR 448/05.

In so doing, the Court also ensured its institutional primacy linked to the substantive application of the fundamental rights of the European Union.

3.2 FREEDOM

After human dignity, Article 2 TEU then mentions freedom. Freedom is a historical and normative concept,[40] and constitutes a political guideline for the unification of Europe. This guideline is of fundamental importance for the economy and politics in the EU's association of states and constitutions. Freedom is negatively understood as the opposition to any tyranny and, in a positive sense, the possibility of self-determination of the individual.[41]

The concept of 'freedom" was modelled on recital 3 of the EU Treaty, which in turn can be traced back to the preamble to the Single European Act.[42] However, while the Single European Act understands that 'freedom' serves as the basis for the Contracting Parties' commitment to democracy, the wording of Article 2 I TEU mentions the concept on an equal footing with human dignity, equality, democracy, the rule of law and the protection of human rights. Since a number of values – democracy, the rule of law and the protection of human rights – are inherent in freedom and thus already form an order of freedom, it could be doubted whether 'freedom' has a normative status.[43]

It is unclear which concept of freedom underlies the integration process.[44] While the preamble to the Single European Act mentions freedom on an equal footing with equality and justice (fraternity), the principle of equality has a prominent position in the rest of EU law in the form of qualified prohibitions of discrimination and has been included in the canon of values by Article 2 TEU. In addition, there is the understanding of freedom, which wants to guarantee the citizen a sphere of individual decision and responsibility free from regulatory interference. The insertion of equality in Article 2 I TEU suggests that primary law sees the meaning of the value of freedom

40 Callies (n 1) art 2 para 19.

41 Ibid.

42 Schorkopf (n 22) art 2 paras 24, 25.

43 Schorkopf (n 22) art 2 paras 24, 25.

44 Schorkopf (n 22) art 2 paras 24, 25.

at the individual level, according to which the individual shapes life according to his own design.[45]

Components of the 'European concept of freedom' are the self-determination of the individual, respect for human dignity and the absence of foreign rule.[46] The concept of freedom therefore contains a regulating idea vis-à-vis any kind of sovereignty. Concrete constitutional manifestations of freedom are, for example, the rule of law and the individual EU citizens' rights, which include fundamental freedoms and fundamental rights.[47] Finally, freedom in this context also means that interference with the legally protected self-determination of the person by the sovereign bodies of the European union, i.e. member states and the EU, is only permissible if they are based on a law enacted by Parliament.[48]

In addition to equality, freedom is to be regarded as a basic prerequisite for a democratic form of rule. In its decision in the Wightman case, the ECJ also emphasized the central importance of the values of freedom and democracy as the foundations of the EU law.[49] In this context, freedom is therefore understood as collective self-determination.

3.3 DEMOCRACY

At its core, democracy is characterized by the fact that citizens determine public authority in freedom and equality through recurring majority decisions in terms of personnel and objectivity. Public authority is constituted in an association of rulers whose organs must answer for a dualism of government and opposition to an observant and controlling public.

The European Union's commitment to a democratic structure and the democratic legitimacy of its competences and competent authorities also corresponds to the basic Community convictions of all European or European constitutional traditions (Art. 2 TEU). The European Union still does not have its own people and thus nor

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45 Schorkopf (n 22) art 2 paras 24, 25.

46 Calliess (n 1) art 2 para 20.

47 Callies (n 1) art 2 para 20.

48 Cordula Stumpf in: Jürgen Schwarze and Ulrich Becker and Armin Hatje and Johann Schoo (editors), EU-Kommentar (4th edn, Nomos 2019) art 6 EUV, para 4.

49 Case C-621/18 Andy Wightman and Others v Secretary of State for Exiting the European Union (10 December 2018).

about any original popular sovereignty.[50] All sovereign powers of the European Union are derived from the democratic legitimacy of the Member States. The European Union is 'not an independent subject of legitimation'. It is true that it is committed to representative democracy and the Treaty of Lisbon also strengthens the democratic rights of EU citizens.

Overall, therefore, the EU draws its democratic legitimacy first and foremost from the national parliaments and the legitimations derived from them, especially for the members of the European Council and the Council. European elections are still contested by the national parties, which only tend to unite at the level of an elected European Parliament.[51] So, there is a lack of original European parties. The European Parliament also lacks the parliament's typical constellation or conflict between a government-supporting majority and a minority critical of the government (opposition).

Democracy ensures the self-determination of the people by organizing the formation, legitimation, and control of those organs that exercise state power over the citizen. The value of democracy places demands on the structure and content of both the European legal order and the legal systems of the Member States. The concept of democracy was primarily coined in the state. However, the substantive requirements for the principle of democracy in Article 6 TEU are not based on a Member State concept of democracy.[52] The reason for this is that there are also considerable differences in the individual member states to the concrete forms of democracy.[53] As a result, the EU must comply with a European concept of democracy, modified with regard to its special design, and accordingly 'Union-specific concept of democracy'.[54] In this respect, the principle of 'representative' democracy, which is supplemented by a principle of 'participatory' democracy, should be emphasized.[55] This will also make it possible for European referendums, aimed at a legislative initiative by the Commission.

With the entry into force of the Treaty of Lisbon, Title II of the TEU contains four new thematically relevant provisions under the heading 'Provisions on democratic principles" (Articles 9 - 12 TEU). Under Article 10 I TEU, the functioning of the European

50 BVerfGE 89, 155, Decision of 31 March 1998 – 2 BvR 1877/97.

51 Ruffert (n 1) art 9 para 4.

52 Calliess (n 3).

53 Calliess (n 3).

54 Calliess (n 3).

55 Calliess (n 3).

Union is based on representative democracy, supplemented by elements of participatory, associative, and direct democracy, in particular a citizens' initiative (Article 11 TEU).

The ECJ reaffirmed the principles of democracy as part of the foundations of the EU legal order[56] and stressed the importance of promoting democracy, particularly in the field of development cooperation.[57]

The principle of democracy is closely linked to the values of freedom,[58] human rights and the rule of law, which are interdependent. At the same time, the other values of Article 2 TEU form the limit of the democratically achieved will of the citizens. This may only be achieved if human dignity, freedom, equality and the rule of law and human rights are preserved at their core.[59] If democracy and the rule of law come into conflict because initiatives contrary to the rule of law can be democratically legitimized,[60] the Commission resolves this conflict by prioritizing the value of the rule of law over the other values of Article 2 TEU, including democracy.

The principle of democracy is of practical relevance when it is used to interpret provisions of EU law. Thus, for the first time, the CJEU referred directly to the principle of democracy in Efler's case to arrive at an appropriate interpretation of the concept of a legal act, the amendment of which a citizens' initiative may legitimately address.[61] The starting point for the meaning of this value are supranational guarantees of democracy, which the EU member states have ratified in the form of international treaties.[62] Of particular importance is Article 3 ZP 1 ECHR.[63] According to this provision, all contracting parties to the ECHR, which include all EU Member States, are obliged to 'hold free and secret elections at appropriate intervals, which ensure the free expression of the opinion of the people in the election of legislative bodies'. The right to vote in legislative and representative bodies even has the status of a subjective right in According to the Universal Declaration of Human Rights, the will of the people

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56 Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (06 March 2019).

57 Case C-91/05 Commission of the European Communities v Council of the European Union (20 May 2008).

58 Case C-621/18 (n 74).

59 Hilf/Schorkopf (n 22) art 2 para 27.

60 Ibid.

61 Case T-754/14 Efler and Others v Commission (10 May 2017).

62 Hilf/Schorkopf (n 22) art 2 para 28.

63 Ibid.

the basis for the authority of public authority. This will should be expressed through regular, unadulterated, universal, and equal elections by secret ballot or in an equivalent free electoral procedure (Article 21 III UDHR). The Federal Constitutional Court speaks of a right to democracy and links it to human dignity.[64]

Generally accepted contents of the principle of democracy can also be inferred from the practice of the states and the Union.

3.4 EQUALITY – PROHIBITION OF DISCRIMINATION

Equality rights play an overriding role in EU law. First, the enforcement of certain equality rights is essential for market integration. Equality rights also have a unifying effect. After all, equality rights are central to the binding of any form of public authority and therefore have a prominent status in modern legal systems.

The general principle of equality is one of the oldest fundamental rights at Union level. As early as the beginning of the 1970s, the ECJ repeatedly mentioned the principle of equal treatment or the principle of equal treatment as a fundamental principle of Community law in its judgments. However, the ECJ did not elaborate on its content and requirements.[65] The ECJ expressly recognized the general principle of equality in 1977.[66] According to the ECJ, the decisive factor is that, according to this principle, which is one of the fundamental principles of Community law, comparable situations may not be treated differently, unless a distinction would be objectively justified.[67] In many other decisions, the ECJ has concretized and elaborated on the general principle of equality. In its decisions, the ECJ refers to the general principle of equality as a principle of equal treatment, as a general principle of equality, a general prohibition of discrimination or simply as a prohibition of discrimination.[68] In addition to the general principle of equality, there are numerous special equality

64 BVerfGE 123, 267 Judgement of 30 Juni 2009 - 2 BvR 1010/08.

65 Von der Decken in: Sebastian Heselhaus and Carsten Nowak (editors), Handbuch der Europäischen Grundrechte (2th edn, C.H.Beck 2020), § 47 para 1.

66 Joined Cases 117/76 and 16/77 Albert Ruckdeschel & Co and Hansa-Lagerhaus Stroh & Co v. Hauptzollamt Hamburg-St Annen and Diamalt AG v. Hauptzollamt Itzehoe (19 October 1977).

67 Ibid.

68 Von der Decken (n 65).

clauses. These are, on the one hand, the equality of men and women and, on the other hand, the prohibitions of discrimination.[69]

In addition to the general principle of equality, the ECJ has dealt most intensively with the equality of men and women. This particular principle of equality can be found in both primary and secondary law.[70] Equality between men and women in working life is based on Article 157 TFEU, which is strongly shaped by secondary legislation. Full gender equality is enshrined in the second sentence of Article 2 TEU and Article 3 III Subsection 2 TEU, Article 8 TFEU, Article 10 TFEU and Article 19 I TFEU and Article 21 I and 23 of the Charter of Fundamental Rights. Equality between men and women was already part of the founding treaties. This was due to the operation of France, which was already aware of such a scheme and therefore feared that French companies would be placed at a disadvantage in a common market.[71] The original version of Article 119 of the EEC Treaty established the principle of equal pay for men and women for equal work. However, over time, the provision was perceived as insufficient and further developed by a socio-political action program[72] and the three Defrenne judgments of the ECJ.[73] From the 1970s onwards, the Community created a comprehensive system of directives on equality between men and women throughout working life. The most important of them were brought together in 2006 in a single Directive, Directive 2006/54/EC on labor and occupation.[74] This regulates both equal pay and other conditions of employment in the form of further working conditions, access to employment, including occupational social security schemes, and the burden of proof in the event of discrimination. In addition, further directives on maternity protection, part-time work, parental leave, and self-employment were issued.

The EU itself is not the addressee of the primary and secondary law obligation to equal treatment of the sexes in working life. The wording and purpose of the standards are addressed solely to the Member States. Equality in working life is respected

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69 Ibid.

70 Von der Decken(n 65) § 48 para 1.

71 Von der Decken (n 65) § 48 para 3.

72 Council Resolution of 21.01.1974 on a social action program, OJ 1974 C 13, 1.

73 Case 80/70 Gabrielle Defrenne v Belgian State (25 May 1971); Case 43/75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (8 April 1976); Case 149/77 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (15 June 1978).

74 Von der Decken (n 65) § 48 para 4.

by the institutions of the Union not through Article 157 TFEU and the associated secondary law, but through the fundamental right of equality between men and women.[75]

Gender equality is enshrined as a fundamental right in Article 23 of the Charter of Fundamental Rights. It thus constitutes a fundamental right binding on the Union in accordance with Article 6 I TEU. In accordance with Article 6 III TEU, fundamental rights as general principles form part of Union law. To derive this, reference must be made to the constitutional traditions of the member states, to the European Convention on Human Rights and to other international human rights treaties ratified by the EU member states.[76] The constitutions in 10 Member States contain equality between men and women. In 20 constitutions there is partly additional, partly exclusively a prohibition of discrimination on grounds of sex. On the other hand, there is no explicit constitutional anchoring in three Member States. However, the equality of men and women can be indirectly derived from a generally formulated prohibition of discrimination.[77]

Prohibition of discrimination constitutes special principles of equality. Until 1997, only two were enshrined in the Treaties, namely the prohibition of discrimination between producers or consumers in the agricultural sector and the prohibition of discrimination on grounds of nationality.[78] The Treaty of Amsterdam (Article 13 TEC-Amsterdam) introduced a further eight grounds of discrimination: those on grounds of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.[79] The Treaty of Lisbon did not affect the norm. Article 19 I TFEU contains the same eight prohibitions of discrimination. However, this has been included in the new cross-sectional clause of Article 10 TFEU.[80] The cross-sectional clause of Article 10 TFEU, newly inserted by the Treaty of Lisbon, obliges the EU to combat discrimination in all its activities on the eight grounds already set out in Article 19 TFEU. Article 10 TFEU supplements the enabling provision of Article 19 TEU.[81]

However, the Treaty of Lisbon extended the number of prohibited discriminations by making Article 21 I of the Charter of Fundamental Rights binding. It contains nine fur-

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75 Von der Decken (n 65) § 48 para 8.

76 Von der Decken (n 65) § 48 para 81.

77 Ibid.

78 Von der Decken (n 65) § 49 para 1.

79 Ibid.

80 Ibid.

81 Von der Decken (n 65) § 49 para 60.

ther prohibitions of discrimination, namely those on the grounds of skin colour, social origin, genetic characteristics, language, political and other opinions, membership of a national minority, property, and birth.[82] The prohibitions of discrimination under EU law differ in their legal anchoring, their circle of addressees and beneficiaries, their scope of application and also in their fundamental right character.

3.5 RULE OF LAW

The original contractual bases of the European Communities did not contain any explicit standardization of the rule of law. Only the Maastricht Treaty of 1992 formulated a commitment to the rule of law in the preamble. The Treaty of Amsterdam, concluded in 1997, enshrined the rule of law as a principle on which the Union is founded and which is common to the Member States. Nevertheless, even before the creation of these textual anchorings, the ECJ referred to the rule of law[83] and, in parallel with the development of its fundamental rights jurisprudence, recognized individual forms of the rule of law such as the principle of legality, the principles of legal certainty and the protection of legitimate expectations as well as the guarantee of legal protection as general legal principles.[84]

The ECJ stressed early on the importance of the uniform and effective application of European law and referred to the concept of the legal community.[85] In recent decisions, the ECJ has characterized the EU as a union based on the rule of law[86], placing an even greater emphasis on the importance of Member States' compliance with the law. Under EU constitutional law, that meaning is reflected in Article 2 TEU, according to which the European Union and the Member States are committed to the rule of law as one of the core values on which the Union is founded and which are common to all Member States.

The provision acquires direct legal relevance by the fact that EU law is in part explicitly linked to Article 2 TEU, for example where Article 49 I TEU declares respect

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82 Von der Decken (n 65) § 49 para 1.

83 Case C-101/78 Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten (13 February 1979).

84 Calliess (n 1) art 2 para 26.

85 Case C-294/83 Parti écologiste 'Les Verts' v European Parliament (23 April 1986); Joined Cases C-402/05 P and Case C-415 P (n 81).

86 Case C-550/09 Criminal proceedings against E and F (29 June 2010); Case C-583/11 P Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union (3 October 2013).

for the values referred to therein to be a prerequisite for accession or Article 7 TEU establishes a serious breach or threat to those values as a connecting factor for the sanction procedure laid down therein.

Moreover, Article 2 TEU is a rule of law binding on both the European Union and the Member States. Nevertheless, Article 2 TEU has so far played only a minor role as an independent legal standard. The rule of law is designed to be concretized, so that in the application of the law the individual manifestations of the rule of law – whether they are explicitly standardized in the treaties or recognized as unwritten principles – are in the foreground. The political developments in some Member States, which are based on keywords such as populism, authoritarianism and against the background of judicial reforms which call into question judicial independence[87], but also of restrictions on freedom of the press and media pluralism[88], the question of systemic deficiencies in the rule of law. The focus is on the model of an 'illiberal democracy' pursued in Hungary by the Fidesz party under Viktor Orbán and the developments in Poland under the PiS-led government, but corruption in some member states such as Romania and Bulgaria are also a cause for concern.[89]

Primary law contains different connecting factors and manifestations of the principle of the rule of law under EU constitutional law, which are also further substantiated in the context of secondary acts. In the concrete application of the law, the more specific provisions take precedence over the general rule of law. The rule of law is based on three primary connecting factors under EU constitutional law. Article 2 TEU emphasizes the rule of law as a fundamental value of the Union and the Member States. This is concretized by other primary law provisions. Article 47 II of the Charter of Fundamental Rights adds a subjective-legal dimension to the rule of law and makes it enforceable within the scope of the Charter. Article 19 I, Subsection 2 TEU, is the link between the rule of law under EU constitutional law and the general organization of the judiciary in the Member States.

The rule of law and the protection of fundamental rights are linked. Both have their original basis in the recognition as general legal principles by the ECJ. Of particular importance in this context is the guarantee of legal protection provided for in

87 COM(2020) 580 final, p. 12 following.

88 COM(2020) 580 final, p. 20 following.

89 Overview and summary of further deficit findings in COM (2020) 580 final.

Article 47 II of the Charter of Fundamental Rights, which was recognized as a general principle of EU law even before the entry into force of the Charter.[90]

The regulation guarantees that there is legal recourse. Such legal recourse must lead to an independent, impartial court established on a legal basis. This must conduct a procedure that is fair, public and within a reasonable period of time. In addition, the court must ensure the possibility of advice, defense, and representation. In its recent case-law, the ECJ emphasizes that the independence of the courts is part of the essence of Article 47 II of the Charter of Fundamental Rights.[91] The ECJ understands Article 47 II of the Charter as a concretization of the rule of law under Article 2 TEU.

Article 19 I Subsection 2 TEU, is closely linked to the guarantee of legal protection under EU fundamental rights. The ECJ clearly emphasizes this connection when, on the one hand, it states that Article 19 I Subsection 2 TEU, constitutes a concretization of Article 2 TEU and, on the other hand, article 47 II of the Charter of Fundamental Rights as confirmation of the requirements of Article 19 I Subsection 2 TEU.[92]

The provision reaffirms the decentralization of the system of legal protection under EU law, in which the Courts of the European Union and the courts of the Member States jointly exercise judicial power and grant legal protection. Art. 19 I Subsection 2 TEU provides that Member States must provide the necessary remedies to ensure effective legal protection in the areas covered by EU law. The concrete design of court organization and proceedings remains within the competence of the Member States.[93] However, the involvement of the courts of the Member States in the European network of courts leads to EU law requirements for judicial power in the Member States. Accordingly, the ECJ derives from Art. 19 I Subsection 2 TEU that the courts responsible for redress determined by EU law must be independent in order to ensure effective judicial protection.[94] In this way, the ECJ combines the requirements of EU law on national jurisdiction with the EU legal protection guarantee of Article 47 II of the Charter of Fundamental Rights.

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90 Case C-222/84 (n 13).

91 Case C-216/18, PPU Minister for Justice and Equality v LM (28 June 2018).

92 Case C-64/16 (n 2); Case C-619/18 European Commission v Republic of Poland (11 April 2019); Case C-192/18 Commission v Poland (5 November 2019).

93 Case C-33/76 Rewe v Landwirtschaftskammer für das Saarland (16 December 1976); Case C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern (30 November 2006); Case C-619/18; Peter Huber in: Rudolf Streinz (editor), EUV/AEUV (3th edn, C.H.Beck 2018) EUV art. 19 para 51.

94 Case C-64/16; Case C-619/18.

Finally, the principle of the rule of law under EU constitutional law is influenced by international law requirements. With regard to EU fundamental rights, that influence is explicitly ordered in Article 6 III TEU and Article 52 III of the Charter of Fundamental Rights, with the result that, in particular, Article 47 II of the Charter of Fundamental Rights must be interpreted in the light of Article 6 of the ECHR. According to Article 52 IV of the Charter of Fundamental Rights, the constitutional content established in the constitutional traditions of the Member States must also be used to outline the fundamental rights of the European Union.

The expressions of the principle of the rule of law under EU constitutional law in the European Treaties must be interpreted in the light of the Member States' understanding of the constitution due to the historical development of the constitutional content of the Union constitution. On this basis, both the ECJ and the other EU institutions, above all the Commission,[95] have identified various aspects of the principle of the rule of law under EU constitutional law.[96]

At the heart of the idea of the rule of law is the legal binding nature of all sovereign action.[97] Under EU constitutional law, this idea is expressed in the binding of the EU institutions to EU law within the framework of the hierarchy of norms of the EU legal order.[98] The obligation of the Member States to EU law is emphasized in Article 4 III TEU and, more specifically, for the Charter, in Article 51 I 1 of the Charter of Fundamental Rights. In the event of a conflict with Member State law, this is ensured by the primacy of application of EU law.

The principle of legal obligation is complemented by the principles of legal certainty and the protection of legitimate expectations. The recognizability, reliability and predictability of the law are general requirements of the rule of law. To this end, the ECJ has recognized various forms such as in particular the principle of certainty[99] and the

95 COM (2014) 158 final, p. 4; COM (2019) 163 final, p. 1; COM (2020) 580 final, p. 1.

96 Schmahl in: Reiner Schulze and Andre Janssen and Stefan Kadelbach (editors), Europarecht (4th edn, Nomos 2020), § 6 para 8 ff., para 32 following.

97 Case C-496/99 P Commission of the European Communities v CAS Succhi di Frutta SpA (29 April 2004).

98 Schmahl (n 121) § 6 para 12 following.

99 Case C-169/80 Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini (9 July 1981).

prohibition of retroactivity[100] as general principles of law and has enforced the principle of the protection of legitimate expectations[101] in different dimensions.

Another component of the rule of law is the principle of proportionality. The ECJ recognized this as a general principle of law at an early stage.[102] In EU law, it can be found on the one hand in its special form as a barrier to the exercise of competence in Article 5 IV TEU and, on the other hand, as a limit for the restriction of EU fundamental rights in Article 52 I 2 of the Charter of Fundamental Rights. It is also regarded as a standard of justification for the exercise of sovereignty.[103]

Another important building block of the rule of law is the principle of separation of powers. This is reflected in the relationship between the Union institutions in the principle of institutional balance. The exercise of sovereign functions at Union level is distributed among different institutions, which both cooperate and control each other.[104] The rule of law also requires a separation of powers in the Member States, which is particularly important in connection with the position of the judiciary vis-à-vis the other powers of the State.[105]

Finally, the guarantee of effective legal protection completes the requirement of legal obligation as the core content of the rule of law through the review of the legality of sovereign action by independent courts. This means that there must be the possibility of legal protection before the Courts of the European Union or before the courts of the Member States against the exercise of sovereignty. The legal protection guarantee also sets out requirements with regard to the manner in which legal protection is granted, through procedural guarantees and requirements for the independence of the courts. The fundamental rights guarantee of Article 47 II of the Charter of Fundamental Rights and the institutional interlocking of EU jurisdiction and Member State jurisdiction under Article 19 I Subsection 2 TEU shall work together in this respect.

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100 Case C-98/78 Racke v Hauptzollamt Mainz (16 May 2000).

101 Case C-90/95 P Henri De Compte v Parliament (17 April 1997).

102 Case C-310/04 Kingdom of Spain v Council of the European Union (7 September 2006).

103 Calliess (n 1) EUV art 5 para 44.

104 Calliess (n 1) EUV art 13 para 9.

105 Case C-452/16 PPU Openbaar Ministerie v Krzysztof Marek Poltorak (10 November 2016); Case C-585/18 A. K. v Krajowa Rada Sądownictwa (27 June 2019).

3.6 RESPECT FOR HUMAN RIGHTS, INCLUDING MINORITY RIGHTS

The value of respect for human rights 'including the rights of persons belonging to minorities' intersects with respect for human dignity, freedom, and equality, but points to the development of these values into multifaceted universal individual rights. These, in turn, have an intersection with those of the Charter of Fundamental Rights, but designate the separate dimension of the rights applicable to everyone, which find or can find their expression in this, in the thought of the constitutional traditions common to the Member States, in the ECHR, in other international agreements (e.g. Charter of the United Nations) and in general, including natural law, legal principles.

Human rights are rights that every human being unconditionally enjoys because of his or her humanity and human dignity.[106] They are based on the not undisputed idea of a common, universal value system of all peoples. Human rights regulate the relationship between states and individuals and oblige the former to ensure the protection of the latter through appropriate legislation and other measures. They thus have the dialectical function of reconciling the effectiveness of state power with protection against it; because the state is at the same time a guarantor of human rights and potentially their greatest threat.[107]

Therefore, in the German constitutional order pursuant to Article 1 III GG, fundamental rights bind all state power as directly applicable law. The same applies to the EU, which, as the holder of sovereignty, is bound by EU fundamental rights.[108] For the United Nations, the protection of human rights is one of the main objectives alongside the maintenance of international peace and security.

Human rights are an expression of a recent development in the history of mankind. At least in Europe, it was considered a matter of course for centuries that every ruler takes care of the fate of his subjects in an appropriate manner and that there can be no violations of rights in this respect – an idea in complete contradiction to today's understanding of human rights.[109]

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[106] This is already the preamble to the Universal Declaration of Human Rights.

[107] Lena Riemer and Julien Berger, 'Einführung in den internationalen Schutz der Menschenrechte und seine Bedeutung für das nationale Recht' (2022) Juristische Schulung 216.

[108] Preamble, articles 1 III, 55(c) and 56 of the UN Charter. See <https://unric.org/de/charta/> accessed 26 September 2022.

[109] Riemer and Berger (n 108).

The first ideas for universal human rights can be found, for example, in the British philosopher John Locke (1632–1704), for whom all human beings were inherently free, equal, and independent and these natural freedoms could not be taken away from people by state power.[110] These ideas are also reflected in the American Declaration of Independence of 1776, the French Déclaration des Droits de l'Homme et du Citoyen of 1789 and various constitutions of the constituent states of the German Confederation in the 19th century.

Initially, the national protection of human rights developed as a counterweight to state power. It was only in a second step that the idea of creating rules and mechanisms at international level developed to take account of cases where a national system is unable to guarantee adequate human rights protection. While the first steps towards international human rights rules appeared as early as the 19th century – for example with the creation of international humanitarian law – human rights agreements and institutions only emerged in the second half of the 20th century – also and especially as an alternative to and in response to the atrocities of the National Socialist regime and the horrors of the Second World War.[111]

The concept of human rights in Article 2 TEU is to be understood as the term for the human rights guarantees in international instruments for the protection of human rights of the United Nations, the Council of Europe, the OSCE or other regional organisations, as well as for the human rights guarantees recognised under customary international law.[112] According to Article 2 TEU, respecting these human rights, which thus go beyond European fundamental rights, and promoting them in their policies both internally and externally and contributing to their implementation, is one of the foundations of the EU and a principle common to all Member States.[113]

Respect for human rights not only concretizes human dignity and the requirement of freedom, but also the (material) rule of law. It establishes a link with the Charter of Fundamental Rights, according to the preamble to which the Union is founded on the values of human dignity, freedom, equality, and solidarity and is based on the principles of democracy and the rule of law. This closes the circle to the other values referred to in Article 2 TEU.

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110 Ibid.

111 Ibid.

112 Eckhard Pache in: Sebastian Heselhaus and Carsten Nowak (editors), Handbuch der Europäischen Grundrechte (2th edn, C.H.Beck 2020) § 7 para 44.

113 Ibid.

With regard to the rights of persons belonging to minorities, Article 2 TEU refers to the negotiations on Art. I-2 of the EU Constitution. In this context, the wording has been inserted into the text of the Constitution by the Heads of State or Government.[114] This represented a considerable change in relation to the text still proposed by the Convention[115], because in advance various Member States opposed such a mention. With the enlargement of the Union, the weighting within it changed, as the minority issue increasingly affects new Member States.[116] The chosen wording reflects the Council of Europe Framework Convention for the Protection of National Minorities[117] and refers to the rights of persons belonging to minorities and not to the rights of minorities as such.

Human rights also play an important role in the EU in the international field of globalization with regard to supply chains. On 23 February 2022, the European Commission has presented a draft directive on the regulation of business due diligence obligations in the supply chain ('EU Supply Chain Act').[118] According to the Commission, one of the European Union's priorities is a high level of human rights and environmental protection. The EU Action Plan on Human Rights and Democracy 2020-2024 and the European Green Deal bear witness to this. Companies, in particular those that rely on global supply chains, should be subject to 'hard' legal obligations ('obligations') in the sense of human rights and environmental due diligence obligations.[119] One aim of the draft is to hold companies more accountable than before for adverse consequences in both areas.[120] Both conceptually and terminologically, the draft is strongly oriented towards soft law under international law, specifically the UN Guiding Principles on Business and Human Rights (Ruggie Principles)[121] and the thematically relevant OECD Guideline[122].

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114 Callies (n 1) art 2 para 29.

115 Callies (n 1) art 2 para 29.

116 Ibid.

117 Ibid.

118 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

119 Leonhard Hübner and Victor Habrich and Marc-Philippe Welle, 'Corporate Sustainability Due Diligence' (2022) Neue Zeitschrift für Gesellschaftsrecht 644.

120 Justification p. 4 RL-E

121 https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

122 https://mneguidelines.oecd.org/OECD-leitfaden-fur-die-erfullung-der-sorgfaltspflicht-fur-verantwortungsvolles-unternehmerisches-handeln.pdf.

4 CONCLUSION

Fundamental values and fundamental rights play within the framework of the European Legal System Union a central role. The creation of a supranational organization with its own, its own sovereign rights conferred by the Member States could only be achieved through the continuous development of these same values and rights. It is essential for the continued existence and development of the Union to ensure the legality of these values and rights in the Member States.

But the cohesion of the European Union is at risk. Conflicts within the Union are increasing. With the Brexit, political disagreements have reached a new level. But the integration project is also encountering resistance in the remaining Member States. They not only make it more difficult to build consensus in the institutions. National reservations also have an impact on member states' compliance with the law, thereby putting the European legal community to the test.

The founding treaties of the European Economic Community already made it clear that the interdependence of the economy should serve to secure peace and thus also motivate the European states and peoples at the political level for this goal. From the very beginning, the EU was founded on the 'magic triangle of values' of peace, economy, and integration, bundled under the motto 'Peace through economic integration'. The current crises make it clear that the whole structure of the EU falters as soon as one of these foundations loses its base.

It is already clear that the war in Ukraine is a major threat to peace and thus to the economy and, ultimately, to the cohesion of the individual Member States. Thus, in the current economically dramatic time, caused by war, sanctions, energy crisis and inflation, more and more right-wing populist tendencies are gaining ground. Poland and Hungary are already dominated by right-wing populist parties, Italy is facing a change of government in this direction.

It is therefore essential to keep an eye on the common basic values again and again and to keep an eye on them. These values must also be lived and defended. Whether defending these values by force of arms is the right way is doubtful. History shows that violence generates counter-violence and that a spiral develops from which it is very difficult to escape again.

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5 HAVE BLOCKCHAIN AND SMART CONTRACTS REVOLUTIONARY POTENTIAL FOR COMPLIANCE?

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Having become known through the financial sector, blockchain technology is primarily associated as an elementary component of virtual currency – first and foremost BitCoin. If you take a closer look at how the technology behind blockchain works, the potential dispels any doubt that our future will not take place without this technology. Not only in the legal field. In my thesis on the topic "Have Blockchain and Smart Contracts revolutionary potential for Compliance" to achieve the academic degree Master of Law in International Business Law, I took a closer look.

ESSENCE OF THE BLOCKCHAIN

In short, the blockchain is a decentralised data storage system.[1] The essential element of the blockchain is the special decentralised way of storage of information in various blocks, which together form a chain. The blockchain's claim to authenticity is derived from the fact that the blocks are not all under the control of a third party, but are distributed (worldwide) and therefore the information cannot be changed without authorisation.[2]

From a technical point of view, we don't want to get too specific here. A brief explanation will suffice to illustrate how the blockchain achieves its essential characteristics. The data blocks in the blockchain are linked together using cryptographic hash values, timestamps, and transaction data, forming the continuous chain.[3] Each owner transfers the chain to the next by digitally sinning a hash of the previous transaction and the public key of the next owner and adding these to the end of the chain. A receiver can verify the signatures to verify the chain of ownership. Therefore, if you want to modify the data on a block, you should theoretically modify the information of 3 or more blocks to achieve this.[4]

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1 MüKoBGB/Wendehorst EGBGB Art.43 Rn. 305, 306.

2 MüKoBGB/Wendehorst EGBGB Art.43 Rn. 305, 306.

3 Arun Sekar Rajasekara, „A comprehensive survey on blockchain technology" (2022).

4 Xinyan Wang; Jingli Jia; Yuke Cao; Jiacheng Du; An Hu; Yong Liu; Zhiyong Wang, "Application of data storage management system in blockchain-based technology", IEEE, 2023, Section 4.

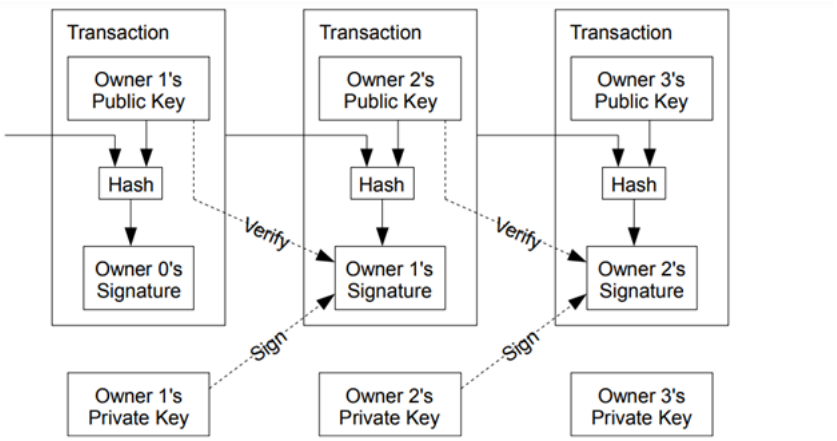

Figure 1[5] | Verification chain of data storage blocks

This technical system of storing data gives rise to the key characteristics that make a blockchain system so different from a traditional centralised system of storing data, and thus justify its major advantages:

DECENTRALIZATION

The main benefit of a decentralised storage system is that it removes the reliance on a single central authority or server. Instead, data is distributed across multiple nodes or devices, increasing security and reducing the risk of data loss or downtime. Distributed storage systems also offer greater scalability, as additional storage capacity can be easily added by connecting more nodes to the network. In addition, distributed storage systems are often more resilient to censorship or single points of failure because there is no single entity that can control or manipulate the stored data.

[5] Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System", Cryptographie Mailing List, 2008, p. 2.

ANONYMITY

One of the main advantages of a decentralised storage system is that it allows users to stay anonymous and protect their privacy and identity. In a centralised system, where data is controlled by a single authority on one server, there is more risk of unauthorized access or monitoring. In a decentralised system, however, it is harder to trace back to individual users.

By keeping their anonymity, users can store and access their data without sharing personal information or exposing themselves to potential data breaches. This can be especially important for confidential data, such as personal or financial information, where preserving privacy is essential.

DE-TRUST

The “de-trust” effect in a blockchain means that trust in a central authority is no longer necessary or is reduced. Blockchain technology uses cryptographic algorithms and consensus mechanisms to replace trust.[6] Encryption and digital signatures guarantee the validity and origin of transactions, while consensus mechanisms reach consensus among distributed nodes. This removes the dependence on a central authority, enhancing transparency and allowing parties to interact without trusting each other. The de-trust effect also improves security, transparency, and robustness in blockchain systems.

SECURITY

Also, decentralized storage systems prioritize the implementation of robust encryption techniques. Data is often encrypted both at rest and in transit, ensuring that even if a node is breached, sensitive information remains inaccessible to unauthorized parties. This encryption adds an extra layer of security, safeguarding the data throughout its storage and transfer processes.

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[6] Wen-Wei Li; Weizhi Meng; Kuo-Hui Yeh; Shi-Cho Cha, Trusting Computing as a Service for Blockchain Applications, IEEE, 2023, pp.

Moreover, Data redundancy ensures that multiple copies of the data are stored across different nodes, reducing the likelihood of data loss. Consensus algorithms verify and validate data across the network, ensuring its integrity and authenticity. These measures make decentralized storage systems more reliable and resistant to tampering or unauthorized modifications.

INTERMEDIATE RESULT

To conclude, decentralized storage is more secure than conventional centralized storage because of its diverse structure, encryption methods, reliable setting, data backup, and attack resilience.[7] By integrating these security features, decentralized storage systems offer a stronger option for safeguarding valuable information and preserving data privacy.

POTENTIAL OF BLOCKCHAIN IN THE LEGAL FIELD

Now that we are aware of the benefits of decentralised data storage on a blockchain, the question naturally arises as to how we can use it. What potential is there for us to exploit? The focus here will be on potential applications in the legal field.

SMART CONTRACTS

A very interesting innovation in the field of law, based on blockchain technology, is the computer programs commonly referred to as ‘smart contracts’. The term is initially somewhat misleading, as these are not “smart” contracts in the sense of artificial intelligence, as they do not understand natural language and cannot independently check whether a certain event relevant to execution has occurred. Instead, they are “self-executing contracts” based on a computer programme that is “stored in a tamper-proof manner and is guaranteed to execute predetermined measures if certain

[7] Zhiwei Gao, Hongbo Fan and Jinjiang Liu, “Blockchain-based solution for secure storage and sharing of shipping data[J]”, China Water Transport, no. 10, 2022, pp. 57-58.

conditions are met."[8] Furthermore, the term "contract" is misleading, as it is not necessarily a contract in the sense of German civil law.[9] As is well known, this requires the submission of two concurring declarations of intent, the offer and the acceptance (Sections 145, 147 German Civil Code); once the parties have agreed on the essential elements of the contract (*essentialia negotii*), the contract is concluded. The term is therefore to be understood more in the technical sense and refers to an automated legal process and business transaction rather than a legal relationship.[10]

As in real life, the functionality of smart contracts initially requires pre-negotiated contractual obligations. These obligations are then "programmed" into a software which is running on the blockchain, rather than being recorded on paper. The consequences of breaches of duty or other circumstances can also be defined and programmed in advance. In the abstract, the transaction is executed as soon as the defined conditions are met.[11]

Figure 2[12] | How smart contracts work

8 Fries/Paal Smart Contracts/Finck S.2.

9 Schrey/Talhofer NJW 2017, 1431.

10 Paulus, JuS 2020, 107.

11 Fries AnwBl 2018, 86.

12 https://www.g2.com/articles/smart-contracts, visited 23 May 2024.

Smart contracts can be used wherever legally relevant actions can be taken based on digitally verifiable events. They are particularly suitable for standardised processes. They are currently used primarily in the financial and insurance sectors. Other typical applications include the Internet of Things (IoT), supply chain and identity verification.[13]However, if there is an interpretation of undefined legal terms, an error in the coding or other unforeseeable events, the limits of usability of Smart Contracts are quickly reached.

However, it would also be conceivable to settle any contractual agreement using Smart Contracts. For example, a smart contract could automatically transfer the purchase price at the end of a predefined period or when certain conditions are met. From a legal point of view, this presents us with new challenges, because in the event of a dispute, it is not the creditor who would have to go to court to enforce his claim for payment, but the debtor who would have to enforce his claim for repayment. This means that the creditor is spared court proceedings and subsequent enforcement. New rules are needed to prevent the ZPO from being circumvented.

ESSENCE OF CORPORATE COMPLIANCE

In the following, we will explore the potential of blockchain technology, and in particular the application of Smart Contracts, in the area of corporate compliance. From a company perspective Compliance is a management responsibility for the entire board. The establishment of a Compliance Management System ("CMS") is required. The overriding objective is to take organisational precautions to prevent the company or its employees from violating the law.[14] There is no one-size-fits-all solution for setting up a CMS. Requirements vary and depend on the specific risk situation of each company. The compliance risk profile is determined on the basis of the specific circumstances of the company, such as type, size, organisation, geographical presence, relevant markets, turnover, industry and other factors.[15] The strategies for avoiding violations depend on the respective laws, international directives and internal corporate governance regulations.

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13 Hohn-Hein/Barth GRUR 2018, 1093.

14 Wagner/Holm-Hadulla/Ruttloff Metaverse und Recht, 2023, S. 81.

15 Pauthner/Stephan/Hauschka/Moosmayer/Lösler, Corporate Compliance, 3. Auflage 2016, Rnd.4.

Each business process of a market participant triggers a series of inspections aimed at verifying compliance with regulatory requirements. When considering a company participating in a specific market, it not only has to fulfill its own mandatory measures to ensure compliance but also becomes the subject of compliance inspections by other companies. It actively and passively participates in the compliance process. In today's business landscape, compliance with regulatory requirements has become increasingly complex due to factors such as growing concerns regarding data privacy, evolving regulations influenced by market dynamics, a significant increase in data volumes, and the expanding scope of international trade and transactions. To thrive in this environment, it is essential for companies to effectively consolidate, verify, store, and report data in compliance with the regulatory authorities' prescribed formats.[16] While keeping up with the constantly changing regulatory environment can be challenging and costly, aggregating and automating this data is also often problematic for firms due to the use of legacy IT systems and 'siloing' of information in different systems due to regulatory and legal impediments. Consequently, there is still a heavy reliance on manual processes and archaic partially automated processes, particularly in smaller firms.

The illustration of a Know Your Customer (KYC) and Anti-Money Laundering (AML) process serves as an example: These requirements apply particularly to financial institutions, which means that almost every market participant will have to undergo this process sooner or later. In practice, this mainly entails verifying and verifying a multitude of data to determine and authenticate the beneficial owner. On one hand, data needs to be collected and provided, while on the other hand, the recipient must securely receive, store, analyze, verify, and ultimately document the process, often involving sensitive data. This entails significant effort on both sides. If a company fails to comply with its documentation obligations to meet regulatory compliance requirements, regulators can impose fines based on turnover.

However, many companies tend to avoid the compliance process due to perceived effort and cost, thereby putting both their financial standing and reputation at risk.

[16] Chirag, How Can Enterprises Navigate the Regulatory Compliance Landscape with Blockchain?, 2024.

BLOCKCHAIN POSSIBILITIES FOR REGULATORY COMPLIANCE

USE CASE: KYC, AML AND OTHER REGULATORY REPORTING

As already mentioned, the blockchain offers various characteristics that can be used as possibilities for complying with regulatory requirements. As an immutable database, it enables detailed records of access, changes, and values. Once data is entered into the blockchain, it cannot be altered, modified, or deleted. By integrating these features into daily business processes, companies can fulfill their regulatory requirements from the earliest stages of product development or service provision.[17]Thinking of the KYC or AML process described above, AML compliance monitoring involves continuously screening clients' personal and transaction information to detect any suspicious activities or risks. Towards achieving better AML compliance optimizing the onboarding process is an important initial step. Blockchain technology has the potential to further enhance monitoring through increased automation and the implementation of real-time alerts.

For instance, by leveraging the immutability and transparency of the blockchain, companies can establish a robust and reliable system for monitoring and enforcing compliance measures. The integration of blockchain and smart contracts enables the automation of compliance checks, reducing manual efforts and potential errors. Real-time alerts provide timely notifications, enabling prompt actions to mitigate any potential compliance risks.[18]

With the use of "smart contracts" embedded in the blockchain, rules can be hard-coded, ensuring that specific triggers or alerts are generated based on predefined criteria. For instance, in the context of a trade transaction, if there is a risk of sanctions associated with the counterparty, an alert can be automatically generated, prompting further investigation or even halting the transaction. This proactive monitoring ap-

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17 Chirag, How Can Enterprises Navigate the Regulatory Compliance Landscape with Blockchain?, 2024.

18 Chami Akmeemana, Using Blockchain to Solve Regulatory and Compliance Requirements, 2017.

proach provided by blockchain technology can significantly improve AML compliance efforts.

In summary, enhancing the onboarding process is a positive step, but the potential of blockchain technology extends beyond that. Through automation and real-time alerts facilitated by smart contracts, companies can improve AML compliance monitoring, ensuring adherence to regulatory requirements and enhancing overall risk management practices.

USE CASE: SUPPLY CHAIN

Another very interesting field of application is the supply chain. Supply Chain Act, EU's Green Deal, United States' Clean Air Act and many other laws requires companies to carry out analyses on supply chain contracts to identify risks and ensure that all activities within their supply chain comply with the laws, regulations and ESG standards of all markets they operate in (e.g. human rights or sustainability). The companies have to publish an annual report containing the analyses. For example, food manufacturers may need to keep a closer eye on timelines and temperatures to ensure food safety, and manufacturers of military equipment may need to be more thorough about ensuring that only people with the right security clearances can access their goods[19].

However, any business that sells physical goods should be keeping a clear handle on the origins and the journeys of their products — and the supplies or ingredients used to make those products.

The Blockchain and its specific characteristics could be use as ideal tool to ensure compliance throughout the entire supply chain. Blockchain ensures transparency by recording and displaying every transaction or change, simplifying the verification of compliance. Additionally, the immutability of blockchain guarantees the integrity of data along the supply chain. Certain companies have displayed innovation by utilizing blockchain applications to facilitate product traceability. These tracking functionalities and programs simplify the process of determining the origins of specific products, enabling more efficient handling of potential recalls and identification of affected items in case of contamination. By maintaining comprehensive tracking

[19] DItledgers, Regulatory Compliance in Sustainable Supply Chains using Blockchain, 2024.

information for each product, it also becomes easier to verify authenticity and detect counterfeit items.[20]

Nevertheless the potential of the blockchain can only be realised if a powerful ecosystem is created that can use the blockchain. Companies not only need the ability to implement, suitable use cases and the right business environment, but also the support of the government and, in particular, the regulatory authorities. To take full advantage of blockchain and other technologies, it is important to open a dialogue between the industry and regulators to ensure that market solutions are developed that adequately address compliance, corporate governance and legal issues while providing significant efficiency and cost benefits to the financial ecosystem. Regulators that are fully engaged today will be better able to capitalise on the opportunities of tomorrow.

USE CASE: BLOCKCHAIN-ARBITRATION

The idea of conducting arbitral proceedings "on the chain", i.e. using the blockchain, is also completely new and not impossible in international arbitration. One example is the automatic implementation of a smart contract running on the blockchain by issuing the award. In principle, however, there are no limits to the imagination. There are plans to automatically initiate arbitration proceedings on the basis of arbitration clauses in smart contracts, without the need for user involvement.[21] For example, a smart contract could automatically initiate arbitration if the software determines that a party has not fulfilled its contractual obligations.[22] If necessary, a smart contract could also automatically compile the relevant facts of the case and send them to the arbitration tribunal.[23] - This is certainly conceivable, at least if these facts are derived solely from the blockchain.

International discussions are even considering assigning artificial intelligence an arbitrator role. In Germany at the latest, however, the Basic Law is likely to set limits to the endeavours towards automation. According to Article 92 of the Basic Law for

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20 The Receptionist, Supply Chain Compliance: What is it and how to maintain it?, 2024.

21 Jevremovic, 2018 In Review: Blockchain Technology and Arbitration, Kluwer Arbitration Blog vom 27.1.2019.

22 Chan/Rhodes; The Rise of Digital Identities and Their Implications for International Arbitration, JURIST Legal News & Commentary vom 6.2.2022.

23 Kaulartz DGRI Jahrbuch 2017, Blockchain and Smart Contracts, Rn. 19.

the Federal Republic of Germany, the judiciary is generally the responsibility of the judges.

There are countless areas in which the use of blockchain can offer innovative solutions to existing problems. As already mentioned, it requires the right infrastructure and the right ecosystem to be able to implement innovative ideas. Regulatory authorities and market participants must cooperate with each other. It is important to pave the way for companies in all sectors to utilise the benefits in the long term.

THE IDEA OF FUSION THE BLOCKCHAIN WITH ARTIFICIAL INTELLIGENCE

The greatest potential of blockchain technology is likely to result from its interaction with artificial intelligence (AI). AI refers to the use of computers, data, and sometimes machines to imitate the cognitive abilities and judgment of humans. This broad field includes sub-fields such as machine learning and deep learning, which use AI algorithms trained on data to make predictions or classifications. The advantages of AI include the automation of repeating tasks, enhanced decision-making skills, and better customer experiences.

We use artificial intelligence every day, both in our work and personal lives. But even though artificial intelligence has many advantages, it also raises some doubts and concerns for many people.

This is mainly due to the fact that the solutions offered are not readily understandable to the human user. This black box approach is acceptable in some industries, but not in all. Trust in new technologies such as artificial intelligence is created on the fact that users categorise something as safe and reliable. In order to really trust decisions made by artificial intelligence, users expect transparent and trustworthy results. The interaction of blockchain with artificial intelligence could create this trust. AI algorithms rely heavily on high-quality data to generate accurate predictions and insights. Blockchain technology can help improve the quality of data by ensuring that it is accurate, up-to-date and tamper-proof.[24]

[24] Ialav, AI and Blockchain: Are There Possible Synergies, 2023.

Another area where AI and blockchain can create synergies is in the area of data privacy. With the rise of big data, there are growing concerns about how data is collected, stored and used. AI can help analyse this data and identify patterns and trends, but there are concerns about the privacy of this data. By using blockchain to create a secure and transparent record of data usage, it may be possible to address these concerns and create a more trustworthy system for collecting and analysing data.[25] It would also be conceivable to use AI to gain insights from huge amounts of data that are qualitatively stored on the blockchain so that predictive analyses are possible. Based on this, an AI could analyse data about a transaction history and, for example in the field of cryptocurrency, future price movements or data about a company's supply chain to predict future demand for its products.[26]

Further synergies arise when AI is used in conjunction with smart contracts. AI can help improve smart contracts by enabling them to automatically adapt to changing conditions or execute certain conditions based on data stored in the blockchain. For example, an AI-powered smart contract could adjust the terms of an insurance policy based on data about the performance of the insured asset, such as a vehicle or machine.

SUMMARY

The use of blockchain technology has enormous potential. This technology is not only an useful asset in the area of corporate compliance, where the use cases are obvious, particularly in regulatory reporting. In combination with artificial intelligence, there are almost unlimited application possibilities.

However, there are still a few obstacles to overcome before. Firstly, blockchain as an AI-based technology requires considerable resources, which can make it difficult to scale its use cases to a large number of users. Secondly, the regulatory challenges should not be underestimated. The use of innovative technologies is regularly confronted with regulatory requirements. Governments are trying to strike a balance between innovation and security concerns. For example, the use of innovative systems is often hindered by data protection concerns, which means that the development of ideas cannot progress. The topic of cyber security also remains highly relevant.

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25 Ialav, AI and Blockchain: Are There Possible Synergies, 2023.

26 Thakore, An Overview of Blockchain and AI: Synergies and Contrasts, 2024.

Especially with automated processes on the blockchain, it is extremely important that the systems can withstand attacks from hackers or other malicious actors. The potential for damage increases enormously if you imagine that data stored on the blockchain, which serves as the basis for AI-based decisions, has been manipulated. Social acceptance must also be taken into account. As already mentioned, this can only be created through trust. If technical innovations are too complex and incomprehensible to the average observer, it will always be difficult to create acceptance in society.

Nevertheless, the fact remains: both individually and in combination with AI, blockchain has the potential to revolutionise the way we store, process and analyse data. From improving smart contracts to detecting fraud and managing supply chains to improving decision-making in DAOs, the possibilities are endless. As these technologies continue to evolve, we can expect to see more innovative solutions that utilise their combined power to drive new levels of efficiency, transparency and security across various industries.

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6 THE 'GREEN DEAL' OF THE EU IN THE LIGHT OF EU CONSTITUTIONAL LAW AND WTO LAW

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1 INTRODUCTION

Climate protection is one of the most important tasks for our future – on this point there is usually consensus. Therefore, 'Green Deal' is the flagship initiative of the EU and the key driver of its climate ambition. The EU is pushing all stakeholders to consciously commit to reducing their carbon footprint and creating long-term value through sustainable solutions.[1] Politics, society and business face the common challenge of achieving the goals agreed in the Paris Climate Agreement. It is not the goal that is in dispute, but the way to get there.[2] Climate protection cannot mean neglecting other tasks. The Corona pandemic and the Ukraine conflict have caused enormous human and economic damage to the global economy. Therefore, it is important that the national economy return to growth.

The European Union wants to achieve both goals with the same means. The European Union's increased climate-related environmental protection goals are commonly grouped under the heading 'Green Deal'. Commission President Ursula von der Leyen set six headline ambitions for the Commission's activities in the coming years when she took office. In doing so, she defined the European Green Deal and ecological restructuring of European society as her central guidelines.[3] This was presented as the most important initiative the Commission intends to take in its first years – including the commitments for the first 100 days.[4] The name 'Green Deal' reminds us of the effective 'New Deal' with which Franklin Delano Roosevelt initiated economic policy measures in the US to overcome the Great Depression (1933 to 1938).[5] In this respect, an equally revolutionary project seems to be announced.[6]

The statement of the environment report of the European Environment Agency paved the way for the Green Deal.[7] The European Parliament declared a climate

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1 Rainer Kirchdörfer, 'Wie mit Marktwirtschaft und Technologie der Klimaschutz gelingt' (foreword) in Familienunternehmen, Chancen und Risiken in der Politik des Green Deal.

2 Ibid.

3 Communication from the Commission COM(2020) 37 final, 'Commission Work Programme 2020' (29 January 2020) para 2.

4 Ibid, para 5.

5 Hermann-J. Blanke and Stefan Pilz, 'Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union' (2020) Zeitschrift für Europarecht 270, 277.

6 Ibid.

7 Wolfgang Köck and Till Markus, 'Der europäische „Green Deal" – Auf dem Weg zu einem EU „Klimagesetz"' (2020) Zeitschrift für Umweltrecht 257.

and environment emergency, called on the Commission, the Member States and all global actors, and declared its own commitment, to urgently take the concrete action needed in order to fight and contain this threat before it is too late.[8]

2 JUSTIFICATION OF ECOLOGICAL TRANSFORMATION OF ECONOMY

Measures taken to implement climate protection must be consistent with fundamental rights and with the system of constitutional law and EU law. Furthermore, the goals of climate protection provide a legal basis and a justification for encroachments on fundamental rights. Finally, in the course of the (supra) state-directed ecological transformation of the economy, the principle of equal treatment must be observed, especially in its form as institutional protection of the open market and fair competition.[9]

2.1 SYSTEM DECISION FOR SOCIAL MARKET ECONOMY

The system decision for the social market economy follows from individual provisions of Basic Law and primary law of the EU. In this context stands for example the provision of art 173 TFEU as a specific policy competence of the EU.[10] Both legal systems, the German and the EU legal system are based on social market economy and require that every measure can be classified as coherent with this system decision. The social market economy anchored in the European Treaties is not a target that can be set at will. It is a consequence of the fundamental values laid down in the European Charter on Fundamental Rights and fundamental rights of the Basic Law.[11] If the individual human being with his or her freedom of will and freedom of contract is to be at the centre of the legal order, then the entire economic life must

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8 European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)) para C.1.

9 Udo Di Fabio, 'Green Recovery: Rechtsmaßstäbe für den ökologischen Umbau der Wirtschaft' in Familienunternehmen, Chancen und Risiken in der Politik des Green Deal 12.

10 Ibid, 13.

11 Ibid.

in principle also be able to develop freely, free from all state's tasks. Private autonomy, freedom to choose an occupation, freedom of trade, right to property, principle of equal treatment and social rights are the fundamental legal building rights from which the competition-neutral social market economy as an institution consistently and inevitably follows.[12] Every economic policy – including the ambitious ecological transformation policy for better sustainability and effective climate protection – must respect this framework.[13] This is a central element of rule of law. Constitution is open in terms of state's tasks, but binds the state action.

Social market economy is primarily based on a framework-setting, competition-neutral regulatory policy.[14] Regulation of markets by state is only considered to be in line with the system of social market economy where, for example, there are monopolies that distort the market and which should therefore be limited in their effect by state control and intervention.[15] A reliable framework must be established for market participants, which provides planning security for their own development. Stability of global markets always concerns investments with medium- and long-term effects and is therefore essential to protect right to property, freedom of trade and trust from the rule-of-law point of view.[16] Steering instruments, such as a well designed certificate trading system are in line with social market economy. Social market economy tolerates state intervention, when it comes up to concrete dangers, assessable risks or other challenges.[17] Even if the social market economy principle does not seem very justiciable, it is a guideline for the fundamental rights.

2.2 ENVIRONMENTAL PROTECTION AS CENTRAL CONCERN OF PRIMARY EU LAW

Environmental protection is a central concern of primary EU law, as can be seen from art 3 para 3 TEU, art 11 TFEU and art 191 TFEU. Terms such as 'high level of

12 Ibid.

13 Ibid.

14 Ibid.

15 Thomas Fetzer, Staat und Wettbewerb in dynamischen Märkten. Eine juristisch-ökonomische Untersuchung unter besonderer Berücksichtigung der sektorspezifischen Telekommunikationsregulierung in Deutschland und den USA (Mohr Siebeck 2013) 15.

16 Di Fabio (n 9) 13.

17 Di Fabio (n 9) 14.

environmental protection' and 'improving the quality of the environment' are explicitly mentioned. Within the CFR, art 37 represents the central provision for environmental protection. Art 37 CFR primarily promotes environmentally friendly interpretation of norms of EU law respectively national environmental protection law and can justify restrictions on fundamental rights.[18]

2.3 ART 37 CFR AS A CENTRAL PROVISION FOR ENVIRONMENTAL PROTECTION

CFR became binding with entry into force of the Lisbon Treaty on 1 December 2009 and has the same rank as primary EU law.[19] It is therefore of interest that the CFR contains a separate provision on environmental protection. The practical scope is complemented above all by the case law of the ECJ. According to the ECJ, art 37 CFR does not only contain a principle that provides for a general obligation of the EU with regard to the objectives to be pursued within the framework of its policies.[20] On the contrary, the ECJ counts the guarantees under art 37 CFR very much among the rights regulated by the Treaties, art 52 para 2 CFR.[21] In support of its view, the ECJ has pointed out that art 52 para 2 CFR provides that rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. Such is the case with Article 37 of the Charter.[22] In this context the EU Commission verified, if the proposal for CBAM respects the fundamental rights and observes the principles recognised in particular by the CFR. No infringement was detected, in particular, the proposal for CBAM contributes to the objective of a high level of environmental protection in accordance with the principle of sustainable development as laid down in Article 37 of the Charter.[23]

In addition to fundamental rights in the narrower sense, the CFR also contains so-called principles, as can already be seen from the provision of art 6 para 1 TEU. The

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18 Di Fabio (n 9) 14.

19 Hans D. Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht' (2011) Zeitschrift für Umweltrecht 563.

20 Case C-444/15 Associazione Italia Nostra Onlus v Comune di Venezia and others (ECJ judgement of 21 December 2016) para 61.

21 C-444/15 paras 62-63.

22 C-444/15 paras 62-63.

23 European Commission COM(2021) 564 final, 'establishing a carbon border adjustment mechanism' (14 July 2021) para 3.

distinction between rights and principles, which was already discussed in the Convention responsible for drafting the CFR and which occurs in a similar way in French and Spanish constitutional law, was concretised by the provision of art 52 para 5 CFR.[24] The fundamental difference between 'rights' and 'principles' is also referred to in the Explanation relating to the CFR, where rights are referred to as 'subjective rights' that shall be respected, whereas principles shall be observed.[25]

On the one hand, the principles contain binding law, as obligated legal entities must comply with them pursuant to art 51 para 1 GCH. On the other hand, their enforcement in court is subject to restrictions. Principles may be implemented through legislative or executive acts adopted by the EU in accordance with its powers, and by the Member States only when they implement EU law.[26] Accordingly, they become significant for courts only when such acts are interpreted or reviewed.[27] They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities.[28] Principles are more legal requirements, which require the obligated legal entity not to unreasonably impair the protected good in question and entitle them to promote the protected good through implementing acts. Furthermore, principles are characterised by their particular need for implementation and fulfilment. However, unlike fundamental rights in the narrower sense, they do not convey any subjective rights. Such rights can only arise from implementing acts.[29]

Due to its character as a principle the provision cannot be used in the context of legal remedies. Nor can claims for damages for violation of art 37 CFR arise because they require a subjective right.[30] However, if court proceedings are opened on a different basis, then principles must be taken into account, as indicated by art 52 para 5 sentence 2 CFR. Accordingly, the compatibility of a legal regulation with a principle can be examined within the framework of an incidence review.[31] If a plaintiff wants to ward off an infringement, there is usually available a legal remedy. Therefore, the restriction of judicial review has only little effect in the defence situation.

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24 Hans D. Jarass, Charta der Grundrechte der Europäischen Union (4th edn, C.H. Beck 2021) art. 52 paras 68-69a.

25 Explanations relating to the Charter of Fundamental Rights, OJ C 303 (14.12.2007) art. 51 para 5.

26 Ibid.

27 Ibid.

28 Ibid.

29 Hans D. Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht' (2011) Zeitschrift für Umweltrecht 564.

30 Hans D. Jarass, Charta der Grundrechte der Europäischen Union (4th edn, C.H. Beck 2021) art. 37, para 3.

31 Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht' (n 29) 564.

Art 51 para 1 CFR rules who is bound by the Charter. This also applies to the principles, as can be seen explicitly from sentence two of this provision.[32] The Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. Therefore, it addresses first the institutions, offices and other agencies of the EU as well as the EU as a legal entity. In addition, pursuant to Article 51 para 1 sentence one CFR, it is only binding on the Member States when they act in the scope of Union law.[33]

The principle of environmental protection in art 37 CFR forms an important component of primary EU environmental law. Art 37 CFR aims for a high level of environmental protection. The understanding of the term 'high level of environmental protection' is similar to art 191 TFEU, also taking into account the diversity of situations in the various regions of the Union.[34] The principle that preventive action should be taken, shall apply. Environmental damage should as a priority be rectified at source. Improvement of the quality of the environment must be integrated into the policies of the EU and ensured in accordance with the principle of sustainable development. All these criteria are also part of the Green Deal of the EU as well as the interests of next generations.

2.4 TARGET OF ECOLOGICAL TRANSFORMATION OF ECONOMY

Transformation of the economy is a significant and central challenge at the present time. It refers to restructuring of the economy with the aim of conserving natural resources and protecting environment. The focus of transformation is thus on sustainability.[35] At the heart of this European initiative is the so-called 'Green Deal', which is also to be supported by financial resources.[36] This ecological transformation programme has far-reaching implications for the economy. This raises fundamental questions about the compatibility of this sustainability-oriented programme with es-

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32 Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht' (n 29) 564.

33 Explanations relating to the Charter of Fundamental Rights, OJ C 303 (14.12.2007)) art. 51 para 1.

34 Calliess, EUV/AEUV art. 37 CFR para 6.

35 Kay Windthorst, 'Die ökologische Transformation der Wirtschaft aus der Perspektive der Familienunternehmen – Vom politischen Ziel zur praktischen Umsetzung' in Familienunternehmen, Chancen und Risiken in der Politik des Green Deal 73.

36 Ibid.

sential parameters of the existing open market economy, such as freedom to conduct a business, competitiveness of economy, growth and profit-making.[37]

To implement the ecological transformation, the EU and the Member States can use different instruments. Particularly are feasible restrictions in the form of prohibitions and bans, but also technical unification through harmonisation and standardisation, which target less at competition than at sustainability goals, especially climate and environmental protection. This type of regulation requires a legal basis because of the encroachment on the fundamental economic rights of companies concerned.[38]

In addition, the public sector can also implement incentives by financial support or other incentives for ecologically sustainable behaviour. A legal basis is also required for this if this also interferes with the fundamental rights of the non-funded competitor. The same applies if the framework conditions of competition are changed by incentives. It should be noted that the importance of the public interest of ecological sustainability does not automatically justify such measures. Rather, a legal basis is required for this, which in particular must satisfy the principle of proportionality. According to the doctrine of materiality of the BVerfG, all material decisions are subject to the reservation of the law.[39]

The Green Deal aims to use a wide range of different instruments. The European Commission wants to do this by providing 'a roadmap with actions to boost the efficient use of resources by moving to a clean, circular economy and stop climate change, revert biodiversity loss and cut pollution', as well as outlining investments needed and financing tools available.[40] The Green Deal presents a broad mix of policies with different degrees of novelty, in different stages of development and of different nature. The European Commission has avoided listing a later year than 2021 for the implementation of its policies under the Green Deal – often by announcing just the next, more concrete, policy document on the way to any binding measure.[41]

As far as environmental sustainability as a goal for transformation of the economy is concerned, it should be recalled that this goal is legitimised under Union and German constitutional law. According to art 191 para 1 TFEU and art 37 CFR, preserving,

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37 Ibid.

38 Windthorst (n 35) 78.

39 BVerfG, Decision of 28 October 1975 - 2 BvR 883/73. See 'Verwaltungsrechtliches Vorverfahren für die Anfechtung von Strafvollzugsmaßnahmen' (1976) Neue Juristische Wochenschrift 34, 35-36.

40 Squire Patton Boggs, The European Green Deal – Europe's "Man on the Moon Moment"?, December 2019, 1.

41 ibid.

protecting and improving the quality of the environment and prudent and rational utilisation of natural resources are essential objectives of the EU's environment policy. At national level, art 20a Basic Law establishes the protection of the natural foundations of life and animals as a state objective, also of its responsibility towards future generations.[42] There is also a broad consensus that the measures taken so far have proven to be insufficient and that further steps are necessary.[43] The German state has reacted to this development and decided to participate in the European transformation process set up to combat these deficits. In doing so, it must comply with the precautionary principle of Article 191 para 2 TFEU. Based on this principle, preventive action should be taken, it cannot wait and trust that the environmental and resource problems will take care of themselves, but must fight environmental damage as a matter of priority.[44]

According to art 11 TFEU, environmental protection requirements must be integrated into the definition and implementation of the EU's policies and activities, in particular with a view to promoting sustainable development. Insofar as this leads to a conflict with other principles, such as an open market economy with free competition (art 119 para 1, 120 TFEU), this must not be resolved unilaterally to the detriment of environmental protection, but adequate account must be taken of this objective.[45] The goal of ecological sustainability is an imperative that must be taken into account by the EU and the German state. In its implementation, the principle of an open market economy with free competition under Union law and the fundamental economic rights of those concerned must be considered.[46] This includes, in particular, freedom to choose an occupation, right to property, and private autonomy. Measures to realise ecological sustainability must remain within this legal framework.[47] Insofar as concrete steps have already been taken to realise the Green Deal, for example in the areas of environmental protection, energy supply and the circular economy, a prima facie view does not show that they exceed this framework.[48]

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42 Windthorst (n 35) 82.

43 Windthorst (n 35) 82.

44 Windthorst (n 35) 82.

45 Windthorst (n 35) 83.

46 Windthorst (n 35) 83.

47 Windthorst (n 35) 83.

48 Windthorst (n 35) 83.

2.5 GREEN DEAL AS A NEW GROWTH STRATEGY WITH A RESOURCE-EFFICIENT ECONOMY

The European Green Deal is the EU's new growth strategy, aiming to transform the EU into a fairer and more prosperous society, with a modern, resource-efficient and competitive economy, with no net emissions of greenhouse gases by mid-century.[49] The main goal is to harness the significant potential in global markets for low-emission technologies, sustainable products and services in order to achieve climate neutrality by 2050.[50] Economic growth is to be decoupled from resource use. A circular and sustainable management of resources will

- improve our living conditions
- maintain a healthy environment
- create quality jobs
- provide sustainable energy resources.[51]

The Green Deal is not a climate pact, it is not an agreement between sovereign entities and those affected, such as companies, but a political concept on the basis of which the EU and the Member States want to achieve the transformation process, primarily by means of regulation and incentives.[52]

3 EU COMPETENCE AND LEGAL BASIS

The EU can only act if it has been authorised by the Member States under the Treaties according to the principle of conferral under art 5 TEU. The principle of subsidiarity and proportionality must justify its action.[53]

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49 European Commission 'Industry and the Green Deal'.

50 Ibid.

51 European Commission 'Delivering the European Green Deal'.

52 Windthorst (n 35) 75-76.

53 Jana Viktoria Nysten, 'Eine EU CO_2-Bepreisung für internationale Importe' (Würzburger Berichte zum Umweltenergierecht Nr. 52 vom 23.06.2021) 6.

There are two provisions as the legal basis. This are the environmental competence under art 192 TFEU, and the common commercial policy under art 207 TFEU.

The common commercial policy under art 207 TFEU, includes, among other things, changes with regard to tariff rates. However, exercise of competences conferred by art 207 para 6 TFEU in the field of common commercial policy shall not affect the delimitation of competences between the EU and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation. Art 207 para 6 TFEU is not problematic for introduction of a CBAM in line with intended Option 4:[54] domestic products are not affected, and the EU has corresponding competences in the areas of energy, environment and taxes.[55] ETS has already been adopted based on corresponding competences. Harmonisation in this area is therefore not excluded, even if special majority requirements may apply in the area of taxation.[56] Thus, provided, that it complies with the subsidiarity and proportionality principles, Option 4 should in principle also be able to be implemented in accordance with the ordinary legislative procedure on the legal basis of art 207 TFEU.

However, the Commission intends to base the CBAM on art 192 para 1 TFEU as this initiative is action being taken to combat climate change and to serve the other environmental objectives specified in art 191.[57] This means that the CBAM proposal will be adopted through the ordinary legislative procedure. However, EU case law has established that the content of the measure determines the choice of legal basis. It is established ECJ jurisprudence that the choice of the legal basis for an Union act must rest on factors that, in particular, include the aim and the content of the measure at issue.[58] The application of those criteria amounts to the question whether the imposition by the EU of a tax on certain products – whether imported or not – on the basis of carbon emitted in the course of the consumption or production of these products is aimed at achieving the objectives listed under art 191 para 1 TFEU.[59] Notwithstanding the very precise design for a carbon tax, the answer to this question is highly likely to be affirmative for one, several, or all objectives listed in art

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54 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 6-8.

55 Ibid.

56 Ibid.

57 Commission staff working document SWD(2021) 601 final PART 1/4, 'IMPACT ASSESSMENT REPORT' (n 255).

58 Case C269/97 Commission v Council (ECJ judgement of 4 April 2000) para 43-48.

59 Joost Pauwelyn and David Kleimann, European Parliament's online database, 'Trade Related Aspects of a Carbon Border Adjustment Mechanism. A Legal Assessment' (April 2020) PE 603.502, 13.

191 TFEU. Union acts laying down policies contributing to the objectives listed in art 191 para 1 TFEU are generally adopted in accordance with the ordinary legislative procedure. Here, in essence, the European Parliament and the Council co-decide on a legislative proposal tabled by the Commission.[60] However, EU legal acts on the environment must be adopted in accordance with a special legislative procedure if the provisions of that act are 'primarily of a fiscal nature', art 192 para 2a) TFEU. If so, the Council acts unanimously on a proposal from the Commission after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.[61] The jurisprudence of the ECJ suggests that a scheme, which generates revenue for public authorities and creates a direct link between a charge on carbon emitted and the production or consumption of a product, makes for a tax.[62] As a tax scheme is an instrument of fiscal policy, it is arguably 'primarily of a fiscal nature' within the meaning of art 192 para 2 TFEU and hence subject to the special legislative procedure laid out in that provision.[63]

The EU Treaties allow for a change of legislative procedure. Art 192 para 2 TFEU provides for the possibility to switch, for the purposes of tax measures in the area of environment policy, to the ordinary legislative procedure and hence qualified majority voting in the Council. The so-called 'passarelle clause' in art 192 para 2, second sentence, stipulates that the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may render the ordinary legislative procedure applicable. This switch from the special legislative procedure to the ordinary legislative procedure – as advocated by the Commission as more efficient and democratic decision-making in EU tax policy – would add the European Parliament as a co-legislator in carbon tax legislation.[64]

The EU could adopt the measure at issue also under art 207 para 2 TFEU and art 191 para 2 TFEU. However, the Commission intends to base the CBAM on art 192 para 1 TFEU.[65]

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60 Ibid.

61 Ibid.

62 Case C-346/97 Braathens Sverige AB v Riksskatteverket (ECJ judgement of 10 June 1999) para 23.

63 Pauwelyn and Kleimann (n 59) 14.

64 Pauwelyn and Kleimann (n 59) 14.

65 European Commission COM(2021) 564 final, 'establishing a carbon border adjustment mechanism' (14 July 2021) para 3.

The absence of EU level action could lead to 'environmental dumping' between the Member States, where Member States compete for the least stringent climate change measures to benefit their own economies, damaging the internal market and weakening climate action.[66] An urgent climate transition requires a high degree of investments. As a result, foregoing the benefits of economies of scale and the possibility of reducing emissions where they are more cost-effective, would result in a slower climate transition due to increased costs and less available funds.[67] As a carbon market, the ETS incentivises emission reductions to be made by the most cost-effective solutions first across the activities it covers, achieving greater efficiency by virtue of its scale.[68] Implementing a similar measure nationally would result in smaller, fragmented carbon markets, risking distortions of competition and likely lead to higher overall abatement costs.[69]

4 WTO COMPATIBILITY

Since the Commission mentioned the possible introduction of a CBAM at the end of 2019, the main topic of discussion has been the extent to which such a project can be compatible with WTO law at all. There has also been much discussion on this in the literature.[70] The European Parliament supports the introduction of a CBAM, provided that it is compatible with WTO rules by not being discriminatory or constituting a disguised restriction on international trade.[71] It considers that as such, a CBAM would create an incentive for European industries and EU trade partners to decarbonise their industries and therefore support both EU and global climate policies towards GHG neutrality in line with the Paris Agreement objectives.[72] In the following,

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66 Commission staff working document SWD(2021) 557 final, 'Subsidiarity Grid' (14 July 2021) para 2.3 b).

67 Ibid.

68 Commission staff working document SWD(2021) 601 final PART 1/4, 'IMPACT ASSESSMENT REPORT' 11-12.

69 Ibid.

70 Tim Merkel, 'Rechtliche Fragen einer Carbon Border Tax – Überlegungen zur Umsetzbarkeit im Lichte des Welthandelsrechts' (2020) Zeitschrift für Umweltrecht 658, 666.

71 Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC OJ L 264 para 9.

72 Ibid.

the discussion on the issue of the compatibility of the CBAM with WTO law will not be reviewed in its entirety, but the focus will be on the main topics.

4.1 LEGAL CONSEQUENCES OF INCOMPATIBILITY OF CBAM WITH WTO LAW

The first question is what the consequences would be if the EU were to introduce a CBAM in violation of WTO law. Any competitiveness provision with a significant impact on trade is likely to trigger a WTO complaint.[73] If parts of a climate change measure were found to violate WTO law, the only formal remedy currently offered by the WTO dispute settlement system is that the WTO Member would then have to change its legislation as to the future. No damages for past harm are due.[74] Hence, a competitiveness provision could be included as part of a good faith effort to tackle climate change, pursuant to a good faith interpretation of relevant WTO rules.[75] If the effort fails, and the WTO strikes down the provision, EU as the legislator gets a second chance to correct its measure so as to bring it in line with WTO recommendations. EU would get the chance to do so within a reasonable period of time, without any sanction or obligation to pay compensation. Furthermore, the dispute resolution system is at the moment not fully operational. The US does not support the proposed decision to commence the appointment of Appellate Body members. This situation is seriously affecting the overall WTO dispute settlement system.[76]

4.2 NON-DISCRIMINATION OBLIGATION

The GATT of the WTO establishes a general non-discrimination obligation in international trade between the parties to the agreement. This obligation is divided into a 'most-favoured nation principle' of art I GATT and art III GATT on 'national treatment',

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73 Patrick Low and others, 'The interface between the trade and climate change regimes: scoping the issues', Staff Working Paper WTO ERSD-2011-1 (12 January 2011) 1 et seq.

74 Joost Pauwelyn 'Carbon Leakage Measures and Border Tax Adjustments Under WTO Law' (21 March 2012) 7.

75 Ibid.

76 The World Trade Organization Press Release, 'Members continue push to commence Appellate Body appointment process (28 MARCH 2022).

whereby art XX GATT allowing certain exceptions to justify discrimination.[77] Furthermore, within the framework of art II:2 lit. a) and art III:2 GATT, it is also possible to implement specific border tax adjustments, which, provided they remain within the framework set by GATT, do not constitute a violation.

4.2.1 MOST-FAVOURED-NATION TREATMENT OF ARTICLE I GATT

Art I:1 GATT requires that any advantage granted by any WTO Member to any product originating in any other country shall be accorded immediately and unconditionally to the like product originating in all other contracting parties. In relation to the introduction of CBAM, this provision raises questions in particular regarding a distinction between the different importing countries. The most-favoured-nation treatment principle would mean that the EU could not provide different CO_2 prices for different WTO contracting parties.[78] The European Parliament stressed that Least Developed Countries and Small Island and Developing States should be given special treatment in order to take account of their specificities and the potential negative impacts of the CBAM on their development.[79] The most-favoured-nation treatment principle would mean that the EU cannot provide for different CO_2 prices for different WTO contracting states, for instance on the basis of their level of development. If special conditions are provided for certain developing states, these 'most favourable' conditions and CO_2 pricing would have to be granted to all contracting states. Differentiation according to the development status of countries seems to be difficult in relation to the most-favoured-nation treatment principle.[80]

4.2.2 NATIONAL TREATMENT PRINCIPLE OF ARTICLE III GATT

Art III:1 GATT rules that internal taxes and other internal charges should not be applied to imported or domestic products so as to afford protection to domestic production. In concrete terms, this means that imported products shall not be subject, directly or indirectly, to any form of taxation or other charge, which is higher than that imposed directly or indirectly on 'like' products of domestic origin.[81] This requires that

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77 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 14-15.

78 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 15.

79 Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 (n 77) para 8.

80 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 16.

81 Ibid.

imported products are not treated less favourably than like domestic products.[82] A crucial question in this respect is which products can thus be compared.[83] The WTO Appellate Body has drawn up a non-exhaustive catalogue of criteria in this regard, which aims to determine 'likeness' between and amongst products. The Appellate Body clarified that the 'characteristics' of a product include any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product. Such 'characteristics' might relate, inter alia, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.[84] However, it went on to state that 'product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product.[85]

Accordingly, the characteristics, nature and quality of the products, their end-uses, consumer preferences and habits, and tariff classification are the main factors to be examined. For the planned CBAM, at least almost all criteria should be fulfilled. As far as consumer preferences are concerned, it could be argued that consumers prefer EU products because they are produced with less CO_2 or are subject to higher production standards. However, this would suppose that EU products are always lower in CO_2 emission, which cannot be determined in such a general way. It is more likely that EU products cause the same or at least comparable CO_2 emissions as non EU-products, but that their manufacturers have to pay for them under the ETS or comparable mechanism. Since imported products are not treated worse than domestic products and are subject to the same ETS, resp. CBAM requirements, the national treatment principle seems to be preserved.[86] With respect to Least Developed Countries and Small Island Developing States, which should be given special treatment in order to take account of their specificities and the potential negative impacts of the CBAM on their development,[87] this criterion might be a problem.

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82 Pauwelyn, 'Carbon Leakage Measures' 37 et seq.

83 Ibid.

84 Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (12 March 2001) para 67.

85 Ibid.

86 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 17.

87 Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 (n 77) para 8.

4.2.3 ART II:2 LIT. A) GATT 'LIKENESS'

CBAM would be permitted in case the carbon measure imposed on imports can be classified as an internal measure, that is, a tax or 'equivalent' to an internal tax pursuant to GATT Article II:2(a) and the carbon measure on domestic production sufficiently applies to or affects products.[88] In a cap-and-trade regime like the ETS, producers must normally hold emission credits or allowances up to the level of carbon they emit at their production installations. In the context of the debate above on permissible 'border adjustment', the question is whether such obligation to hold emission allowances can be qualified as an 'internal tax' in line with art II:2 lit. a) and art III:2 GATT. The general definition of a tax is 'a compulsory contribution imposed by the government for which taxpayers receive nothing identifiable in return'.[89]

The obligation to hold an emission allowance could be qualified as a 'regulation'. You can argue that emission certificates establish a right to emit GHG and thus grant a counter-performance from the state.[90] In a recent case before the European Court of Justice, for example, Advocate General Kokott rejected the notion that the obligation to buy emission allowances is a tax or charge and construed it rather as a special type of regulation:

'It would be unusual, to put it mildly, to describe as a charge or tax the purchase price paid for an emission allowance, which is based on supply and demand according to free market forces, notwithstanding the fact that the Member States do have a certain discretion regarding the use to be made of revenues generated (Article 3d(4) of Directive 2003/87)'.[91]

The need to hold a permit for emitting CO_2 almost exclusively serves the interests of the wider community. Companies subject to the obligation do not receive anything specific or identifiable in return, there are no sovereign rights of Member States to the atmosphere. The right to emit GHG is not linked to CO_2 allowances, which is also shown by the fact that the emission control approval of a production unit is independ-

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88 Pauwelyn, 'Carbon Leakage Measures' 35 et seq.

89 Organisation for Economic Co-operation and Development 'Definition of Taxes' (19 April 1996) 3-5. The Definition of Taxes is comparable to § 3 para 1 AO.

90 Merkel, 'Rechtliche Fragen einer Carbon Border Tax' 661.

91 Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change (ECJ judgement of 21 December 2011) para 216.

ent from the ETS.[92] From this perspective, the cost of having to present an emission credit could qualify as a 'tax'.

Under the national treatment principle of art III GATT, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products. Article III covers only internal taxes that are borne by products.[93] According to this panel, as is the case for taxes, regulations can only be adjusted at the border if they 'apply to the product as such', not if they regulate the producer. Ultimately, the question is how to interpret the words 'regulations (…) affecting (…) products', in GATT Article III:1. As with border tax adjustment, some line must be drawn between purely producer regulations that cannot be adjusted at the border, and product-related regulations that can be adjusted at the border.[94] However, this does not necessarily mean that all process regulations are by definition not adjustable. If they sufficiently 'affect' the 'product' they could be found to be subject to GATT art III.[95] From that perspective, the 'nexus' between a carbon label or intensity standard and the products affected by it (say, carbon-intensive steel or cement) could be found to be tight enough so as to permit a finding that the carbon regulation is one 'affecting (…) products' in the sense of GATT art III:2 and, therefore, adjustable at the border.[96]

4.3 ENVIRONMENTAL EXCEPTIONS ARTICLE XX GATT

Any violation may still be justified under the environmental exceptions of art XX GATT.[97] Climate legislation might be justified as a measure under art XX(b) GATT, namely as a measure 'necessary to protect human, animal or plant life or health'. In 2001, the WTO Appellate Body accepted a French ban on imports of asbestos as qualifying under the exception of GATT art XX(b) for health protection.[98] Furthermore violation of the GATT can be justified under the environmental exceptions of

92 Merkel, 'Rechtliche Fragen einer Carbon Border Tax' 661-62.

93 GATT Panel Report, United States – Restrictions on Imports of Tuna, DS21/R (3 September 1991) para 5.13.

94 Pauwelyn, 'Carbon Leakage Measures' 32-33.

95 Ibid.

96 WTO panel report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R (7 October 2005) paras 8.42-8.45.

97 Pauwelyn, 'Carbon Leakage Measures' 43-44.

98 European Communities – Measures Affecting Asbestos paras 155-81.

art XX(g) GATT as a measure 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.' The WTO Appellate Bod also decided in 2001 that a modified US ban on shrimp based on how these shrimp were caught abroad – that is, a pure process measure, similar to a carbon tax or regulation – was justified under art XX(g) GATT.[99]

For a carbon tax or regulation on imports to meet the art XX(g) GATT exception, three cumulative conditions must be met.[100]

(i) The planet's atmosphere must be considered as an 'exhaustible natural resource'. Considering the international importance given today to the problem of climate change and the catastrophic consequences that are linked to it for all forms of life on earth, it would be surprising if the WTO would not accept that the planet's atmosphere is an 'exhaustible natural resource'.[101] Required is 'a sufficient nexus' between carbon emissions in, for example, India and the climate change consequences that such carbon emissions can have for such carbon-restricting country. The world's atmosphere is, after all, a global commons; and carbon emissions are, because of their global impact, a collective action problem.[102]

(ii) Domestic climate legislation must 'relate to' the conservation of the planet's atmosphere. The 'related to' test requires a 'substantial relationship' between the domestic climate legislation and the conservation of the planet's atmosphere and related climate.[103] This test must be applied to the legislation as such and its general design; not so much to its specific details.[104] Unless there are blatant inconsistencies or protectionist features, climate change legislation should normally pass this 'related to' test.[105]

(iii) The domestic climate legislation on imports must be made effective in conjunction with restrictions on domestic production and consumption. As long as the do-

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99 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products –WT/DS58/AB/RW (22 October 2001) para 92.

100 Pauwelyn, 'Carbon Leakage Measures' 45-47.

101 Ibid, 45-46.

102 Ibid, 45-46.

103 Ibid, 46.

104 Ibid, 46.

105 Ibid, 47.

mestic legislation imposes broadly similar restrictions also on domestic businesses, this clause will be met.[106] This third test under art XX(g) GATT should therefore be not difficult to meet for the CBAM.

Finally, even if all three conditions under the specific paragraph of art XX(g) GATT were met, the domestic climate legislation that was found to violate any other GATT provision would also have to fulfil the introductory phrase of art XX GATT. This phrase requires that 'measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.[107]

Chapeau of art XX GATT provides similarly that 'measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.[108] The discrimination to be avoided under the introductory phrase of art XX GATT is different from the discrimination referred to under most-favoured-nation treatment of Article I GATT and national treatment principle of art III GATT. Under articles I and III GATT, the discrimination is focused on 'like products'; under art XX GATT it is focused on 'countries where the same conditions prevail'.[109] Quite logically, the discrimination under the exception in art XX GATT must be different from the discrimination under art I or art III GATT. If the discrimination in art XX GATT were the same as in art I or III GATT you would not be able to justify it under art XX GATT.[110] Discrimination under the introductory phrase of art XX covers both, discrimination between different foreign countries exporting to the carbon-restricting country and discrimination between foreign countries and the carbon-restricting country.[111] The Appellate Body, based on its decisions in the previous environmental disputes refers to numerous requirements.[112] The issue here is that the measure in question should not be disproportionate, going beyond the minimum of what is necessary to achieve its objective. The unequal treatment must therefore be justified in its extent.[113]

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106 Ibid, 47.

107 Ibid, 47.

108 US – Shrimp paras 118 et seq.

109 Pauwelyn, 'Carbon Leakage Measures' 48.

110 Ibid.

111 Ibid.

112 Pauwelyn, 'Carbon Leakage Measures' 48-51.

113 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 19.

However, art XX GATT requires such equal treatment only between countries in which exist the same conditions. Climate legislation must take account of local conditions in foreign countries. In US – Shrimp, the original US ban was faulted because it required that all other countries 'adopt the same policy' as the US did.[114] However, the Appellate Body ruled that not only 'equal things must be treated equally', but also 'unequal things must be treated unequally'. Article XX GATT does not proscribe unilateral trade restrictions, but a reasonable degree of limitation must be imposed on their use – in line with the wording of the chapeau – if the balance of rights and obligations is to be preserved.[115] On the one hand the requirement to take into consideration different conditions which may occur in different foreign countries, may force the carbon-restricting entity to consider whether developing countries should, for historical reasons, carry the same burden as other countries. In simple words, the introductory phrase of art XX may force the carbon-restricting entity to have lower or even no carbon restrictions on imports from developing countries, especially the poor ones.[116] The fact that a developing country ratified the Kyoto Protocol could force the EU to exclude it from its carbon tax. Under the Kyoto Protocol, developing countries did not have to commit to any emission reductions. It can also join an international agreement on climate change and link between the Kyoto Protocol and European tariff preferences for goods coming from developing countries who have ratified and implemented, among other agreements, the Kyoto Protocol.[117]

On the other hand US – Shrimp decision of the Appellate Body mentioned above may force a carbon-restricting entity to consider whether a foreign country already imposes emission cuts.[118] This, may oblige the carbon-restricting entity to impose lower (or no) import taxes or emission allowance requirements on imports from countries that have their own climate policies in place. The Kyoto Protocol leaves it open how countries meet their targets, be it through taxes, regulations or a cap-and-trade system. Art 6 of the Paris Agreement provides indications of what contributions to promote sustainable development and environmental integrity could or should be recognised.[119] However, it has not yet been clarified how exactly this is to take in

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114 US – Shrimp, para 40.

115 Ibid, 48.

116 Pauwelyn, 'Carbon Leakage Measures' 49-50.

117 Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, OJ L 169 (30.6.2005) Annex III, Part B, para 23.

118 Pauwelyn, 'Carbon Leakage Measures' 49.

119 Nysten, 'EU CO_2-Bepreisung für internationale Importe' 19.

place and how it is to be implemented within the framework of the CBAM.[120] Even if the EU is extremely active in international fora to strengthen environmental global rules and to accompany trade partners and less developed countries on a path to decarbonise and CBAM will complement the international environmental action of the EU and favour decarbonisation in third countries,[121] concrete mathematic calculation or solution is missing in the document. As the Commission has highlighted the need for targeted ways to support LDCs, the form of technical assistance, technology transfer, extensive capacity building and financial support, with the objective to develop industrial production structures that are compatible with long-term climate objectives were taken into account.[122] Assistance could be carried out through existing support channels including through the mechanisms established under the UNFCCC.[123] In the absence of such compensating mechanisms, LDCs could argue that the introduction of a CBAM will be a disproportionate burden for them and that they conflict with the UNFCCC principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.[124] Another challenge will be to convince the WTO that the CBAM is only the extension of domestic climate policy, applied on an equal footing to imports.

5 CONCLUSION

If one follows the development of international and European trade policy in recent times, one cannot help but get the impression that the fundamental free trade principle of the 'open market' no longer dominates, but rather new varieties of a new protectionism. The Ukraine war, the annexation of Crimea and sanctions against Russia are the most recent key words. The supply of natural gas to Germany is at risk, especially for the second half of 2022 and the winter of 2022/2023. Gas prices are exploding and endangering entire branches of industry in Germany, such as the chemical sector, logistics sector and agriculture. Associated losses of economic prosperity will now become even more prominent and push issues such as environmental

120 European Commission COM(2021) 564 final, 'establishing a CBAM' (n 65) para 5.

121 Ibid.

122 European Commission COM(2021) 564 final, 'establishing a CBAM' (n 65) para 5.2.1.11.

123 Ibid.

124 Ibid.

protection into the background. It is therefore to be expected that the impact of a more ambitious climate policy on the competitiveness and performance of German and European economy will increasingly come into focus in the future.

The conception of the CBAM has proven to be a lever that encouraged countries to seek discussion with the EU on climate policy cooperation. In the face of difficult partners such as China, Brazil, Russia and Turkey, Brussels was also making clear signals that the EU wants to rely on strength in climate and trade policy in order to realize the Green Deal targets. Long-term contracts for natural gas, which is urgently needed for the economic transformation and decarbonisation of the economy, beyond 2049 are out of reach. Fulfilment of long-term contracts with Russia and supply with natural gas, with regard to the sanctions against Russia, is top priority now in order to be able to cover basic needs and keep supply chains running in Germany and Europe. Currently EU seems to turn from driver to driven as result of the Ukraine war.

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7 INFRINGEMENT OF DATA PROTECTION AS AN ABUSE OF ECONOMIC AND POLITICAL POWER – IS THE CASE OF CAMBRIDGE ANALYTICA JUST THE TIP OF THE ICEBERG?

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INTRODUCTION

Personal data has been widely recognised as a valuable commodity for at least a decade, fuelled, inter alia, by the developments in computing and data storage. Legislators in the EU have tried to keep up with the speed and scope of developments around how personal data is being used by reforming the overall legal data protection framework as well as introducing supplementary legislation to deal with specific aspects in that area.

The revelations surrounding the case of Cambridge Analytica have demonstrated the lengths companies will go to, to harness this value and abuse their power, in the particular case for political purposes.

Although the breaches that happened in the case of Cambridge Analytica could be dealt with under the data protection legislation at the time, the introduction of the General Data Protection Regulation did strengthen the legal framework, for example by making it easier to identify a breach, making it more difficult for data controllers and data processors to conceal their practices and introducing a more stringent penalty and enforcement regime. Additional legislation also introduces additional safeguards, which, on the whole, present a strong framework to suggest a likely prevention of infringements of a similar nature happening in the future.

The transfer of personal data from the EU to the U.S. is a cornerstone of the transatlantic relationship. The deficiencies in the U.S. approach to data protection compared to the EU's commitment to privacy for its residents have been exposed in Schrems I and Schrems II. Following the new adequacy decision by the EU Commission, the Data Privacy Framework, Schrems III looks likely and could seriously undermine any efforts at EU level.

Is data the new oil?

The phrase "*Data is the New Oil*" has been ubiquitous over the last decade. Attributed to Clive Humby, a British mathematician, who coined the phrase in 2006, his analogy referred to the similarities between oil and data, which in their raw state offer little, but can increase their value (exponentially) after going through various processing stages[1]. In more recent times, the interpretation of Humby's phrase has taken on different meanings. Some have focused on the similarities between oil and

[1] The University of Sheffield, 'Clive Humby Visting Professor of Computer and Information Science' (2024).

data as heralding and generating significant industrial and technological developments.[2] Similarities have also been drawn between the concerns around regulatory control, particularly anti-trust measures to address the exponential growth and the dominance of the key players in the sphere of both commodities.[3]

Although the analogy between oil and data does work to an extent it is also clear that the qualities of data as a commodity necessitate an approach that goes beyond trying to handle it in the same way as oil. In any event, the comparison with oil alone does not explain how data has achieved its status. How does the intangible nature of data generate such immense value, which may even surpass oil, a tangible resource, with all of its different uses and purposes.

In the case of Cambridge Analytica, personal data was collected covertly through Facebook, highlighting one of the risks of political advertising by means of micro-targeting, in that the individual is completely unaware about why they are being targeted with specific political adverts.

DATA PROTECTION IN THE EU AT THE TIME OF CAMBRIDGE ANALYTICA

Facebook confirmed that Cambridge Analytica had access to the personal data of around 2,7 million EU citizens. The distinction between *Cambridge Analytica* – with its potential breaches – affecting US or EU citizens is important to the extent that there are fundamental differences in the legislative frameworks regulating data privacy. Most notably, EU citizens have their rights to privacy and personal data protection safeguarded by the Charter of Fundamental Rights of the European Union[4]. US citizens' rights of privacy are neither a fundamental human right nor is it enshrined constitutionally. Rather, the United States Constitution tries to protect their citizens from violations of their liberties, e.g. through the 1st and 4th Amendments[5]. EU data protection legislation extends its reach to the processing of personal data of EU citi-

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2 Christoph Stach, 'Data Is the New Oil–Sort of: A View on Why This Comparison Is Misleading and Its Implications for Modern Data Administration' (2023) *Future Internet* 15, no. 2: 71.

3 The Economist, 'The world's most valuable resource is no longer oil, but data' The Economist Leaders (6 May 2017).

4 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EUChFR).

5 American Library Association, 'Constitutional Origin of the Right to Privacy' (2009).

zens by third countries. Broadly speaking this means that third countries, which process personal data outside the EU legal framework, had to prove an "adequate level of protection" under the Data Protection Directive (DPD)[6] which came into force on 13 December 1995. Under the General Data Protection Regulation (GDPR)[7], which came into force on 25 May 2018, this was strengthened, evidenced by the general principle for third country transfers now providing that they must not undermine the level of protection provided through the GDPR.

The data that was collected was caught by the definition of personal data under the DPD with it being *"(…) information relating to an identified or identifiable natural person"*[8]. Under the provisions of the DPD, member states were required to enact legislation to ensure that personal data would be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*[9]" with *"(F)urther processing of data for historical, statistical or scientific purposes (…) not considered as incompatible provided that Member States provide appropriate safeguards*".

The DPD details the different grounds for the legitimate processing of personal data with Article 7(a) setting out *unambiguous consent* as one such criteria. At the time of *Cambridge Analytica* third party apps could be operated in cooperation with Facebook, meaning that, if users logged into the third party app through their Facebook login, Facebook would allow the third party app to access users' personal data but also the personal data of their network. On one hand, although Facebook's privacy settings were arguably transparent about how one's data could end up being collected by a third party app used by a friend and, although any user could have adapted their privacy settings accordingly, it required the user to actively find and change their settings to avoid their data from being shared. This means that consent would be given to not share, the default being that data would be shared. Again, this stands in contrast to the concept of "unambiguous consent" and the legislative framework in place at the time. On the other hand, Facebook's policy to permit third-party apps to

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6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/0031.

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1.

8 DPD, art 2(a).

9 DPD, art 6(1)(b).

collect the data of an user's network was not open-ended, rather it was intended to be solely used to enhance the experiences of those users.

ASSESSMENT OF CAMBRIDGE ANALYTICA UNDER THE GENERAL DATA PROTECTION REGULATION

PERSONAL DATA

The changes in digital technology and the increasing value of personal data are reflected in the GDPR's amended definition of the same. In particular, the definition of personal data has been broadened to now include '*name*', '*location data'* and '*online identifier'* as identifiers that can identify, directly or indirectly, "*an identifiable natural person*"[10]. In the context of *Cambridge Analytica*, the previous definition of personal data under the DPD did cover the personal data that was collected. It is however entirely possible that additional categories of personal data specified under the GDPR, such as location data and online identifiers, would have been useful data points for Cambridge Analytica's purposes. The assessment of the CA Event under the GDPR definition of personal data therefore does suggest a wider data breach in reference to what constitutes '*personal data'*. The relevance of this could be reflected in larger penalties for the breach.

CONSENT

In order for the processing of personal data to be lawful it must meet one of the bases set out in Article 6 of the GDPR with consent arguably being the clearest one (under both the DPD and the GDPR) to set out and provide evidence for. However, the consent requirements have changed markedly under the GDPR with one crucial difference being the inclusion of the words "*for one or more specific purposes*"[11].

[10] GDPR, art 4(1).

[11] GDPR, art 6(1)(a).

Considering *Cambridge Analytica* and the issues around consent, the GDPR's revised definition does not change the problems with consent. Nevertheless it is helpful, and it was clearly felt to be necessary, to include this wording in the GDPR in reference to consent.

In terms of what consent means, the DPD states that *"'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."*

In the GDPR definition some key words and details have been added (emphasis added)

"'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;"(…)[12]

The word consent features 12 times in the DPD and 72 times in the GDPR. The GDPR provides numerous explanations of how consent should be obtained. The lack of the lawful basis for processing on the basis of consent is therefore easier to identify under the GDPR than it was under the DPD.

SPECIAL CATEGORIES OF PERSONAL DATA

Both, DPD and GDPR provide for the protection of special categories of personal data, which includes personal data revealing political opinions. As outlined before, this may well include some of the data collected from Facebook during *Cambridge Analytica*, e.g. an individual may have liked or written posts which reveal a certain political leaning. Processing special categories of data requires a lawful basis[13] and in addition one of the separate conditions/execptions.[14] Broadly speaking, the processing of this type of data is prohibited under the DPD and the GDPR except where there has been '*explicit consent*'[15] with the GDPR

[12] GDPR, art 4(11).

[13] DPD, art 7; GDPR, art 6(1).

[14] DPD, art 8; GDPR art 9.

[15] DPD, art 8(2)(a); GDPR, art 9(2)(a).

adding the words "*for one or more specified purposes*". Aside from consent there are other exceptions which, if applicable, allow the lawful processing of special categories of personal data. Similarly to the provisions of the DPD, processing is permitted in the course of the legitimate activities of "*a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim".* Where the DPD requires "*appropriate guarantees*" the GDPR stipulates "*appropriate safeguards*". Both, however, limit the applicability of the exception to the personal data of the "*members or former members of the body or to persons who have regular contact with it in connection with its purposes".*

Processing of special categories of data on the grounds of a substantial public interest was covered in Article 8(4) of the DPD. The exception has remained in the GDPR albeit with 'tighter' drafting, i.e. providing "*for suitable and specific measures to safeguard the fundamental rights and interests of the data subject*[16]". Guidance relating to this provision can be found in recital 56 of the GDPR, providing for the legitimacy of processing personal data on political opinions if this is required as part of the operation of democracy in a Member State.

PRINCIPLE OF ACCOUNTABILITY

The opacity surrounding *Cambridge Analytica* has been considered already. The GDPR tries to address a lack of transparency by introducing the accountability principle in Article 5(2):

"The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')."Paragraph 1 sets out the requirements ('Principles') relating to the processing of data, e.g. the lawful, fair and transparent processing of personal data[17] and the principles of "purpose limitation"[18] and "data minimisation"[19].

16 GDPR, art 9(2)(g).

17 GDPR, art 5(1)(a).

18 GDPR, art 5(1)(b).

19 GDPR, art 5(1)(c).

PERSONAL DATA BREACH

A "personal data breach" is defined for the first time in the GDPR[20]. In addition, detailed provisions are set out, prescribing the steps that must be taken if such a breach occurs "*unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons*"[21]. If *Cambridge Analytica* had happened under the GDPR, that would have meant that the data controller should have notified the breach 72 hours after it became aware of it to the supervisory authority of the respective Member State[22]. If a personal data breach could result in a high risk to the rights and freedoms of the data subject, then the data subject must also be notified as soon as possible by the data controller or by the supervisory authority.

Arguably, the two main changes in terms of their impact on a breach comparable to *Cambridge Analytica* are the new liability attached to the role of the data processor and the changes to the penalty regime for data breaches.

DATA PROCESSOR

Whereas under the DPD it was up to the controller to ensure that a processor acting on his behalf would provide "sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures[23]" the GDPR requires compliance of both, data controller and data processor with the Regulation. Notwithstanding the above, the onus remains on the data controller to ensure the data processor complies with the legal framework. The GDPR suggests that a data controller which passes on the processing activities to a data processor should ensure that the data processor can provide "*sufficient guarantees*"[24] for the implementation of "*technical and organisational measures which will meet the requirements*"[25] of the GDPR as well as that they can ensure secure processing.

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20 GDPR, art 4(12): " 'personal data breach' means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;".

21 GDPR, art 33(1).

22 GDPR, art 33.

23 DPD, art 17(2).

24 GDPR, Recital 81.

25 Ibid.

PENALTY REGIME

Under the DPD remedies and sanctions were left to the discretion of Member States.[26] A look at the fines imposed by the UK ICO (£500,000) and the Italian Data Protection Authority (€1 million) in relation to *Cambridge Analytica* is one example that shows the divergence that existed prior to the GDPR.

Article 58 of the GDPR sets out a wide range of powers (investing, corrective, authorisation and advisory) which are vested in the Member States' supervisory authorities in relation to data breaches. The level of maximum fines is set out in Article 83 and can be categorised as follows:

Infringements of the controller and the processor of Articles 8, 11, 25 to 39, 42 and 43 will attract a maximum administrative fine of the higher of (i) €10 million or, if it is a company, (ii) 2% of the total global annual turnover of the previous financial year[27];

Infringements of principles of processing (Articles 5, 6, 7, 9), of data subjects' rights (12-22), transfers to third countries or an international organisation (44-49), obligations under Member State law (Chapter IX) or non-compliance with supervisory authority under Article 58(1) and (2) will attract a maximum administrative fine of the higher of (i) €20 million or, if dealing with a company, (ii) 4% of the total global annual turnover of the previous financial year[28].

This revised regime is underpinned by the notion that fines despite being "*proportionate*" should also be "*effective and dissuasive*"[29]. As with any other law, if there are no consequences for breaches and infringements then compliance may become a problem.

Generally, there is evidence of an increase in enforcement actions and fines, particularly over the last few years.[30] The European Commission has published two reports on how the GDPR has been applied[31], noting that "*There has been a significant uptick in enforcement activity by data protection authorities in recent years, including*

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26 DPD, art 22, 23, 24.

27 GDPR, art 83(4).

28 GDPR, art 83(5).

29 GDPR, (151).

30 Dr Alexander Schmid, Luiza Esser, 'GDPR Enforcement Tracker Report, Numbers and Figures' (CMS Legal, 2024).

31 European Commission, 'Communication from the Commission to the European Parliament and the Council – Second Report on the application of the General Data Protection Regulation' (25.7.2024) COM(2024) 357 final.

the imposition of substantial fines in landmark cases against 'big tech' multinational companies."[32]. However, that being said, there are ongoing appeals by some of the companies against their fines[33]. Additionally, there have been difficulties, too, in dealing with reported breaches, ranging from lack human resources to lack of technical and legal knowledge[34], which leading on from the earlier point around fines are the next tier of successful compliance. Even if penalties are in theory effective and dissuasive, enforcement is key for the law to have the desired effect.

Since the GDPR came into force there have been other legislative developments regarding data protection at EU level and therefore their impact on a data breach comparable to *Cambridge Analytica* must be considered.

THE EUROPEAN EPRIVACY REGULATION

First published in January 2017, the Proposal for a Regulation on Privacy and Electronic Communications[35] intends to review and ultimately replace the existing ePrivacy Directive to, firstly, ensure consistency with the GDPR and to, secondly, ensure alignment with the objectives of the EU's digital strategy " A Europe fit for the digital age", particularly focusing on increasing the trust in and the security of digital services.

Having the status of "lex specialis[36]" in relation to the GDPR, the ePrivacy Regulation's role is to "*particularise and complement the general rules on the protection of personal data laid down in Regulation (EU) 2016/679 as regards electronic communications data that qualify as personal data*"[37]. At the time of considering the ePrivacy Regulation proposal it is not clear when and in what form it will become effective in EU member states because of on-going discussions regarding the drafting and

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32 Ibid. 4.

33 For example, Amazon Europe Core S.À.R.L has appealed the decision by the Luxembourg National Commission for Data Protection to issue them with an administrative fine of €746 million.

34 N31, 7.

35 Proposal for Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communication) (ePrivacy Regulation).

36 ePrivacy Regulation, 1.2.

37 ePrivacy Regulation, (5).

it not currently being highlighted as a priority file.[38] That being said on the basis of the current proposal it is possible that the following provisions would be have to be considered in a data breach comparable to *Cambridge Analytica*:

- Article 5 (*Confidentiality of electronic communications data*) provides that all electronic communications is confidential and any interference is only allowed by the end-user unless it is permitted by the ePrivacy Regulation.
- Article 6 (*Permitted processing of electronic communications data*) sets out the instances where processing of electronic communications data is permissible. These include where processing is necessary for the transmission of the communication[39], where processing is necessary for security reasons or to detect technical transmission errors or faults[40], where processing is required to provide a service to the end-user and the end-user has given their consent[41]; or finally, where the end-user has given their consent for one or more specified purposes that cannot be fulfilled by processing information that is made anonymous[42]. None of the permitted reasons would be applicable in the collection and sharing of the Facebook messages, particularly with the definition and conditions for consent stemming from the GDPR.

THE DIGITAL SERVICES ACT PACKAGE

The Digital Services Act[43](DSA) together with the Digital Markets Act[44] (DMA) are part of a policy drive by the EU, aiming "*to create a safer digital space where the*

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38 European Parliament Legislative Train Schedule, 'Proposal for a regulation on privacy and electronic communications' In " A Europe Fit for the Digital Age" (20.6.2024).

39 ePrivacy Regulation, art 6(1)(a).

40 ePrivacy Regulation, art 6(1)(b).

41 ePrivacy Regulation, art 6(3)(a).

42 ePrivacy Regulation, art 6(3)(b).

43 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

44 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

fundamental rights of users are protected and to establish a level playing field for businesses.[45]"

The DSA came into force on 16 November with rules being applicable to platforms with more than 45 million EU users from the end of August 2023 and applicable to all platforms from 17 February 2024. Put simply, the DSA sets out rules for online digital services and platforms on how to deal with illegal online content, goods and services. It also introduces safeguards for online users whose content is removed or restricted by an online platform[46]. Further, transparency requirements are coming into force in relation to content moderation[47], advertising[48] and recommender systems that are used by online platform providers[49]. The aim of the DSA is to complement the provisions of the GDPR by creating an additional tier of protection for the processing of personal data, particularly when it comes to processing by providers of online platforms[50]. The obligations set out in the Digital Services Act are applied asymmetrically, i.e a large intermediary or digital service with a wide reach and impact in society is subject to more and more stringent obligations than small services with less reach and impact[51].

Facebook was designated as Very Large Online Platform (VLOP) on 25 April 2023[52] because they have more than 45 million active users in the EU every month. As a VLOP Facebook is required to identify, analyze and assess risks arising from "*the design or functioning of their service*" or "*from the use made of their services*" in regard to, inter alia, "*any actual or foreseeable negative effects on civic discourse, electoral processes, and public security*"[53]. *Cambridge Analytica* had, at the very minimum, a foreseeable negative effect on civic discourse and electoral processes by trying to influence the voting intentions of selected individuals in the U.S. elections.

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45 European Commission, 'The Digital Services Act package' (25 July 2024).

46 See for example DSA, art 17, 20, 21.

47 See for example DSA, art 15.

48 See for example DSA, art 26.

49 See for example DSA, art 27.

50 For example, Article 26(3) of the DSA provides that intermediaries must not profile users on the basis of special categories of data under Article 9(1) of the GDPR for the purpose of targeted advertisements.

51 DSA, Section 5 'Additional obligations for providers of very large online platforms and of very large online search engines to manage systemic risks'

52 European Commisssion Press Release, 'Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines' (25 April 2023).

53 DSA, art 34(1).

The DMA entered into force on 1 November 2022 with its rules applying from May 2023. Like the DSA it applies to platforms with at least 45 million users and at least 10,000 business users (entities that offer goods and services on a platform) in the EU[54]. The aim of the DMA is to create an environment that fosters contestability and fairness between online platforms. It tries to achieve this by designating online platforms who provide 'core platform services' (such as search engines or messenger services) as 'gatekeepers'.

The European Commission designated Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft as gatekeepers in September 2023[55]. As part of their legal obligations, gatekeepers need to provide some of the personal data of their users to their business users[56] so as not have an unfair exclusive access to large sets of data and distort the market. The DMA also promotes the idea of interoperability, enabling users to easily switch between different services and platforms by requiring gatekeepers to keep certain functionalities interoperable (including but not linited to messages between individual end users, sharing of images, voice messages and videos between individual end users).[57] Fines for infringements can be as high as 10% of the gatekeepers' total global turnover in the preceding financial year (or 20% with repeat infringements)[58].

THE SCHREMS II DECISION AND THE RISKS IN THE TRANSFER OF PERSONAL DATA BETWEEN THE EU AND THE US

At the core of the long running issues surrounding the EU-U.S. data transfer lies the tension between the EU's approach to privacy, which is embedded in its treaties and the European Charter of Fundamental Human Rights[59] and the US' mass

54 DMA, art 3(2)(b)

55 European Commission Press Release, 'Digital Markets Act: Commission designates six gatekeepers' (6 September 2023).

56 DMA, art 6(10).

57 DMA, art 7(2).

58 DMA, art 30(1), 30(2).

59 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EUChFR).

surveillance programmes (such as PRISM, UPSTREAM). The scale of the mass surveillance was made public by Edward Snowden, a former CIA officer and National Security Agency contractor, in 2013, which included the surveillance of personal data of individuals within the EU by global technology corporations.[60] These revelations led to the first challenge from Maximillian Schrems against the EU-US Safe Harbour framework, the predecessor to the Privacy Shield, and led to it being declared invalid by the CJEU.[61]

Less than a year after *Schrems I* was invalidated, the Commission implemented a new decision on the adequacy of the protection for data transfers from EU to the U.S., the Privacy Shield. This was also declared invalid following a second challenge by Maximillian Schrems[62]. The CJEU found that the Privacy Shield did (still) not provide the adequate level of protection when transferring the personal data of the claimant and Facebook user Maximillian Schrems from Europe (Facebook Ireland) to the U.S. (Facebook Inc.), in particular in relation to the surveillance programmes and the resulting infringements of individuals' rights under the GDPR[63].

The latest incarnation of the Privacy Shield is the EU-U.S. Data Privacy Framework[64] which the European Commission adopted on 10 July 2023, promising that this would "*address all the concerns raised by the European Court of Justice, including limiting access to EU data by US intelligence services to what is necessary and proportionate, and establishing a Data Protection Review Court (DPRC), to which EU individuals will have access.*"[65] Maximilian Schrems has announced that he is planning another challenge. Whereas his challenge may be predictable it is maybe more surprising to hear that members of the European Parliament echo Schrems' criticism, particularly that the personal data of EU residents remains vulnerable to

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60 Fabien Terpan, 'EU-US Data Transfer from Safe Harbour to Privacy Shield: Back to Square One?' (2018) European Paper Vol. 3 No 3, 1056.

61 Case C-362/14 Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems [2015] ECLI:EU:C:2015:650 (Schrems I).

62 *Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems* [2020] ECLI:EU:C:2020:559 (Schrems II).

63 Schrems II, 178-185.

64 Commission Implementing Decision EU 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework C/2023/4745 [2023] *OJ L 231/118 (DP Framework).*

65 European Commission, 'Data Protection: European Commission adopts new adequacy decision for safe and trusted EU-US data flows' (10 July 2023) Press Release.

mass surveillance, which would render the Data Privacy Framework inadequate and invalid like the previous frameworks before. [66]

The significance of avoiding another declaration of invalidity is closely linked with the importance of the transatlantic data flows for businesses and consumers and what this means for growth, supply chain management etc.

CONCLUSION

The comparison between data against another valuable commodity, oil, revealed that they both share similar qualities but that the analogy may nevertheless be unhelpful in the assessment of how dominance and competition is legislated for.

Assessing the infringements in *Cambridge Analytica* under the DPD and the GDPR indicated that the process for identifying breaches would have been simplified under the latter. Although it was established and confirmed at Member State and EU level that there was a data breach under the Data Protection Directive, the clarifications to the definition of consent and the conditions for obtaining it lawfully are one strong example of the GDPR pointing to infringements without much analysis or interpretation. Potentially, there would have also been a wider breach under the GDPR due to the widening of the definition of personal data.

Other infringements that would have occurred in *Cambridge Analytica* under the GDPR are in relation to the accountability principle (Article 5(2)) and regarding the reporting requirements when a breach occurs (Article 33). There was a particularly focus on two notable provisions in the GDPR which, arguably, could have had an impact on *Cambridge Analytica* or which could prevent a similar event occurring in the future. One is the new compliance requirement on data processors although the data controller will remain responsible to ensure that data processors take the necessary measures to be compliant. The penalty regime has been strengthened considerably and, as a result, this is another factor which, arguably, could have stopped *Cambridge Analytica* or may prevent another organisation attempting harvesting of personal data on a similar scale. Although there have been some high-profile deci-

[66] Adam Satariano, Monika Pronczuk and David McCabe, 'U.S. and E.U. Complete Long-Awaited Deal on Sharing Data' The New York Times (10 July 2023).

sions leading to large fines it remains to be seen if any outstanding appeals change the perceived impact of the new penalty regime.

There have been further legislative developments since the GDPR and these were assessed in relation to *Cambridge Analytica*, particularly in how far they could be applied to the facts of the case.

One important area of the research was the adequacy of the framework underpinning the data transfer from the EU to the U.S.. Following the decisions in *Schrems I* and *Schrems II*, which led to the invalidation of the adequacy decisions in place at the time, the 'Data Privacy Framework' was introduced, aiming to address the security and privacy concerns that have been discussed for some time. The vulnerabilities that were established in *Schrems I* and *Schrems II* have not been addressed by the latest framework so another serious (and probably successful) challenge must be expected.

Although the conclusion was that the GDPR's (and other associated legislation) chances of success in preventing a data breach similar to *Cambridge Analytica* would be high, there is a real risk that this will be undermined by the lack of a sufficient adequacy decision for the transatlantic transfer of personal data.

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In 2019 Susanne moved to Tyrol, Austria with her family. What was supposed to be a temporary stay of one year turned into 5 years in the Alps. During that time Susanne successfully completed the International Business Law, LL.M. at the University for Continuing Education Krems, focusing on her big interest in issues of data protection in the EU and the U.S.

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Moreover, Amelie is the Co-founder and Vice President of the non-profit association Deutsche Gesellschaft für Contract und Claim Management e.V.

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ISBN 978-3-95663-328-7

Steinbeis-Edition