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Drafted by Whom? Legal Journals in the Age of AI

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Artificial Intelligence (AI), and particularly generative AI, has swiftly become a focal point of discourse across disciplines, and the legal discipline is no exception. Often celebrated for its intellectual depth but also criticised for its insularity and traditionalism, the academic (legal) community now faces pressing questions about what it means to be an author, a scholar, and an academic journal in an era of machine-generated text. The EJLS, dedicating this editorial to the use of AI in academic publishing, aligns with a growing movement within the academic (legal and non-legal) publishing world to engage in reflecting and establishing clear guidelines. Such guidelines are increasingly necessary since the use of AI is already reshaping research and publishing practices, yet remains largely unregulated and unevenly addressed across journals.[1]

At the EJLS, we are highly aware that most submissions we receive (in English) come from authors for whom English is not their first language. Rather than viewing this as a barrier, we see it as a reflection of the global and inclusive nature of legal scholarship. Our journal is proud to be an inclusive platform for international scholars, many of whom are contributing to legal scholarship from diverse linguistic and academic backgrounds. In

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1 Gregory E. Kaebnick, David Christopher Magnus, Audley Kao et al., 'Editors' Statement on the Responsible Use of Generative AI Technologies in Scholarly Journal Publishing' (2023) 26(4) Medicine, Health Care and Philosophy 499; Geraldine S. Pearson, 'Artificial Intelligence and Publication Ethics' (2024) 30(3) Journal of the American Psychiatric Nurses Association 453.

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this context, AI tools can play a genuinely helpful role. When used responsibly, they can assist authors in enhancing clarity, correcting grammar, and improving structure without compromising the originality of their ideas. This is especially true for our New Voices Articles, a format dedicated to early-career scholars. Indeed, our current issue (Volume 17, No. 1) consists entirely of New Voices contributions. At the EJLS, we strongly believe in creating space for emerging legal scholars to share original and critical arguments. Allowing the use of AI to assist with language refinement, while maintaining strict boundaries around substantive authorship, can support that mission by levelling the playing field and ensuring that scholarly voices are not 'lost in translation'.

We, nevertheless, draw a firm line when it comes to the use of AI tools for the generation of ideas, arguments, and substantive analysis. That domain must remain the province of human intellect. Why this distinction? Because algorithms can improve language, but critical thought must remain human. The responsibility for ideas -be they doctrinal innovations, normative critiques, or new methodological insights- must rest squarely with the author. To blur this line would be to endanger the epistemic integrity of legal scholarship.

This position is not unique to EJLS, but we are among the few (legal) journals with a specific, public-facing policy explicitly outlined on our website.[2] In doing so, we recognise the rapidly evolving technological

2 For statements from legal journals regarding their use of AI policies see, inter alia: Leiden Journal of International Law, 'Author Instructions – Preparing Your Materials' </www.cambridge.org/core/journals/leiden-journal-of-international-law/information/author-instructions/preparing-your-materials> accessed 30 August 2025; Computer Law & Security Review, 'Guide for Authors – Ethics and Policies' <www.sciencedirect.com/journal/computer-law-and-security-review/publish/guide-for-authors> accessed 30 August 2025; Journal of Penal Law and Criminology, 'Artificial Intelligence Policy' < https://iupress.istanbul.edu.tr/en/journal/jplc/information/artificial-intelligence-

landscape and the vacuum of norms and best practices that too often accompanies such acceleration. As highlighted in a recent report by the Ottawa Law Review on the challenges and opportunities of AI in legal publishing, many journals have yet to articulate any clear guidance at all.[3] This gap has created ambiguity for authors, reviewers, and editors alike.

AI tools promise efficiency, but they also pose risks of fabricated content, undisclosed algorithmic biases and the gradual erosion of accountability.[4] As the Ottawa report makes clear, generative AI often offers authoritative-sounding answers that are incorrect, fabricated, or untraceable.[5] Particularly concerning in legal scholarship is the possibility that AI-generated content

policy> accessed 30 August 2025; Cambridge Journal of International Law, 'Policy on Artificial Intelligence' <https://cilj.co.uk/submission-instructions/> accessed 30 August 2025.

For statements from non-legal journals regarding their use of AI policies see, inter alia: American Journal of Political Science, 'AJPS AI Policy' <https://ajps.org/2025/06/17/ajps-ai-policy/#:~:text="American%20Journal%20Political%20Science%20requires,drafting%20pre%2Danalysis%20plans%2C%20writing> accessed [add date]; Economics of Education Review, 'Ethics and Policies – Declaration of Generative AI in Scientific Writing' <www.sciencedirect.com/journal/economics-of-education-review/publish/guide-for-authors> accessed 30 August 2025; Journal of Economic Theory, 'Ethics and Policies – Declaration of Generative AI in Scientific Writing' <www.sciencedirect.com/journal/journal-of-economic-theory/publish/guide-for-authors> accessed 30 August 2025.

3 Yan Campagnolo (ed), Artificial Intelligence's Impact on Legal Journals: Challenges and Opportunities for the Ottawa Law Review (University of Ottawa Press 2025) 9-12.

4 Taylor & Francis, 'AI Policy', <https://taylorandfrancis.com/our-policies/ai-policy/> accessed 30 August 2025.

5 Ibid 15-17.

may cite fabricated cases or misrepresent legal doctrines. These risks are not merely theoretical: they have already played out in real courtrooms.[6]

For this reason, the EJLS mandates disclosure whenever AI tools are used to inform or generate any substantive aspect of a submission. If a generative AI tool was used to sketch arguments, summarise a case, or propose a structure for the analysis, this must be disclosed in a footnote, including the exact prompt. The author must assume full responsibility for the result, as if it were their own, because, ultimately, it is.[7]

Our policy also rests on a broader ethical conviction that AI is not an author.[8] Authorship entails accountability, deliberation and intellectual

6 Sarah Merken, 'Judge Disqualifies Three Butler Snow Attorneys From Case Over AI Citations' (Reuters, 24 July 2025) <www.reuters.com/legal/government/judge-disqualifies-three-butler-snow-attorneys-case-over-ai-citations-2025-07-24/ > accessed 30 August 2025; Daniel Wu, 'Lawyers Using AI Keep Citing Fake Cases in Court. Judges Aren't Happy' (The Washington Post, 3 June 2025) <www.washingtonpost.com/nation/2025/06/03/attorneys-court-ai-hallucinations-judges/ > accessed 30 August 2025; Dan Mangan, 'Judge Sanctions Lawyers for Brief Written by A.I. with Fake Citations' (CNBC, 22 June 2023) <www.cnbc.com/2023/06/22/judge-sanctions-lawyers-whose-ai-written-filing-contained-fake-citations.html> accessed 30 August 2025.

7 See, for instance, Harvard Journal of Law and Technology, 'Use of AI Policy', stating that "All authors are ultimately responsible for the content of their submissions", < https://jolt.law.harvard.edu/submissions> accessed 30 August 2025. See also, International and Comparative Law Quarterly, 'Use of Artificial Intelligence (AI)', stating that "AI tools cannot be credited as authors and must not be used to present third-party ideas, words or data without citation, in line with best practice and the Cambridge University Press plagiarism policy", < www.cambridge.org/core/journals/international-and-comparative-law-quarterly/information/author-instructions/preparing-your-materials> accessed 30 August 2025.

8 See: Hadar Y. Jabotinsky, Roee Sarel, 'Co-Authoring with AI? Ethical Dilemmas and Artificial Intelligence' (2024) 56(1) Arizona State Law Journal 187.

responsibility. It is not a function that can be delegated to software. The question of authorship, once philosophical, is now practical: should we accept AI as a co-author? Our answer is no.

This is not to say that the EJLS does not welcome innovation. We see promise in tools that help reviewers check references, editors streamline language checks, or authors translate abstracts. We are exploring how such tools might enhance our internal processes in controlled and transparent ways. However, these must never supplant the careful reading, contextual understanding, and analytical insight that define peer review and editorial work in the legal domain.

Legal scholarship must tread a careful path. Blanket rejection of AI would ignore its real benefits and alienate a new generation of scholars accustomed to digital tools. Conversely, embracing AI without scrutiny risks weakening the very foundations of quality and integrity that journals like the EJLS have long upheld. The challenge is not only technological but also normative. What kind of scholarship do we wish to publish? And what kind of scholarly culture do we want to foster?

To navigate this path, we propose three principles that will guide EJLS' ongoing response to AI in legal publishing:

> **1. Transparency:** Any use of AI in the research, drafting, or review process must be disclosed. The most significant risk with AI tools in academic publishing is their potential for invisible use. When authors or reviewers rely on AI to generate arguments or analysis without disclosure, machine-generated ideas may be mistaken for original human scholarship. Requiring such use to be noted, for instance, in a footnote, aligns with academic norms about declaring tools and

Gregory E. Kaebnick, David Christopher Magnus, Audley Kao et al., 'Editors' Statement on the Responsible Use of Generative AI Technologies in Scholarly Journal Publishing' (2023) 26(4) Medicine, Health Care and Philosophy 499

methods and helps maintain the reader's trust in the integrity and authenticity of the published work.

2. Accountability: The (human) author remains fully responsible for the content of the submission, regardless of the tools used. While AI can generate text, it cannot be responsible for it: it does not understand legal reasoning, cannot defend a position, and cannot verify accuracy. Authors must therefore ensure that all claims, conclusions and citations are accurate and sound, even when AI-assisted. This principle supports our requirement that human authors must verify any AI-generated content and protects against the risk of fabricated citations or inaccurate reasoning being published without scrutiny.

3. Integrity: The core intellectual contribution of any submission must be the product of human reasoning, creativity and originality. Legal scholarship is not merely about producing coherent language. Instead, it is grounded in original thinking, sound methodology, and critical analysis. Allowing AI to take over these substantive functions would undermine the intellectual value of academic publishing. Maintaining integrity means ensuring that scholarship reflects the author's own thought process. This principle underpins our policy that AI may only be used for language or stylistic assistance, but not for generating substantive content. It also reinforces the 'novelty and originality' standard that defines peer-reviewed academic work and helps establish a clear editorial identity for the EJLS in an evolving publishing landscape.

We certainly do not view these principles as conclusive, but as a living framework. We welcome dialogue with our contributors, peer reviewers and readers about the proper role of AI in legal scholarship. Like legal doctrine itself, our policies will evolve through engagement, precedent, and debate.

In dedicating this editorial to the subject, we are not only setting a standard but also inviting to a reflection. AI tools should be used wisely, not as tools that aim to replace the legal scholar, but rather as tools that support them. The future of legal publishing depends not on algorithms alone, but equally on the values we choose to encode within them.

IN THIS ISSUE

While the opening pages of this editorial have been dedicated to discussing the role of AI in academic publishing and outlining the EJLS' position on the matter, the articles featured in this issue turn to different, though equally timely, legal questions. As previously noted, Issue 17(1) is notably shaped by contributions to our New Voices section, an aspect we are particularly pleased about. At the EJLS, we place high value on the work of early-career scholars and emerging researchers. We are proud to present an issue in which most articles come from this vibrant and critical segment of the academic community.

The issue opens with **Eleonora Dallagiacoma's** article. Drawing on the Narrative Policy Framework, Dallagiacoma investigates the underlying assumptions and strategic storytelling behind the EU's Nature Restoration Law. Despite significant regulatory innovations, she finds that the law remains embedded in a managerial paradigm that views nature as a resource to be controlled and sustained for human benefit.

Thilo Köhler subsequently contributes with an analysis of how the enduring influence of the Meroni doctrine affects the legal feasibility of expanding the European Securities and Markets Authority's powers. Köhler suggests that a carefully designed delegation framework, aligned with subsidiarity and proportionality, could allow for the establishment of a Conduct of Business authority within the current legal order. However, treaty revision may still offer the most robust solution.

Finally, **Dominika Moravcová** examines the essential requirement of a cross-border element in applying the European Small Claims Procedure. Through an analysis of CJEU jurisprudence and related instruments, she explores how this jurisdictional condition is interpreted and whether parties domiciled in the same Member State might nonetheless bring claims under the Regulation by invoking cross-border dimensions.

Issue 17(1) closes with Luca Tenreira's book review of Ingrid Landau's 'Human Rights Due Diligence and Labour Governance'.[9]

I would like to sincerely thank all the authors who have contributed to this issue for their thoughtful and engaging scholarship. My gratitude (as always) also goes to the reviewers whose careful and constructive feedback has been invaluable in shaping these articles. Finally, I warmly thank the members of the Executive Board for their dedication and hard work throughout the editorial process. This issue would not have been possible without your collective effort. Overall, I want to express my appreciation for our excellent collaboration throughout the past academic year. Your support, insights and collegiality have made working together on the journal both productive and enjoyable.

Finally, a goodbye -or perhaps better, a see you soon- is due. In our previous issue, we introduced the new members who had recently joined the editorial board. Since then, no new additions have been made. However, one important member of our team, who has left a strong and lasting mark on the EJLS, is now moving on. I would like to personally thank Sebastian von Massow for his many years of dedication to the journal, for his always wise advice and for the excellent professional and personal relationship we have built over the years. On behalf of the entire EJLS team, but also personally, I wish him all the very best in the next steps of his academic journey.

9 Ingrid Landau, Human Rights Due Diligence and Labour Governance (Oxford University Press 2023).

UNVEILING THE NARRATIVES BEHIND THE NATURE RESTORATION LAW: ANALYSING THE DRIVING FORCES OF EU RESTORATION REGULATION

Eleonora Dallagiacoma*

Every society develops narratives embodying a collective understanding of the world's nature, functioning, fundamental values, and the roles of different actors. These narratives are central to policy analysis as they reflect institutional structures and reinforce collective aspirations. Considering the narratives behind policy actors' actions helps understand their strategic behaviour. This article examines a recent European Union environmental regulation that attracted significant attention and controversy: the Nature Restoration Law (EU Reg 2024/1991). The article explores narratives as fundamental assumptions and patterns that underpin the regulation and examines their use in strategic communication. The analysis applies the Narrative Policy Framework to the Commission's initial 2022 proposal, the final approved regulation, and accompanying documents. Findings reveal that, despite important innovations in environmental policy, such as the introduction of new environmental protection domains, the assumptions and narratives supporting the regulation remain anchored in a traditional managerial perspective, in which nature is considered a source of resources essential to human life, to be sustainably controlled and managed.

Keywords: European environmental policy; nature restoration law; narratives; narrative policy framework; narrative strategies

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I INTRODUCTION

The Nature Restoration Law (NRL) (EU Reg 2024/1991) is a recent, much-debated European environmental law. This regulation is rooted in 2019, when the European Union (EU) structured an action plan called the Green Deal (COM/2019/640) to tackle the complex challenges related to

environmental and climate change.[1] With the NRL, the EU positioned itself as a global leader in addressing ecological restoration and its potential impacts, with legally binding targets as the overall objective.

The EU has different legal frameworks, strategies and action plans with diverse objectives regarding nature conservation and the restoration of habitats and species (e.g., the Habitats Directive (92/43/EEC), Water Framework Directive (2000/60/EC), Floods Directive (2007/60/EC), Marine Strategy Framework Directive (2008/56/EC), and Birds Directive (2009/147/EC)). However, the European Commission (the Commission) explicitly states that protection is incomplete, limited restoration was achieved, and implementation and compliance with legislation are insufficient.[2] In response to these acknowledged shortcomings and the pressing need for more comprehensive environmental action, the Commission tabled a proposal for the Nature Restoration Regulation. The 22 June 2022 proposal was finally published.

The proposal itself was highly controversial – it involved two years' negotiation among the European Parliament, the Council, and the Commission and was finally adopted on 17 June 2024 after a controversial vote, many amendments and lots of possible exceptions and disclaimers which reduced its scope and specific objectives.[3]

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1 European Environment Agency, Governance in Complexity - Sustainability Governance under Highly Uncertain and Complex Conditions (2024).

2 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on nature restoration' COM(2022) 304 final.

3 An Cliquet et al., 'The Negotiation Process of the EU Nature Restoration Law Proposal: Bringing Nature Back in Europe against the Backdrop of Political Turmoil?' (2024) 32(5) Restoration Ecology.

Existing literature provides a picture of the innovation of the law, underlying the novelties in addressing environmental issues.[4] Several studies have highlighted the possible difficulties in its application and enforceability due to the strong dilution during the negotiation.[5] However, scholars have not engaged in providing an analysis of the NRL from a linguistic perspective, analysing the assumptions and narratives behind the regulation. To address this research gap and contribute to the critical literature, this paper aims to identify, analyse and describe the underlying assumptions, values and beliefs that have informed and shaped the NRL. In this regard, the Narrative Policy Framework (NPF) is viewed as an analytical lens that establishes concepts

4 Eleonora Ciscato, 'Il carattere trasformativo del Regolamento europeo sul Ripristino della Natura nelle politiche ambientali' in Rivista Giuridica dell'Ambiente (2024); Maria Vittoria Ferroni, 'The Loss of Biodiversity as a Serious Environmental Threat: The Need for a New Legal Paradigm' in Biodiversity Laws, Policies and Science in Europe, the United States and China (2024); Jan Pollex, Andrea Lenschow, 'When Talk Meets Actions–Return to Commission Leadership in EU Environmental Policy-Making with the European Green Deal' (2024) Journal of European Public Policy; Carmela Leone, 'The Obligation of Member States to Guarantee River Connectivity in Light of the Most Recent Reforms' (2024) Federalismi.it 129; Elisa Cavallin, 'Nature Restoration and Agriculture and Forestry: At the Opposite Side of the Fighting Ring or Compatible After All? An Analysis of the Proposal and the Final Agreement on the Nature Restoration Law' (2024) 33 European Energy and Environmental Law Review 48; Tiina Paloniitty, Susanna Kaavi, Li Yuan, 'Regulating Industrial Emissions, Water Management or Aquatic Biodiversity? Navigating the Evolving European Legal Landscape on Waters' (2024) 33 European Energy and Environmental Law Review 70.

5 Bruna Paolinelli Reis et al., 'The Added Value of the Long-Term Ecological Research Network to Upscale Restoration in Europe' (2024) 366 Journal of Environmental Management; Twan Stoffers et al., 'Reviving Europe's Rivers: Seven Challenges in the Implementation of the Nature Restoration Law to Restore Free-Flowing Rivers' (2024) 11 WIREs Water e1717; Raisa Mäkipää et al., 'We Need Targeted Policy Interventions in the EU to Save Soil Carbon' (2024) 12 Frontiers in Environmental Science; Cliquet et al. (n 3).

such as belief systems and narrative strategies to consider specific narrative characteristics in public policy sources.[6] Since its inception, the NPF and its approach to analysing policy processes have been applied to environmental disputes,[7] specifically those facing climate change.[8] Historically, environmental issues have been a source of significant polarisation, with numerous narratives proposed by various actors. Each narrative is laden with foundational assumptions and values.[9]

This study adopts the analytical lens of the NPF to answer the following research questions: 1) what are the implicit narratives within the NRL? 2) What kinds of narratives are used in communication to legitimise political action? And 3) What kind of axiological approach to environmental issues is

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6 Michael D. Jones, Mark K. McBeth, 'A Narrative Policy Framework: Clear Enough to Be Wrong?' (2010) 38 Policy Studies Journal 329; Elizabeth A Shanahan, Michael D Jones, Mark K. McBeth, 'How to Conduct a Narrative Policy Framework Study' (2018) 55 The Social Science Journal 332.

7 Simon Schaub, 'Public Contestation over Agricultural Pollution: A Discourse Network Analysis on Narrative Strategies in the Policy Process' (2021) 54 Policy Sciences 783; Sabine Bailey et al., 'How Narratives Shape Policy: Lessons Learned from Port Projects Adjacent to Coral Reefs in Florida and the Cayman Islands' (2022) 144 Marine Policy; Ricky N. Lawton, Murray A. Rudd, 'Scientific Evidence, Expert Entrepreneurship, and Ecosystem Narratives in the UK Natural Environment White Paper' (2016) 61 Environmental Science and Policy 24.

8 Ben Galloway et al., 'The Effect of Policy Narratives on Policy Elite versus Public Preferences for Hydraulic Fracturing Regulation' (2024) 41 Review of Policy Research 613; Michael D. Jones, 'Communicating Climate Change: Are Stories Better than "Just the Facts"?' (2014) 42 Policy Studies Journal 644; Deserai A. Crow et al., 'A Narrative Policy Framework Analysis of Wildfire Policy Discussions in Two Colorado Communities' (2017) 45 Politics and Policy 626; Mark K. McBeth, Donna L. Lybecker, Jessica Sargent, 'Narrative Empathy: A Narrative Policy Framework Study of Working-Class Climate Change Narratives and Narrators' (2022) 185 World Affairs 471.

9 Ellen Palm et al., 'Narrating Plastics Governance: Policy Narratives in the European Plastics Strategy' (2022) 31 Environmental Politics 365.

brought forward with this regulation by the EU Commission?

The analysis focuses on the following documents: EU Reg. 2024/1991,[10] Proposal (COM/2022/304), [11] Impact Assessment annexed,[12] Brochure on Nature Restoration—'Restoring nature. For the benefit of people, nature and the climate',[13] factsheets on 'Biodiversity and resilience',[14] and 'Nature Restoration Law'.[15]

To address the abovementioned issues, the paper is organised as follows. Section II presents the theoretical framework, elaborating the relationship(s) between policies and narratives, analysing the narratives considered in this study, and illustrating the NPF and its concepts. Section III presents the research design, data, and methods. Section IV presents the findings. Section V summarises and concludes the study.

10 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 [2024] OJ L 2024/1991, 29.7.2024.

11 European Commission (n 2).

12 Commission Staff Working Document, 'Impact Assessment Accompanying the proposal for a Regulation of the European Parliament and of the Council on nature restoration' SWD (2022) 167 final.

13 Directorate-General for Environment (European Commission), Restoring Nature: For the Benefit of People, Nature and the Climate (Publications Office of the European Union, 2022) <https://data.europa.eu/doi/10.2779/439286> accessed 18 August 2023.

14 'Factsheet - Biodiversity and Resilience' (European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/fs_22_3749> accessed 1 October 2024.

15 'Factsheet - Nature Restoration Law' (European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/fs_22_3748> accessed 1 October 2024.

II Theoretical Considerations

1. Narratives and Policy Analysis

Public policies are instruments through which public authorities define and operationalise strategic priorities. These policies articulate and promote public interest, allocate temporal and attentional resources, direct investment strategies, engage with innovation, establish regulatory frameworks, and address the socio-educational dimensions of society, among other critical areas of governance.[16]

Distinguishing between governance approaches based on our understanding of the world and those that shape how we perceive the world is inherently challenging.[17] No regulation exists in a value-free vacuum. Facts and values are intertwined, with scientific and legal imaginaries being tacitly assumed and incorporated into legal or policy interventions.[18] It is fundamental to understand the axiological content of regulations, that is, the reasoning that underlies the choices made by policymakers who claim to act in the public interest. This reasoning encompasses institutional practices, discourses, techniques, and instruments through which contemporary governments claim legitimacy.[19]

'Narratives' provide an illuminating explanation regarding the complexity of interactions between public policies and political actors, events, contexts,

16 Sara Valaguzza, 'Climate Change: From Science to Policies, Backward and Forward' in Sara Valaguzza and Mark Alan Hughes (eds), Interdisciplinary Approaches to Climate Change for Sustainable Growth (Springer International Publishing 2022) .

17 Sheila Jasanoff, Science and Public Reason (1st edition, Routledge 2013).

18 Directorate-General for Research and Innovation (European Commission), Taking European knowledge society seriously (Publications Office of the European Union, 2007).

19 Sheila Jasanoff, States of Knowledge: The Co-Production of Science and the Social Order (Routledge 2004).

and outcomes.[20] In qualitative research literature, 'narrative' has various meanings.[21] In the field of Science and Technology Studies, narratives are well-known and accepted rhetorics that facilitate the consolidation of implicit premises and assumptions in scientific, social, and political decisions.[22]

> Narratives that shape society operate at many different levels and in different forms. There are the so-called master narratives, sweeping accounts, such as that which conflates general societal progress with technological advance; or more confined narratives focus on specific, local events. Public policy narratives usually lie somewhere between these two levels. They are framed by and build on master narratives about society and how it should function; but they also articulate diverse, more situated narratives pertaining to particular causes, effects and desired endpoints.[23]

The central role of narratives in organising and explaining complex social science phenomena cannot be overstated. Not being mere anecdotal constructs, narratives serve as foundational elements in the epistemological processes of knowledge construction and dissemination in social contexts.[24] They have increasingly become an important lens through which policy studies are analysed, offering both qualitative and quantitative insights. Narratives in policy studies are multifaceted and incorporate elements of literary theory, psychology, communication and public policy. The present study is based on the theoretical reference framework of the NPF—a specific

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20 Christopher M. Weible, Paul A. Sabatier, 'Weible, Christopher M., and Paul A. Sabatier. 2017. Theories of the Policy Process. Boulder, CO: Westview Press' (2017) 3 European Policy Analysis 397.

21 Donald E. Polkinghorne, 'Narrative Configuration in Qualitative Analysis' (1995) 8 International Journal of Qualitative Studies in Education 5.

22 Sheila Jasanoff, Designs on Nature: Science and Democracy in Europe and the United States (Princeton University Press 2005).

23 Directorate-General for Research and Innovation (European Commission) (n 18), 73.

24 ibid.

tool for understanding the role and forms of narratives—to study them using a quantitative, structuralist, and positivistic approach.[25]

2. *The Narrative Policy Framework (NPF)*

The NPF provides a structured approach for understanding the role of narratives in policy processes. Developed by Jones and McBeth,[26] it posits that narratives can be empirically studied to reveal their influence on policy outcomes. It delineates narratives into core components—setting, characters (heroes, villains, victims), plots and morals—congruent with structuralist methodologies that allow for hypothesis testing and falsification.[27] The NPF allows the integration of narratives into traditional policy analysis, facilitating increased understanding of how stories shape public policies.

Focusing on the most recent European environmental regulation, the NRL, this article adopts a meso-level analysis: research is grounded at the level of political actors and how they construct, use, and communicate to influence the policy process. [28] To answer the research questions, the 'policy narrative content' model was used in this study. Unlike narrative elements (setting, characters, plot, morals), the building blocks of narratives, policy narrative content provides meaning within the narrative elements to create realities. The focus is on the analysis of content characteristics—belief systems and narrative strategies—rather than structural characteristics.

The NPF recognises that while the structural elements of narratives are fundamental, the content within these structures provides meaning, thereby influencing policy perspectives and decisions.[29] This variation in content was traditionally viewed as highly nuanced, with the belief that each narrative is

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25 Jones and McBeth (n 6).
26 ibid.
27 ibid.
28 Shanahan, Jones and McBeth (n 6).
29 Ibid.

unique. The NPF challenges this view by suggesting that variations in policy narratives are not random but can be systematically measured based on the belief systems and narrative strategies that shaped them.[30]

Belief systems are stable sets of implicit values and beliefs that orient individuals, groups, coalitions, and societies in the context of political debates.[31] These orientations are not spontaneous but reflect consistent values such as equality, freedom, and security.[32] The NPF posits that these orientations provide a stable framework that helps understand how individuals and groups interpret and communicate policy narratives' content.[33]

Narrative strategies are methods used by narrators to intentionally shape political reality. These strategies involve deliberate manipulation of narrative elements to achieve specific goals such as persuasion, recruitment and conflict management.[34] The NPF identifies several common narrative strategies: scope of conflict, causal mechanisms and devil shift. Scope of conflict involves distributing the costs and benefits of the proposed policy among the characters in a narrative. Causal mechanisms explain the cause-

30 Jones and McBeth (n 6).

31 On belief systems, see Shanahan, Jones and McBeth (n 6). The concept has also been explored in the context of international law, where Jean d'Aspremont, International Law as a Belief System (Cambridge University Press 2017) 4, defines them as "a set of mutually reinforcing beliefs prevalent in a community or society".

32 These examples of core political values (equality, freedom, security) are drawn from Shanahan, Jones and McBeth (n 6). On the broader theoretical framework of values in policy analysis, see Milton Rokeach, The Nature of Human Values (Free Press 1973); Paul Sabatier and Hank Jenkins-Smith, Policy Change and Learning: An Advocacy Coalition Approach (Westview Press 1993); Armin von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 European Law Journal 95.

33 Shanahan, Jones and McBeth (n 6).

34 ibid.

and-effect relationships within a narrative, influencing how policy issues are perceived and addressed. The devil-shift strategy exaggerates opponents' power and malevolence to mobilise support and justify policy action against them.[35] These strategies help narrators communicate their policy perspectives effectively, thereby influencing public opinion and policy outcomes.[36]

III Research Design And Methods

1. Data Collection

Having established the theoretical framework, attention now turns to the methodology followed. This study adopted a non-experimental design.[37] Content analysis of the following documents was conducted to consider the processes connected with the NRL, from conception to divulgation to all stakeholders: EU Reg. 2024/1991,[38] Proposal (COM/2022/304), [39] Impact Assessment Annexed,[40] Brochure on Nature Restoration—'Restoring nature. For the benefit of people, nature and the climate',[41] and factsheets on 'Biodiversity and resilience', [42] and 'Nature Restoration Law'.[43]

35 ibid.

36 ibid.

37 ibid.

38 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 [2024] OJ L 2024/1991, 29.7.2024 (n 10).

39 European Commission (n 2).

40 Commission Staff Working Document (n 12).

41 Directorate-General for Environment (European Commission) (n 13).

42 'Factsheet - Biodiversity and Resilience' (n 14).

43 'Factsheet - Nature Restoration Law' (n 15).

2. Data Analysis

A thematic analysis of the documents was conducted, being a foundational method 'for identifying, analysing, and reporting patterns (themes) within data'.[44] The thematic analysis followed an inductive, data-driven approach, exploring the whole dataset looking for the occurrence and recurrence of themes related to the research questions (i.e., themes connected with belief systems and narrative strategies), without using a pre-existing coding framework. The theoretical framework guided the distinction between belief systems and narrative strategies, without imposing specific thematic areas, categories or predetermined content codes.

The thematic analysis involved the following steps:[45]

- Data familiarisation: immersion in the texts to develop familiarity with the data and engage in the analytical procedures.
- Data coding: labelling each relevant unit of data, which, depending on the specific instances, comprised whole sentences or complete paragraphs, with a code symbolising or summarising that extract's meanings. The original data were rearranged into a more manageable and meaningful form through structured coding using Nvivo software.[46] Because the coding process is mainly inductive, all units of data were coded, with reference to the identified belief systems and narrative strategies.
- Searching for themes: common and recurring patterns and relationships in the codes were searched to develop an abridged list of

44 Virginia Braun, Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 79.

45 Mark Saunders, Philip Lewis, Adrian Thornhill, 'Research Methods for Business Students' (2019) <https://elibrary.pearson.de/book/99.150005/9781292208794> accessed 20 December 2024.

46 Braun and Clarke (n 38).

themes related to the research questions. A theme is 'a broad category incorporating several codes that appear to be related to one another which indicates an idea that is important to the research question'.[47] Building on the theoretical framework, these themes were classified as belief systems (general, connected with a managerial approach, or connected with involved actors) and narrative strategies (2 scopes of conflict and 30 causal mechanisms). Given the number of causal mechanism strategies, they were explained by summarising the relationship types and using graphics with different colours for the different relationships and different thicknesses of arrows in relation to the number of occurrences of a specific relationship (if the arrow that connect two themes was thicker there were more occurrence of the specific relationship).

The results are presented in the tables. To compare the number of occurrences despite different numbers of pages in the documents, each table contains an 'n/npgs' column; 'n' is the number of occurrences and 'npgs' the number of pages.

IV Findings and Discussion

Following the theoretical framework in Section II and data collection and research design and methods in Section III, this Section outlines and discusses the main findings. The section is structured into two main parts, each addressing and reflecting the two core assumptions of the analytical theory adopted in this study: the belief systems and narrative strategies. These two parts are further divided into sub-sections to better explore and describe key characteristics. Specifically, regarding belief systems, the discussion is organised into three sub-sections: the first addresses more general belief systems related to environmental themes; the second focuses on belief systems connected to the actors involved in the regulation; and the third

47 Saunders, Lewis, Thornhill (n 39), 585.

examines belief systems specific to the economic-managerial context. For the narrative strategies, the analysis is also divided into two sub-sections, each corresponding to two classical types identified within the theoretical framework and observed in the documents analysed: the scope of conflict and the causal mechanisms.

1. *Belief Systems*

Twelve types of belief systems were identified, connected with the general approach followed by the Commission regarding environmental issues (Table 1).

Table 1. Belief systems

Belief Systems	Total n.	Documet											
		EU Reg 2024/1991		Proposal		Imp. Ass		Factsheet_Nature		Factsheet_Biodiversity		Brochure_Nature	
		n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs
Ecosystem services - ecological, economical, social functions	63	10	0,244	17	0,213	31	0,258	3	1,5	0	0	2	0,083
Human activities are causing changes, nature pushed out from lives	6	1	0,024	0	0	1	0,008	0	0	0	0	4	0,167
Human beings outside ecosystem - environment (keeper - manager)	26	3	0,073	2	0,025	16	0,133	0	0	0	0	5	0,208
Nature as a toolbox (nature-based solution, ecc)	30	6	0,146	7	0,088	4	0,033	1	0,5	3	1,5	9	0,375
Nature presents a range of aesthetic, spiritual and restorative values to people (not only in monetary terms)	2	0	0,000	0	0	2	0,017	0	0	0	0	0	0
Nature time is different, long time needed	12	3	0,073	0	0	7	0,058	0	0	0	0	2	0,083
Neutrality of expertise and science (informatics - data, ecc)	8	4	0,098	3	0,038	1	0,008	0	0	0	0	0	0
New technologies increase speed, effectiveness of reporting	3	0	0,000	1	0,013	2	0,017	0	0	0	0	0	0
One Health	4	1	0,024	2	0,025	1	0,008	0	0	0	0	0	0
Policy must be science-based or evidence based	55	19	0,463	12	0,150	21	0,175	0	0	0	0	3	0,125
Risks are possible in evaluation (scientific uncertainties, ecc)	1	0	0,000	0	0	1	0,008	0	0	0	0	0	0
Speed imperative - urgency act before too late (efficiency)	16	2	0,049	5	0,063	4	0,033	0	0	1	0,5	4	0,167

Some highlighted themes pertain to the ecological thinking behind the legislation, whereas others relate to interactions between science and policy. Three closely related categories were most prevalent: 'ecosystem services—ecological, economical, and social functions', 'human beings outside ecosystem—environment (keeper-manager)', and 'nature as a toolbox (nature-based solution, etc.)'. They refer to an overarching narrative within anthropocentric ecological thinking: humans are in a privileged position and responsible for managing the environment. They are not simply exploiters of resources but can undeniably benefit from them (ecosystem services—ecological, economic, and social functions), especially if their resource management is conscious and 'sustainable'. The primary reference point is

the current paradigm of ecosystem services linked to ecological restoration. Ecosystem services are the benefits people derive from ecosystems, co-produced through interactions between ecosystems and society. It refers to the functions and processes provided by ecosystems that directly or indirectly generate multiple benefits essential for human survival and well-being. It permeates all the regulations to which it directly refers. [48] It is noteworthy that in the final version of the approved regulation, an objective has been added to Article 1: food security. Thus, while the initial focus was solely on ecosystem restoration to cope with climate change and biodiversity loss, it is now emphasised that this is closely linked to a vital need for human beings: food security, a specific ecosystem service.

During examination, it emerged that the term 'nature' was not used often, except to imply it is an example of human activity (see the code 'nature as a toolbox (nature-based solution, etc.)'). Humans emerge as external protectors by awareness of the ecosystem's current degradation status quo

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48 The concept of 'ecosystem services' was first discussed in Paul R. Ehrlich and Harold A. Mooney, 'Extinction, Substitution, and Ecosystem Services' (1983) 33 BioScience 248; The Millennium Ecosystem Assessment (MEA), initiated by Kofi Annan in 2000 and published in 2005, is a major study of human impacts on the environment. Ecosystems and Human Well-Being: Synthesis; a Report of the Millennium Ecosystem Assessment (Island Press 2005); Various governments used ecosystem services and natural capital frameworks to achieve specific policy goals. Beyond the various categories, ecosystem services are increasingly attracting the interest of policymakers at national and international levels. The valorisation of natural goods (in a different logic from environmental ethics) is based on the fact that nature provides services that can be quantified in terms of added or subtracted value in the face of certain events attributable to human behaviour.

For more information, look at: Sara Valaguzza (ed), Esplorazioni di diritto dell'ambiente (Editoriale Scientifica 2024); Robert Costanza and Herman E Daly, 'Natural Capital and Sustainable Development' (1992) 6 Conservation Biology 37; Stefan Zerbe, Restoration of Ecosystems – Bridging Nature and Humans: A Transdisciplinary Approach (Springer 2023)

(although the anthropogenic cause is never explicit except in one fact sheet (see the code 'human activities are causing changes, nature is being pushed out of our lives')). They are not seen as integral parts of the environment–nature system (humans outside the ecosystem-environment as keepers–managers). This role is within the paradigm of ecosystem restoration: from an awareness of the current degradation, humans act to bring ecosystems to a state they consider *good*, adding to the passive protection–observation of ecosystems. The idea of human responsibility is absent in the texts under consideration. Degraded ecosystems are mentioned in the definition of 'restoration' and in laws and other documents, but the anthropogenic cause is not.

Regarding other ecological belief systems related to the human–non-human relationship, differences can be observed between official institutional documents (regulations, proposals, impact assessments with annexes) and documents for dissemination (brochures, fact sheets). The anthropogenic causes of the current state of terrestrial and marine ecosystems are only present in the dissemination documents. These documents generally discuss the relationship between humans and their environment and the need to act urgently (speed imperative–act urgently before it is too late (efficiency)). Another belief system, evident throughout the documents and featuring prominently in the adopted regulation, concerns the need for decisions to be based on scientific evidence. This perspective holds that all issues related to scientific data are neutral and transcend partisan interests (neutrality of expertise and science (informatics–data, etc.)).

Both dissemination and the impact assessment documents emphasise that the timescales of ecosystems are orders of magnitude different from ours and that more time is needed to visualise the benefits of actions taken today (nature's time is different, long timespan). For example, ecological restoration risks are insufficient to address biodiversity loss unless long-term approaches (from centuries to millennia) focus on the complexity of the degraded ecosystem, integrating approaches based on interaction networks and

evolutionary potential.[49]

Occasional reference is made to the 'One Health approach', connected to the close interdependence between human health and planet health. It is emphasised in two instances in the Impact Assessment that nature is not just a repository of resources, but has aesthetic, spiritual, and restorative values for people. Finally, in response to the urgency to act, new technologies are offered that can increase the speed and validity of responses (new technologies increase speed, effectiveness of reporting), even considering that errors are possible in scientific assessments, implying that risk is never zero (risk is possible in assessment (scientific uncertainties, etc.)).

A. Actor Analysis.

The texts use different expressions to refer to people: citizens, people, public, society, and stakeholders, which have specific meanings according to the message (Table 2). 'Citizen' is generally used regarding consultation with citizens, the stages preceding the proposal by the Commission, or the need for Member States to consult citizens in national recovery plans ('citizen science' is mentioned in this last context). 'People' is used almost exclusively in dissemination texts in which the Commission presents its proposal to the public and seeks consensus. 'Society' is used as a neutral term where cost-benefit analyses and beneficial added value for society are discussed.

The two most-used terms deserving attention are 'public' and 'stakeholders'. From scholarship, stakeholders are groups or individuals who can affect or are affected by the achievement of an organisation's objectives.[50] This

49 David Moreno-Mateos et al., 'The Long-Term Restoration of Ecosystem Complexity' (2020) 4 Nature Ecology & Evolution 676.

50 Robert Edward Freeman, Strategic Management: A Stakeholder Approach (Pitman 1984); R Edward Freeman, 'The Politics of Stakeholder Theory: Some Future Directions' (1994) 4 Business Ethics Quarterly 409.

includes employees, customers, suppliers, local communities, and competitors.

Regarding the NRL, this term is used to refer to all interested parties, interpreting interest as exclusively economic. Member States and citizens are not considered stakeholders unless they have economic activities that overlap with regulations. This is a particular interpretation of the term. However, the 'public' is seen as citizens who do not play an active role in the construction of the proposal but are impacted by the proposal and regulation. The legislature refers to the public when discussing consultation, access to data and justice, referring to local communities and the concepts of health, well-being, and survival. There generally is a dichotomy between the terms 'public–consultation' and 'stakeholder–involvement'. Stakeholders (actors with economic interests) are consulted directly and can participate in the process.

Table 2. Belief systems – Analysis of terms referring to citizens

Belief systems - Actor Analysis	Total n.	Document											
		EU Reg 2024/1991		Proposal		Imp. Ass		Factsheet_Nature		Factsheet_Biodiversity		Brochure_Biodiversity	
		n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs
Citizen	24	5	0,122	6	0,075	12	0,100	0	0	0	0	1	0,042
People	17	3	0,073	4	0,050	1	0,008	2	1	2	1	5	0,208
Public	49	23	0,561	16	0,200	9	0,075	0	0	0	0	1	0,042
Society	25	3	0,073	4	0,050	18	0,150	0	0	0	0	0	0
Stakeholder	51	10	0,244	14	0,175	24	0,200	0	0	0	0	3	0,125

2. Managerial Approach.

Economic factors are central to all the documents considering belief systems. Seven themes related to belief systems are specifically connected with a distinct managerial approach (Table 3). By focusing on these aspects, the ecosystem services paradigm assigns economic value to nature and to its individual components.[51]

51 Valaguzza (n 42).

Table 3. Belief system – Managerial approach

Belief systems - Managerial approach	Total n.	Document											
		EU Reg 2024/1991		Proposal		Imp. Ass		Factsheet_Nature		Factsheet_Biodiversity		Brochure_Nature	
		n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs
Economies of scale	2	0	0,000	1	0,013	1	0,008	0	0	0	0	0	0
Natural capital	6	3	0,073	3	0,038	0	0	0	0	0	0	0	0
Possible investments	32	12	0,293	8	0,100	9	0,075	1	0,5	0	0	2	0,083
Costs (without writing about possible investments)	17	4	0,098	6	0,075	7	0,058	0	0	0	0	0	0
'Cost-benefit' analysis	60	4	0,098	9	0,113	36	0,300	2	1	1	0,5	8	0,333
Stakeholder	51	10	0,244	14	0,175	24	0,200	0	0	0	0	3	0,125
Other	7	4	0,098	3	0,038	0	0	0	0	0	0	0	0

2. *Narrative Strategies*

Following the analysis on belief systems, this section illustrates another way through which narrators shape policy realities: 'narrative strategies' – narrative elements the narrator uses to persuade, recruit, dampen or inflame conflict, find consensus, or legitimise choices.[52] The analysis highlights two major types presented within the NPF: 'scope of conflict' and 'causal mechanism' (Tables 4 and 5). Scope of conflict distributes the costs and benefits of a proposed policy to the characters in the policy narrative. Causal mechanisms posit a causal relationship within the policy issue through the strategic use of characters and things in the narrative.[53]

A. Scope of Conflict.

The analysis reveals cost-benefit analysis as the most common narrative strategy, used in various contexts, referring to the long-term benefits of implementing ecosystem restoration measures that involves significant initial costs – the Commission is aware of this and emphasises that these costs can be covered by national or European funds. The long-term benefits outweigh the costs, making it worthwhile.

52 Shanahan, Jones and McBeth (n 6).
53 ibid.

The second narrative strategy concerns the benefits accrued, on the one hand, to the EU by positioning itself as a global leader regarding contemporary challenges. Ecosystem restoration is high on the international agenda (2050 vision of the Convention on Biological Diversity, United Nations Convention to Combat Desertification, 2030 Agenda for Sustainable Development, and UN Decade of Ecosystem Restoration all call for the protection and restoration of ecosystems). On the other hand, the EU needs to honour its commitments under the United Nations Framework Convention on Climate Change and Paris Agreement.

Table 4. Narrative strategies – *Scope of conflict*

Narrative strategies Scope of Conflict	Total n.	Document											
		EU Reg 2024/1991		Proposal		Imp. Ass		Factsheet_Nature		Factsheet_Biodiversity		Brochure_Nature	
		n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs
'Cost-benefit' analysis	60	4	0,098	9	0,113	36	0,300	2	1	1	0,5	8	0,333
Global Leadership of EU (EU as inspiration for other countries)	12	0	0	4	0,050	5	0,042	1	0,5	0	0	2	0,083

B. Causal Mechanism.

Regarding 'causal mechanisms' (Table 5), the analysis revealed seven kinds of relationships used to link concepts: 'increase', 'potentially increase' (may differ due to uncertainty), 'are essential for', 'limit-protect from', 'potential negative impact on', '(if lacking) negative impact on', 'negative impact on'. The last three, referring to negative impacts, differ in the degree of certainty: in the first case, despite uncertainties, there could be negative impacts; in the second case there is certainty of negative impacts in its absence; in the third, there is certainty of negative impacts regardless of other conditions.

Table 5. Narrative strategies – *Causal mechanism*

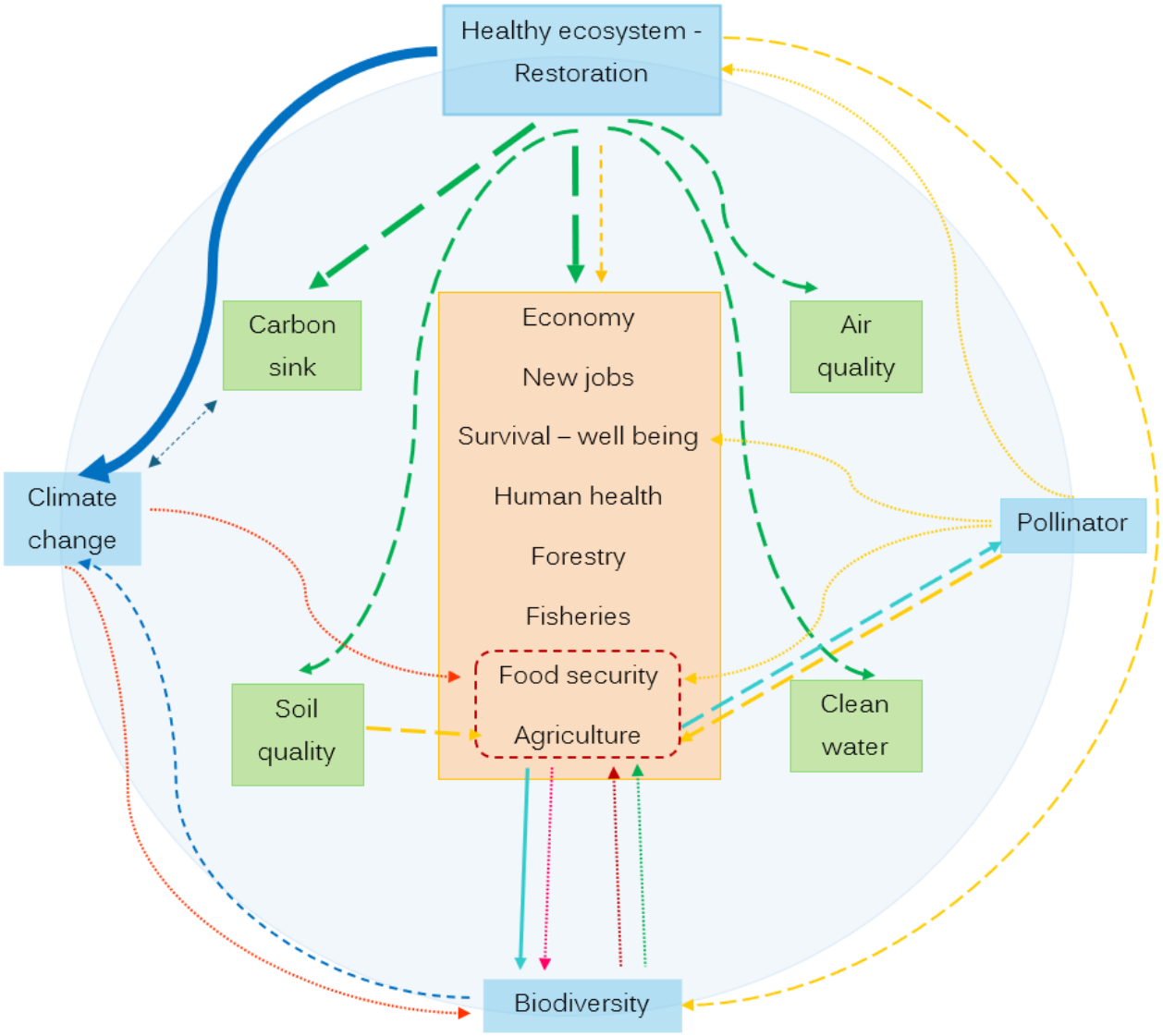
Narrative strategies - Causal Mechanism																
Relationship			Total n.	Document												
				EU Reg 2024/1991		Proposal		Imp. Ass.		Factsheet_Nature		Factsheet_Biodiversity		Brochure_Nature	
				n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs	n	n/npgs
Agriculture	potentially increase	Biodiversity	34	12	0,293	15	0,188	3	0,025	0	0	1	0,5	3	0,125
Agriculture	potentially negative impact	Biodiversity	3	1	0,024	0	0	1	0,008	1	0,5	0	0	0	0
Agriculture	potentially increase	Pollinator	18	3	0,073	3	0,038	8	0,067	1	0,5	2	1	1	0,042
Biodiversity	(if lacking) negative impact on	Economy	10	0	0,000	2	0,025	8	0,067	0	0	0	0	0	0
Biodiversity	increase	Agriculture	6	2	0,049	3	0,038	1	0,008	0	0	0	0	0	0,0
Biodiversity	limit-protect from	Climate change	10	4	0,098	1	0,013	2	0,017	0	0	1	0,5	2	0,1
Biodiversity	(if lacking) negative impact on	Human health	1	0	0,000	0	0	1	0,008	0	0	0	0	0	0
Biodiversity	(if lacking) negative impact on	Agriculture	2	0	0,000	0	0	2	0,017	0	0	0	0	0	0
Biodiversity	(if lacking) negative impact on	Food security	2	0	0,000	0	0	2	0,017	0	0	0	0	0	0
Climate change	negative impact on	Food security	2	1	0,024	0	0,000	1	0,008	0	0	0	0	0	0
Climate change	negative impact on	Biodiversity	18	16	0,390	0	0,000	2	0,017	0	0	0	0	0	0
Healthy ecosystem - restoration	increase	Carbon sink	28	3	0,073	6	0,075	12	0,100	2	1	0	0	5	0,208
Healthy ecosystem - restoration	increase	Clean water	18	0	0,000	1	0,013	9	0,075	1	0,5	0	0	7	0,292
Healthy ecosystem - restoration	limit-protect from	Climate change	86	9	0,220	22	0,275	31	0,258	4	2	3	1,5	17	0,708
Healthy ecosystem - restoration	increase	Food security	30	5	0,122	7	0,088	10	0,083	3	1,5	2	1	3	0,125
Healthy ecosystem - restoration	increase	Survival-resilience-well being	37	2	0,049	4	0,050	12	0,100	6	3	0	0	13	0,542
Healthy ecosystem - restoration	increase	Human health	24	2	0,049	3	0,038	8	0,067	3	1,5	3	1,5	5	0,208
Healthy ecosystem - restoration	are essential for	Agriculture	9	1	0,024	0	0,000	5	0,042	2	1	1	0,5	0	0,000
Healthy ecosystem - restoration	are essential for	Fisheries	3	0	0,000	0	0,000	3	0,025	0	0	0	0	0	0,000
Healthy ecosystem - restoration	are essential for	Forestry	1	0	0,000	0	0,000	1	0,008	0	0	0	0	0	0,000
Healthy ecosystem - restoration	increase	New jobs	11	2	0,049	4	0,050	4	0,033	0	0	0	0	1	0,042
Healthy ecosystem - restoration	are essential for	Biodiversity	16	3	0,073	4	0,050	8	0,067	0	0	0	0	1	0,042
Healthy ecosystem - restoration	increase	Economy	17	3	0,073	4	0,050	8	0,067	0	0	0	0	2	0,083
Healthy ecosystem - restoration	increase	Soil quality	18	3	0,073	4	0,050	5	0,042	2	1	0	0	4	0,167
Healthy ecosystem - restoration	increase	Air quality	18	3	0,073	4	0,050	6	0,050	1	0,5	1	0,5	3	0,125
Pollinator	are essential for	Food security	5	1	0,024	1	0,013	1	0,008	1	0,5	1	0,5	0	0
Pollinator	are essential for	Survival-resilience-well being	5	1	0,024	1	0,013	3	0,025	0	0	0	0	0	0
Pollinator	are essential for	Healthy ecosystem - restoration	5	1	0,024	1	0,013	3	0,025	0	0	0	0	0	0
Pollinator	are essential for	Agriculture	18	3	0,073	3	0,038	8	0,067	1	0,5	2	1	1	0,042
Soil quality	are essential for	Agriculture	18	2	0,049	3	0,038	7	0,058	0	0	2	1	4	0,167

Figure 1 highlights the relationships between the main objects in the texts to visualise their use, using arrows that link the themes involved. The thickness of each arrow directly corresponds to the number of occurrences of the relationship it represents; thus, thicker arrows indicate more occurrences. As illustrated in the figure, the diagram reveals which relationships appear most frequently throughout the regulations.

Figure 1. Narrative strategies – cause-and-effect relationships

Legend	
Relationship	**Symbol/colour**
Increase	
Potentially increase	
Are essential for	
Limit-protect from	
Potentially negative impact on	
(If lacking) negative impact on	
Negative impact on	

Number of references	Arrow thickness
0≤n<5	
5≤n<10	
10≤n<15	
15≤n<20	
20≤n<25	
25≤n<30	
30≤n<40	
n≥40	



In Figure 1, the characteristics, events and environmental approaches are shown in the blue boxes and the activities, human sector characteristics and features in the red boxes. The green boxes represent environmental features externally related to humans; characteristics of the world that humans directly influence.

At first glance, the most commonly used strategy is to restore ecosystems to limit climate change, thereby protecting people from its effects. Although climate change and biodiversity are interlinked[54] and Article 1 of the Proposal and of the adopted regulation addresses both objectives (climate change and biodiversity loss),[55] the emphasis on communication is on the former. Restoring ecosystems helps mitigate climate change, particularly

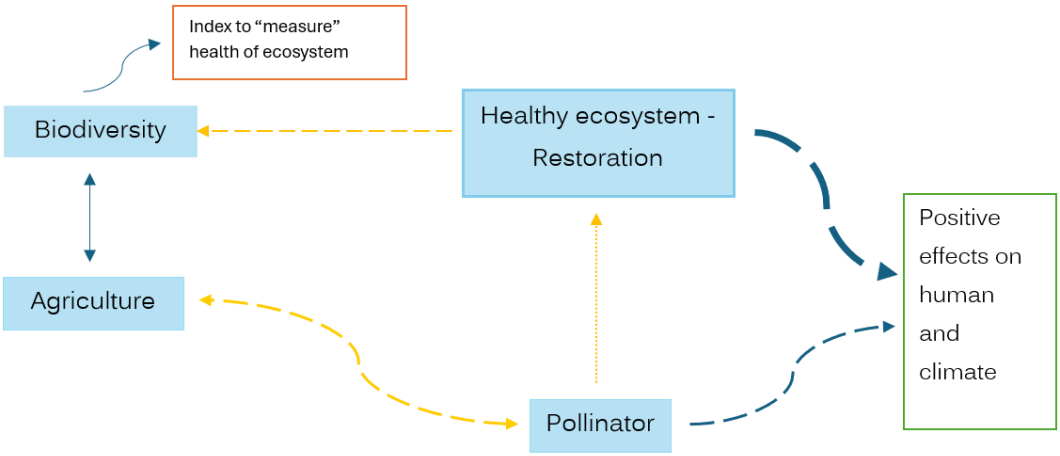
54 Hans-Otto Pörtner et al.,'Scientific outcome of the IPBES-IPCC co-sponsored workshop on biodiversity and climate change' (IPBES secretariat, 2021).

55 Article 1 of the original proposal stated: "This Regulation lays down rules to contribute to: (a) the continuous, long-term and sustained recovery of biodiverse and resilient nature across the Union's land and sea areas through the restoration of ecosystems; (b) achieving the Union's overarching objectives concerning climate change mitigation and climate change adaptation; (c) meeting the Union's international commitments.". Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final. Article 1 of the adopted regulation avoids using the term nature, instead referring to biodiverse ecosystems and it expands the scope to include additional objectives such as food security and land degradation neutrality. It reads: "This Regulation lays down rules to contribute to: (a) the long-term and sustained recovery of biodiverse and resilient ecosystems across the Member States' land and sea areas through the restoration of degraded ecosystems; (b) achieving the Union's overarching objectives concerning climate change mitigation, climate change adaptation and land degradation neutrality; (c) enhancing food security; (d) meeting the Union's international commitments". Regulation (EU) 2024/1991 of the European Parliament and of the Council of 17 June 2024 on nature restoration, OJ L 2024/1991.

through carbon sequestration. It is essential for the survival and health of humans and their activities.[56]

Another, albeit less pronounced, narrative strategy concerns biodiversity reduction. It is closely linked to the agri–food sector and pollinators in a cyclical relationship (Figure 2). Ecosystem restoration is essential for biodiversity, which is linked to agriculture in an interdependent relationship (agricultural practices can negatively affect and increase biodiversity; similarly, biodiversity can benefit agriculture, while its absence would have negative effects). Pollinators play a crucial role and are essential for both agriculture and ecosystem restoration.

Figure 2. Relationships between biodiversity, agriculture, ecosystem restoration, and pollinator



In this narrative framework, the livestock sector is omitted, apparently overlooked or indirectly referenced in the legislative context, despite

56 On ecosystem restoration for climate change mitigation through carbon sequestration, see IPCC, Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report (Cambridge University Press 2022); Bronson W Griscom et al, 'Natural Climate Solutions' (2017) 114 Proceedings of the National Academy of Sciences 11645. On the essential role of ecosystems for human health and survival, see Millennium Ecosystem Assessment, Ecosystems and Human Well-being: Synthesis (Island Press 2005)

discussions on farmland, agriculture, and agroecosystems. Ecosystem restoration includes revitalising land-use systems within traditional cultural landscapes,[57] highlighting the central role of livestock.[58] Two critical factors are worth highlighting: livestock's relationship with climate change and impact on human nutrition. The analysis shows that the dominant narrative strategy focuses on the causal relationship between ecosystem restoration and climate change adaptation mitigation. The significant impact of livestock sector was highlighted in 2008.[59] Therefore, interventions in livestock practices are essential for restoring agroecosystems and effectively mitigating climate change. Livestock affect climate change and have a significant impact on land use, deforestation, and biodiversity loss,[60] which are interrelated and directly linked to current inefficiencies in livestock practices. Another pivotal perspective is: halving European consumption of animal-based products could potentially reduce agricultural land use by a quarter, allowing natural habitats to regenerate.[61] Reduction in animal-based food consumption is critical to slowing and reversing tropical deforestation,

57 Stefan Zerbe, Gerhard Wiegleb (eds), Renaturierung von Ökosystemen in Mitteleuropa (Spektrum Akademischer Verlag 2009).

58 Claire Kremen, Adina M. Merenlender, 'Landscapes That Work for Biodiversity and People' (2018) 362 Science eaau6020; Richard Teague, Matt Barnes, 'Grazing Management That Regenerates Ecosystem Function and Grazingland Livelihoods' (2017) 34 African Journal of Range & Forage Science 77.

59 Heera Lee et al., 'Implementing Land-Based Mitigation to Achieve the Paris Agreement in Europe Requires Food System Transformation' (2019) 14 Environmental Research Letters 104009; Roberto Talenti, 'Revising the European Regulatory Framework for Livestock-Related GHG Emissions - Is the EU Really Advancing Towards Climate Neutrality?' (2022) Rivista quadrimestrale di diritto dell'ambiente.

60 Roberto Talenti, 'Rigenerazione Ambientale e Consumi Alimentari: Una Relazione Riconosciuta Nel Quadro Normativo Europeo?' (2023) Vol.2/2023 Rivista quadrimestrale di diritto dell'ambiente.

61 Henk Westhoek et al., 'Food Choices, Health and Environment: Effects of Cutting Europe's Meat and Dairy Intake' (2014) 26 Global Environmental Change 196.

which is largely driven by imports from the EU and China.[62] Therefore, this issue extends beyond ecosystem restoration and includes broader environmental and sustainability considerations.

V CONCLUSION

The main objectives of this work were to identify the implicit narratives within the NRL, considering all the legislative processes from its birth and their outputs, to clarify what kind of narratives have been strategically used in communication to legitimise political action, and what kind of approach to environmental issues was brought forward by the EU Commission with this regulation.

This study defined the main narratives (interpreted as beliefs and values) underpinning all written documents connected with European regulation 2024/1991. The analyses revealed that this regulation represents a departure from previous policies imposing legally binding targets and introduces many new domains of environmental protection, but the assumptions and narratives underpinning the regulation remain anchored in a classic managerial perspective. The selection criteria pertaining to this perspective are based on economic cost-benefit analyses, despite the uncertainties mentioned in the text itself due to the complexity of environmental issues. It leaves nature as the fountain of resources essential to the survival of humans, whose task it is to sustainably control and manage it. This is reflected to a greater extent in the version that was ultimately approved: the explicit objective of food security was added, and numerous exceptions and disclaimers were inserted that undermine the enforceability of the law, such as the primacy of the energy sector and military needs for national defence. These modifications exemplify the managerial approach to nature identified in the narrative analysis above, where nature is conceptualised as a hub of

62 Florence Pendrill et al., 'Agricultural and Forestry Trade Drives Large Share of Tropical Deforestation Emissions' (2019) 56 Global Environmental Change 1.

resources to be managed and utilised for competing human needs - from food production to energy security and defence requirements. The enduring reference paradigm is that of sustainable development, which has different interpretations.[63] The overarching goal is to maintain existing systems and structures in the face of contemporary challenges and integrate urgent needs that threaten the survival of this species.[64] It is of concern that there appears to be a decline in this integration of environmental issues with a concomitant shift in focus toward greater emphasis on competitiveness. While economic imperatives require a focus on environmental protection,[65] managerial criteria alone could be limiting and insufficient in dictating the direction of environmental policies. A paradigm shift and a comprehensive rethinking of human–non-human relationships are necessary. Cultural and political environments play a reformative role in this context.[66]

Future research could explore and define the different narratives evident in the documents and speeches of other stakeholders affected by environmental regulations, extending the analysis beyond the European context to comparative international perspectives. This study may pave the way for more inclusive and shared approaches.

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63 Roberto Talenti, 'Justicia Intergeneracional y Desarrollo Sostenible: Al Borde de Los Límites Planetarios' (2023) Anuario international CIDOB 2023.

Roberto Talenti, 'Exploring the concept of sustainable development: a non-scientific, growth-oriented, and anthropocentric ontology normalised in international law?' (2024) 16 European Journal of Legal Studies 61.

64 Michelle D Lazarus and Silvio Funtowicz, 'Learning Together: Facing the Challenges of Sustainability Transitions by Engaging Uncertainty Tolerance and Post-Normal Science' (2023) 6 Sustainable Earth Reviews 18.

65 Lavinia Del Corona, 'Potenzialità e Limiti Della "Prospettiva Dei Diritti Umani" Nel Contenzioso Climatico' (2024) Politeia.

66 ibid.

IMPLICATIONS OF THE *MERONI* DOCTRINE FOR THE CREATION OF AN EU CONDUCT OF BUSINESS SUPERVISORY AUTHORITY

Thilo Köhler [*]

This article examines the potential creation of a Conduct of Business (CoB) Supervisory Authority at EU level in light of the Meroni *doctrine. The fragmentation of EU capital markets, attributed to diverse regulatory and supervisory landscapes, limits corporate funding and innovation. The European Central Bank President Christine Lagarde's proposal for a European Securities and Exchange Commission, modelled after the U.S. SEC, suggests enhancing the European Securities and Markets Authority's (ESMA) mandate. However, the* Meroni *doctrine, based on a 1958 European Court of Justice ruling, imposes limits on the delegation of powers to EU agencies. This doctrine distinguishes between discretionary and clearly defined executive powers, generally prohibiting the delegation of the former. This article reviews key case law, including* Meroni, Romano, Short-Selling, *and* Banco Popular, *to infer the criteria relevant for establishing an EU CoB authority. It concludes that while the* Meroni *doctrine remains pertinent, the treaties governing European integration have evolved since the ruling, necessitating adjustments to the application of the doctrine. This article proposes that with a precise delineation of powers and adherence to subsidiarity and proportionality principles, an EU CoB authority could be established, potentially within an expanded ESMA framework. It further argues that a treaty revision would provide more legal certainty and more cost-effective CoB supervision.*

Keywords: *Meroni* doctrine; conduct of business supervision; capital markets union; institutional balance

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I. INTRODUCTION

Capital markets remain fragmented across the EU. Even institutional investors hesitate to commit outside their respective home markets, which leads to uneven corporate funding costs and hampers innovation.[1] The fragmented regulatory and supervisory landscape might partly explain this problem. The projected Capital Markets Union aims to address the

[1] IMF, 'Background Note on CMU for Eurogroup' (2023) 1-10 <https://www.imf.org/-/media/Files/News/Speech/2023/imf-background-note-on-cmu-for-eurogroup.ashx> accessed 28 November 2023.

diverging markets by facilitating the flow of capital across the Union to benefit consumers, investors and companies.[2] For this purpose, a 'Single Rulebook' was established to oversee all harmonised EU measures in financial services, including the banking sector.[3] In addition, the European Securities and Markets Authority (ESMA) plays an important coordinating role in ensuring the consistent application of the Single Rulebook.[4] Within financial supervision, conduct of business (CoB) and prudential supervision are traditionally distinguished.[5] While prudential supervision focuses on financial stability, CoB supervision covers goals such as consumer protection, market integrity, and enforcement of sanctions.[6] In the area of prudential supervision, the European Banking Union (EBU) already introduced the Single Supervisory Mechanism (SSM). The SSM is comprised of the European Central Bank (ECB) and the national competent authorities (NCAs) and is entrusted with prudential supervision of large banks in the Eurozone.

Despite this progress, the main tasks of CoB supervision powers are still split among the 27 NCAs, limiting the impact of the Single Rulebook. To mitigate this issue, Christine Lagarde, President of the ECB, has recently pleaded to create a European Securities and Exchange Commission (SEC),

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[2] European Commission, 'A Capital Markets Union for people and businesses-new action plan' COM(2020) 590 final 2.

[3] European Banking Authority, 'The Single Rulebook' <https://www.eba.europa.eu/single-rulebook> accessed 3 January 2025.

[4] European Securities and Markets Authority (ESMA), 'Interactive Single Rulebook' <https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook> accessed 28 November 2023.

[5] Eddy Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' (2007) 8 EBOR 237, 243.

[6] ibid.

drawing inspiration from the USA.[7] This could be achieved by extending ESMA's mandate.[8] The US SEC's powers are substantial. They include, among others, requiring various disclosures, issuing subpoenas, and imposing sanctions.[9] However, EU law might not allow such significant expansion of an agency's powers. Particularly, this idea could conflict with the *Meroni* doctrine. This doctrine is based on a 1958 judgment of the European Court of Justice (CJEU) that deals with the legal limits of a delegation of power under the Treaty establishing the European Coal and Steal Community (ECSCT).[10]

This article discusses whether the *Meroni* doctrine would prevent the creation of a CoB supervisory authority at EU level and whether *de lege ferenda* a less restrictive approach than developed in this doctrine would be desirable. This article finds that a CoB supervisory authority could be established in a way to respect the limits set out in *Meroni* as currently applicable. This would require a precise delineation of the powers of such an authority and reserving the exercise of significant discretion to an institution expressly mentioned in the treaties (e.g. the Commission). It is further argued that a revision of the treaties to establish a CoB supervisory authority would provide more legal certainty and enable a more cost-effective CoB supervision.

The following section will review the case law to provide an overview of the origins and evolution of the *Meroni* doctrine (section II). Drawing from that, the underlying reasons for the Court's ruling are inferred to define the criteria relevant for an EU CoB authority today (section III). Finally, the

[7] European Central Bank (ECB), 'A Kantian shift for the capital markets union' <https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp231117~88389f194b.en.html> accessed 28 November 2023.

[8] ibid.

[9] Rowan Bosworth-Davies, 'The SEC: An Examination of its Structure, Powers and Procedures' (1993) 2 JFRC 31, 35–38.

[10] Case 9/56 *Meroni v High Authority* [1957/1958] ECR 133.

paper proposes a framework for CoB supervision at EU level (section IV), followed by some concluding remarks.

II. Overview of the Case Law

Although the *Meroni* doctrine is essential for the conferral of powers to EU agencies,[11] academics are still divided on what the *Meroni* doctrine specifically prescribes and which parts remain relevant today.[12] Many different principles have been identified within the ruling.[13] The case law needs to be carefully analysed to determine which of those principles apply to EU agencies under the current primary law as it differs substantially from the primary law at the time of the *Meroni* ruling. Most notably, since the Treaty of Lisbon, Art. 263 TFEU now explicitly references EU agencies and allows the judicial review of their acts.[14] Unlike during the *Meroni* era, today there are numerous EU agencies whose creation was based on broad inter-institutional consensus.[15] To the extent possible, the law should be interpreted in a way that does not unnecessarily hamper the political consensus to promote agencification. Before analysing how *Meroni* should be applied in this changed setting, the decision itself and relevant related rulings must be examined.

In *Meroni v. High Authority*,[16] the defendant, the predecessor of the Commission (the High Authority), granted powers to two bodies established under private law to set up an equalisation system to adjust the prices of

[11] Merijn Chamon, *EU Agencies – Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 175.

[12] ibid 187.

[13] See ibid 191.

[14] Merijn Chamon, 'EU agencies between *Meroni* and *Romano*, or the Devil and the Deep Blue Sea' (2011) 48 CML Rev. 1055, 1056.

[15] Merijn Chamon, 'Granting Powers to EU Decentralised Agencies, Three Years Following *Short-Selling*' (2018) 18(4) ERA-Forum: scripta iuris europaei 597, 606.

[16] *Meroni* (n 10); for context: Maria Patrin, '*Meroni* Behind the Scenes: Uncovering the Actors and Context of a Landmark Judgement' (2021) 6 European Papers 539.

imported scrap metal. The High Authority retained some control over the operations by sending a permanent representative to those agencies who could subordinate their decisions to the approval of the High Authority, although it later denied any responsibility for the deliberations or actions of the agency. The CJEU first clarified that a 'true delegation of powers' had taken place despite the High Authority retaining some control, as it declined any responsibility for the actions of the private agencies.[17] However, the Court held that a delegation could be legal under certain circumstances.[18] This was remarkable as the ECSCT did not explicitly foresee a delegation of powers.[19] The Court further observed that the agency's decisions must be subject to the same rules which applied to the High Authority; and that the High Authority cannot delegate powers it does not have itself (*nemo plus iuris* rule). The delegated powers must be necessary to fulfil the duties assigned to the High Authority under Art. 53 ECSCT. Finally, the Court introduced the distinction between the delegation of discretionary and clearly defined executive powers, which many believe to be the core of *Meroni*.[20] The Court found that these two types of delegations are very different since the latter can 'be subject to strict review in the light of objective criteria determined by the delegating authority'.[21] By contrast, the former 'impl[ies] a wide margin of discretion which may [...] make possible the execution of actual economic policy' and may result in an 'actual transfer of responsibility'.[22] The Court thus concluded that clearly defined executive powers can be delegated, whereas discretionary powers generally cannot.[23]

[17] ibid 149.

[18] ibid 151.

[19] Miroslava Scholten and Marloes van Rijsbergen, 'The Limits of Agencification in the European Union' (2014) 15 GLJ 1223, 1237.

[20] Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case' (2014) 41 L.I.E.I. 389, 394.

[21] *Meroni* (n 10) 152.

[22] ibid.

[23] ibid 154.

Around 20 years later, under the application of the Treaty establishing the European Economic Community (EECT), the Court had to decide in *Romano v. INAMI* (*Romano*) about the powers of an agency established under secondary EU law,[24] as is common nowadays. The Court found that the agency 'may not be empowered by the Council to adopt acts having the force of law'.[25] At the time, some authors considered this ruling even more relevant than *Meroni*.[26] Today, however, most authors deem *Romano* to be irrelevant after the revision of the EU treaties.[27] They now allow judicial review of acts of EU agencies in Articles 263 and 277 TFEU and presuppose the conferral of powers onto them.[28] This implies that EU agencies can now adopt acts having the force of law, since otherwise the judicial review mechanisms would be superfluous.[29]

In *Short-Selling*, the Court delivered a highly significant judgment for the current interpretation of *Meroni*.[30] It concerned ESMA's powers in relation to a temporary ban on short-selling activities. The Court considered them in compliance with *Meroni*, concluding that they 'are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority'.[31] The Court implicitly conceded that ESMA had received discretionary powers, yet still confirmed the compliance with the requirements set out in *Meroni*. This contradicted the dominant contemporary reception of the *Meroni* ruling, which assumed that only non-discretionary powers could be delegated (or conferred).[32] Concerning the

[24] Case 98/80 *Romano v. INAMI* [1981] ECR 1241.

[25] ibid para 20.

[26] Chamon (n 14) 1074.

[27] Merijn Chamon and Nathan de Arriba-Sellier, 'FBF: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies' (2022) 18 EuConst 286, 301.

[28] Case C-270/12 *UK v EP and Council* [2014] EU:C:2014:18 ('*Short-Selling*') para 65.

[29] Chamon (n 27) 301; more cautiously: Chamon (n 11) 258.

[30] *Short-Selling* (n 28) para 65.

[31] ibid para 53.

[32] Chamon (n 11) 184.

legal basis, the Court observed that Art. 114 TFEU can serve as a basis for establishing an EU agency if it promotes the internal market.[33] Furthermore, the Court confirmed the inapplicability of *Romano* after the EU treaties' revision.[34]

In 2022, the General Court (GC) applied those principles in *Banco Popular*,[35] a case concerning a decision of the Single Resolution Board (SRB). Following the methodology of *Meroni*, the GC first assessed whether powers had been conferred to the SRB. It negated the question, claiming that a true conferral of powers had not occurred as the Commission retained control over discretionary decisions.[36] The CJEU confirmed the GC's decision in one of the parallel cases, rejecting the appeal.[37]

Merijn Chamon criticised that *Meroni* should not be relevant to *Banco Popular*, as it did not deal with EU agencies, and only the new requirements of *Short-Selling* should be evaluated,[38] citing a 2019 judgment in which the GC seemingly distanced itself from *Meroni*.[39] However, this view cannot be accepted. Firstly, the CJEU formed its *Short-Selling* ruling on the *Meroni* principles. *Short-Selling* should thus be regarded as a clarification of *Meroni* and not as its replacement. It seems that Chamon misinterpreted the precise delineation and judicial review requirements in *Short-Selling*, reading them as a departure from *Meroni*, which thus far has often been interpreted as

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[33] *Short-Selling* (n 28) paras 105-107.

[34] ibid.

[35] Case T-510/17 *Del Valle Ruiz and Others v Commission and SRB* [2022] EU:T:2022:312 ('*Banco Popular*').

[36] ibid para 219.

[37] Case C-541/22 P *García Fernández and Others v Commission and SRB* [2024] EU:C:2024:820 para 172.

[38] Merijn Chamon, 'The Non-delegation Doctrine in the *Banco Popular* Cases' (*REALaw.blog*, 28 October 2022) <https://realaw.blog/2022/10/28/the-non-delegation-doctrine-in-the-banco-popular-cases-by-merijn-chamon/> accessed 28 November 2023.

[39] Case T-755/17 *Germany vs ECHA* [2019] EU:T:2019:647 para 138.

banning any non-discretionary delegations of power.[40] Furthermore, the GC was correct not to apply the *Short-Selling* principles. In *Banco Popular*, the GC concluded that the EU legislature 'did not delegate autonomous power to the SRB,'[41] whereas in the *Short-Selling* case, ESMA had received discretionary powers for which no other institution would accept responsibility. This assessment is in line with the methodology set out in *Meroni,* where it was firstly determined that a 'true delegation of powers' had taken place.[42] Therefore, it should not be criticised that the Court did not mention the precise delineation and judicial review requirements established in *Short-Selling*, as they presuppose a delegation of power which did not occur in *Banco Popular*. Chamon further claimed that the *Banco Popular* decision contradicted the *Meroni* ruling, arguing that a similar degree of involvement of the High Authority in the equalisation scheme compared to the Commission's involvement in the resolution procedure was not enough to save the equalisation scheme's legality in *Meroni*.[43] This claim is untenable. In *Banco Popular,* the GC found that the Commission had to either endorse or reject the resolution scheme.[44] This active behaviour distinguishes it from *Meroni* where the High Authority held a relatively passive role and later even denounced any responsibility.[45]

In conclusion, the GC was correct in finding that the further conditions established in *Meroni* and clarified in *Short-Selling* should only be considered if powers are actually conferred, in the sense that the delegating institution takes a passive role and accepts little to no responsibility for the agency's actions. In other words, only if a 'true delegation of powers' has occurred,[46] can and should it be evaluated whether those delegated powers are of a

[40] Chamon (n 11) 184.

[41] *Banco Popular* (n 35) para 219.

[42] *Meroni* (n 10) 149.

[43] Chamon (n 38).

[44] *Banco Popular* (n 35) para 217.

[45] Chamon (n 38).

[46] *Meroni* (n 10) 149.

discretionary nature and if so whether they are 'precisely delineated and amenable to judicial review'.[47]

III. The Compatibility of the *Meroni* Doctrine with an EU CoB Authority

It is clear from the preceding summary that *Meroni* is still relevant today, although the treaties have undergone significant modifications since.[48] The fundamental differences between the ECSCT and the current EU treaties should always be considered when applying *Meroni* to EU agencies that exist today.[49] In this context, it should also be highlighted that *Meroni* did not deal directly with agencies established under EU secondary law, as they did not exist at the time of the ruling. Furthermore, in the context of EU agencies, powers are 'conferred' rather than 'delegated', as the Council and Parliament primarily do not transfer their own law-making responsibilities to a different body but rather grant executive powers.[50] Although not identical, it should still be regarded as sufficiently similar to transpose *Meroni* to the context of EU agencies. Nevertheless, as the GC correctly observed,[51] *Meroni* must be interpreted in light of those changes and adjusted accordingly. Therefore, one should ask how the Court arrived at the *Meroni* criteria in order to determine which still hold relevance and how they should be applied today.

1. *True Conferral of Powers and Legal Basis*

As described above, one should first examine whether powers have really been conferred to a different body. This requires an actual shift of

[47] *Short-Selling* (n 28) para 53.

[48] Chamon (n 27) 300.

[49] Pamela Lintner, 'De/centralized Decision Making Under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) 18 EBOR 591, 610; Chamon (n 14) 1059.

[50] Scholten (n 19) 1250; Chamon (n 11) 239-241.

[51] *Germany* (n 39) para 138.

responsibilities. Conversely, a conferral cannot be assumed when the agency takes a merely supportive role, and the institution retains active responsibility for any decision this body takes.[52] If powers are conferred, a suitable legal basis is required. The conferral of powers needs to be explicitly stated.[53] Unlike prudential supervision that was attributed to the ECB pursuant to Art. 127(6) TFEU, the EU treaties do not yet foresee an explicit legal basis for CoB supervision.[54]

However, it could be based on Art. 114 or Art. 352 TFEU.[55] In *Short-Selling*, Art. 114 TFEU was relied upon both for establishing the agency and conferring powers. Unlike the Attorney General (AG), who found the legal basis to be unlawful for the latter,[56] the Court highlighted the legislator's large discretion in choosing the appropriate approximation method. Accordingly, it assumed that the Council and Parliament may confer powers to an EU agency to implement the harmonisation sought. This broad interpretation of Art. 114 TFEU is consistent with previous case law.[57]

Nonetheless, it should be cautioned that the Court supported its reasoning in *Short-Selling* almost exclusively with the specificities of the individual case. Thus, the situation remains uncertain.[58] Some authors regard Art. 352

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[52] *Banco Popular* (n 35) paras 218-219.

[53] *Meroni* (n 10) 151.

[54] Niamh Moloney, 'Capital Markets Union: "Ever loser Union" for the EU Financial System' (2016) 41(3) ELR 307, 333.

[55] Chia-Hsing Li, 'Optimum Governance of Investment Conduct in the Capital Markets Union – A Legal and Economic Analysis' (University of Edinburgh, 2017) 115 <https://era.ed.ac.uk/bitstream/handle/1842/25757/Li2017.pdf?sequence=3&isAllowed=y> accessed 28 November 2023.

[56] *Short-Selling* (n 28) Opinion of AG Jääsken, para 53.

[57] Case C-217/04 *UK v Parliament and Council* [2006] ECR I-3771 ('ENISA'), paras 42-67.

[58] Eilis Ferran, 'European Banking Union: Imperfect, But It Can Work' (2014) 30 University of Cambridge Faculty of Law Research Paper, 1, 19.

TFEU as the preferable legal basis, since Art. 114 TFEU requires a harmonisation effort and is thus more restrictive.[59] However, Art. 114 TFEU seems preferable in practice, as it avoids the unanimity requirement in the Council under Art. 352 TFEU.

2. *Motivations for Restricting the Exercise of Discretionary Powers*

To draw conclusions for an EU CoB authority, it is crucial to analyse why the Court distinguished between discretionary and clearly defined executive powers. On the one hand, the Court supported its reasoning by underlining the institutional reviewability of executive powers using objective criteria. In contrast, discretionary powers were entrusted to institutions which were subject to judicial review. On the other hand, the Court held that the exercise of discretionary powers could endanger the 'balance of powers which is characteristic of the institutional structure of the Community […],'[60] establishing the concept of institutional balance.[61] By analysing those underlying considerations of the Court it will be inferred which principles a new CoB authority must respect.

A. Institutional or Judicial Review

Institutional review by the delegator was essential under the ECSCT as the agencies' decisions were not subject to judicial review.[62] Given this particularity, the Court insisted on institutional review instead. Nevertheless, the Court emphasised the reviewability of the High Authority's decisions,[63] and that the agency's decisions must be subject to the same conditions as if

[59] Li (n 55) 115.

[60] *Meroni* (n 10) 152.

[61] Koen Lenaerts and Amaryllis Verhoeven, 'Institutional Balance as a Guarantee for democracy in EU Governance' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2001) 36-37.

[62] Chamon (n 14) 1056.

[63] *Meroni* (n 10) 142.

the institution had exercised the power itself,[64] thus implicitly ensuring indirect judicial review. Art. 263 and 277 TFEU introduced direct judicial review of the agency's decisions. Accordingly, the Court now requires that the agency's powers are 'amenable to judicial review'.[65] This implies that the agency's acts must follow precise criteria to ensure reviewability.

B. Institutional Balance

The Court introduced its second argument, the concept of institutional balance, stating that discretionary powers are assigned to the institutions within the framework of their responsibilities according to Art. 3(6) TEU. It follows that only institutions can exercise significant discretion confined to their respective tasks. However, the Court implicitly recognised the need to harness the know-how of specialised bodies by allowing delegation in the first place.[66] Combining this with the practical view that any decision requires at least minimal levels of discretion,[67] should lead to the conclusion that the Court did not seek to prohibit the conferral of discretionary powers *per se*. Indeed, the Court stated that a '*wide* margin of discretion' of a non-institution would be unacceptable.[68] Instead, it should be interpreted as limiting discretion with a view to upholding two relevant subprinciples of institutional balance.[69]

The first principle requires that the assignment of discretionary responsibilities to other bodies must remain within certain limits to avoid a power shift.[70] *Short-Selling* revealed that ESMA indeed has some discretion.

[64] ibid 150.

[65] *Short-Selling* (n 28) para 53.

[66] *Meroni* (n 10) 151–152.

[67] Scholten (n 20) 403.

[68] *Meroni* (n 10) 152 (emphasis added).

[69] See Lenaerts (n 61) 44–45.

[70] ibid 44.

However, the Court tolerated it due to ESMA's precise power limitation.[71] This avoided a power shift and thus ensured institutional balance.

The second principle prescribes that institutions should avoid encroaching on each other's responsibilities. The *nemo plus iuris* rule could be seen as a particular manifestation of this legal principle.[72] In this context, the question arises whether the legislator can confer executive powers.[73] For instance, ESMA was arguably granted executive powers that would generally belong to the Commission. One could consider the *nemo plus iuris* rule to be inapplicable in that context as it presupposes a 'delegation' rather than a 'conferral' of powers. Alternatively, the legislature could be regarded as superior to the Commission due to its more direct democratic legitimisation.[74] However, neither suggestion resolves the potential for creating a misbalance to the detriment of the Commission. The Court circumvented this issue, arguing with ESMA's technical expertise and the necessity of conferring those powers to ensure financial stability.[75]

C. Solution: Precise Delineation

Institutional balance and reviewability concerns are simultaneously addressed in the Court's observation that the delegated powers must be 'precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority'.[76] The precise delineation facilitates institutional and judicial review by setting rules that the acts can be checked against. At the same time, it sets clear limits on the agency's acts and thus avoids an erosion of the institutional balance referred to as the first principle above. As the Court emphasised the limited discretion of ESMA, it

[71] *Short-Selling* (n 28) para 45.

[72] *Meroni* (n 10) 150.

[73] Merijn Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' (2015) 21 EPL 371, 389.

[74] Chamon (n 11) 242.

[75] *Short-Selling* (n 28) para 84–85.

[76] ibid para 53.

should be assumed that the Court would not tolerate a significant level of (non-technical) discretion. However, it remains unclear which levels of discretion are acceptable as the Court did not elaborate on this.[77]

The precise delineation could also implicitly address the above-mentioned second principle. It could be argued that the creation of ESMA did not result in the Commission losing any powers. The institution still holds considerable influence over ESMA's decision as it can adopt delegated acts according to Art. 30 of Regulation (EU) 236/2012, determining the criteria and factors ESMA needs to consider before adopting its decisions. This ensures that most of the executive power remains with the Commission and prevents the Council and Parliament from unduly stripping the Commission of its responsibilities.

3. Subsidiarity and Proportionality

Another potential restriction to an EU CoB authority could be the principles of subsidiarity and proportionality, although they were not expressly named as such in *Meroni*. However, the ruling mandated that a conferral is only legitimate if it is 'necessary for the performance of the tasks set out in Article 3'.[78] This is now similarly stipulated in the proportionality principle, which is regulated alongside the subsidiarity principle in Art. 5(1) TEU. The principle of subsidiarity is assessed in two stages. Firstly, the Union can only act where Member States cannot sufficiently achieve the goals. Secondly, they must be better achieved at EU level.[79] The principle of proportionality requires the pursuit of a legitimate objective, and that the measure is suitable,

[77] Scholten (n 20) 394.

[78] *Meroni* (n 10) 151.

[79] Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (OUP 2018) 228.

necessary and reasonable.[80] Despite being theoretically distinguishable,[81] both principles are interrelated as they ultimately require an economic analysis of the pursued aim that specifies at which level it could be achieved at minimal costs.[82] Therefore, the benefits and disbenefits of a CoB authority need to be evaluated.

A. Arguments for and against Centralisation

Centralising CoB supervision could simplify coordination with the SSM by providing one point of contact.[83] Moreover, the need for financial and human resources could be reduced, creating economies of scale. In a more substantive sense, a single supervisor could reduce the fragmentation of EU capital markets and enhance the impact of the Single Rulebook.[84] Finally, a pan-EU supervisor could more effectively address cross-border risks.[85]

Conversely, a purely centralised EU CoB authority might be unable to adequately assess local regulatory frameworks, consumer preferences and customs of local markets. Additionally, language barriers might pose challenges. Under the SSM, these issues of centralisation are softened by employing joint teams consisting of both ECB and NCA staff, which fosters diverse backgrounds.[86] Furthermore, supervisory diversity could also be positively regarded, as it creates competition among national supervisors, limits the risk of errors, and enables experimentation with different supervisory structures.[87]

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[80] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 ELJ 158, 165.

[81] Chamon (n 11) 167.

[82] Li (n 55) 265-266.

[83] Ferran (n 58) 7.

[84] ECB (n 7).

[85] Li (n 55) 125-127.

[86] Christy Ann Petit, 'Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting-ins' (2022) 7 European Papers 889, 899.

[87] Li (n 55) 280-298.

B. Evaluation

Chia-Hsing Li argues that transaction costs would increase if centralised supervision were introduced. Consequently, he believes such a measure would unlikely pass the proportionality and subsidiarity test.[88] However, it should not be overlooked that the CJEU grants broad discretion to the legislator in assessing proportionality.[89] The subsidiarity principle is equally lenient, as its nature is rather political than technical.[90] Thus, it should be assumed that the CJEU would only intervene in fairly apparent infringements of these principles.[91] This should be welcomed. Courts are hardly in a better position to conduct economic assessments and have less democratic legitimisation than Parliament and the Council.[92] In any case, the question should not be a binary between centralisation and decentralisation, but rather how much the current system should be tilted towards centralisation.[93] A moderate shift of the current decentralised network towards a more integrated system should be the preferred option.[94] Therefore, it should finally be explored how an EU CoB authority could legally be constructed.

IV. Framework for an EU CoB Authority

A first option would be to entrust the Commission with CoB supervision. However, this could give rise to concerns regarding its political independence. Moreover, within the Commission, it would probably be

[88] ibid 301.

[89] Case C-84/94 *UK v Council* [1996] ECR I-5755 para 58.

[90] Phil Syrpis, 'In Defence of Subsidiarity' (2004) 24 OJLS 323, 334.

[91] Chamon (n 11) 175.

[92] Fabbrini (n 79) 234.

[93] cf Li (n 55) 303-307.

[94] ibid.

challenging to build a high level of expertise and specialisation that could be developed in a separate agency.[95]

A second possibility would be to expand ESMA's mandate. To comply with *Meroni*, it would be necessary that either the Commission assumes responsibility for substantial discretionary decisions or that there is a precise delineation of discretionary powers based on a suitable legal basis, ensuring institutional balance and adequate review of its actions. Regarding the assumption of responsibility, it would likely not suffice that the Commission 'rubber stamps' any decisions the agency would take, as this would ultimately circumvent the *Meroni* restrictions.[96] Conversely, if the Commission conducts too deep substantive scrutiny, it would again raise the same concerns mentioned under the first option. Additionally, the double structure within the Commission and agency would incur further costs. However, those costs could also be considered appropriate, as they would allow more intensive review mechanisms.

Under current primary law, it seems advisable to define the conditions under which the authority could take measures to ensure the greatest reviewability and institutional balance. If the decisions require rather wide discretion, the authority should only prepare a decision that the Commission should scrutinise and assume to avoid a power shift. This procedure would likely comply with *Meroni*, although absolute certainty is currently not achievable. The safest way would be a Treaty revision that introduces a specific legal basis for a CoB authority, as exemplified in Art. 86 TFEU for the European Public Prosecutor's Office.

[95] Wymeersch (n 5) 251.

[96] Madalina Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) 19 ELJ 111, 123.

V. Conclusion

The fragmentation of the EU capital market warrants a more integrated approach to CoB supervision, including more powers at the EU level. Although the *Meroni* doctrine poses significant challenges in achieving this goal, it does not entirely prevent it. This article has argued for a modern interpretation of *Meroni*, taking into account changes in the primary law. It has shown that the doctrine offers some flexibility regarding the conferral of discretionary powers, as long as the underlying principles of institutional balance and reviewability of decisions are respected. It has therefore proposed a precise delineation of the powers of the EU CoB authority and to assign the responsibility for exercising significant discretion to the Commission. In any case, complete centralisation seems neither feasible nor desirable at this point. Christine Lagarde's vision of a European SEC would likely necessitate a Treaty revision and would unlikely work as effectively as in the USA, where laws are aligned and regional differences less pronounced. However, a measured shift towards centralisation, considering the trade-offs of a centralised CoB authority, may lead to a more effective supervisory framework, contributing to the realisation of the Capital Markets Union. It would also be worth exploring an integrated model where CoB supervision would be combined with prudential supervision in one authority.

CROSS-BORDER DISPUTE AS A SINE QUA NON IN THE REGULATION ESTABLISHING THE EUROPEAN SMALL CLAIMS PROCEDURE

Dominika Moravcová*

This article focuses on the European Small Claims Procedure, with a particular emphasis on its application in cross-border cases. It specifically examines the fulfilment of the sine qua non condition under ratione materiae, namely the cross-border element, analysed through the lens of the Court of Justice's case law concerning this Regulation, as well as the broader context of the Brussels I bis Regulation. The main objective is to explore the possibilities for parties domiciled within the same Member State to initiate the European Small Claims Procedure by invoking a foreign forum clause and to analyse how the cross-border element is articulated within the European judicial area to ensure the application of the Regulation.

Keywords: cross-border cases, European small claims procedure, Brussels I bis

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I Introduction

Judicial cooperation in civil and commercial matters within the European Union ('EU') is an area that has evolved from international cooperation to its incorporation into the EU *acquis*. Although it is a shared competence between the EU and the Member States,[1] it has gradually shifted toward becoming an exclusive competence, both internally and externally, due to the increasing exercise of this competence by the Union.[2] Today, this field constitutes a comprehensive body of international private and procedural law within the EU, comprising not only the rules of secondary Union law but also the multilateral international treaties concluded by the Union in this area, which form an integral part of the Union's *acquis*.[3]

The effective functioning of judicial cooperation in civil and commercial matters presupposes mutual trust in the administration of justice among EU Member States. This trust is rooted in the belief that the rule of law is upheld

[1] Art. 4(2) of the Treaty on the Functioning of the European Union [2012] OJ C326/47 ('TFEU').

[2] If the Union has not yet fully exercised its shared competence in a particular area, Member States retain the power to adopt national legal acts. However, they must respect the duty of sincere cooperation and refrain from actions that could hinder the Union's future exercise of its competences. More on competences in: Paul Craig and Gráinne de Búrca, *EU law – text, cases, and materials* (4th ed, Oxford University Press 2008).

[3] Case 181/73 *Haegemann v Belgian State* EU:C:1974:41, para 5.

at a comparable level across the Member States, making it, in principle, irrelevant in which Member State a particular dispute is adjudicated.[4] Consequently, Member States appear to be relinquishing the exclusive right to enforce claims in their own courts, an expression of sovereignty, and instead trusting that disputes can be resolved on an equal basis in any Member State.[5]

Among the rules of secondary Union law within the EU's area of international private and procedural law, there is the Regulation establishing a European Small Claims Procedure[6] ('ESCP'). This Regulation streamlines access to justice in the EU, offering a cost-effective and expedited mechanism for cross-border claims as an alternative to national procedures.[7] It may only be applied in cases covered by the Regulation's material, temporal, personal, and territorial scope. The term 'small claims' is confined to claims not exceeding EUR 5,000, excluding expenses. Although the European Commission initially intended to extend this alternative option to both cross-border and domestic disputes[8]—thereby creating a uniform procedure for all disputes within the Union—the Member States ultimately agreed to adopt a regulation with a substantive scope limited to cross-border disputes. The case law of the Court of Justice of the European Union ('CJEU' or 'the Court of Justice') may influence this issue through its interpretation

[4] Michal Tomášek and Václav Šmejkal et al., *Smlouva o fungovaní EU. Smlouva o EU .Listina základních práv EU. Komentář* (Wolters Kluwer ČR 2022) 330.

[5] Ibid.

[6] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, [2007] OJ L199/ 1 ('ESCP Regulation').

[7] ESCP Regulation, preamble, recitals 7 and 8.

[8] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' COM (2005) 87 final.

of the Brussels I bis Regulation,[9] which governs jurisdiction in ESCP cases, given that the ESCP Regulation itself does not establish such rules. Therefore, it is pertinent to examine the impact of this case law and assess whether the parties' intent, materialised in the choice of a foreign forum, can constitute the cross-border element that enables the application of the ESCP Regulation. It is precisely the cross-border element, as an international factor, that differentiates private law relations falling under international private and procedural law from purely domestic ones, with its definition varying across regulations, as demonstrated in this article.

The aim of this article is to explore the possibilities for parties domiciled within the same Member State to initiate the European Small Claims Procedure and to examine how the interpretation of the requirement for a foreign element has evolved since the adoption of the Regulation. The article also considers the future trajectory of judicial cooperation in civil and commercial matters, particularly in light of recent case law of the Court of Justice. This article explores the issue through a combined reading with the Brussels I bis Regulation, recognising its increased relevance as a potential consequence of the recent CJEU case law on prorogation.

The article begins by examining the history and teleology of the ESCP Regulation before addressing its relationship with the Brussels I bis to highlight the jurisprudence's significance for our topic. After defining cross-border disputes through selected Regulations, the article focuses on answering the core research question: whether, and under what circumstances, the scope of the ESCP Regulation could be extended to domestic disputes via the prorogation of a foreign forum. The harmonised procedural rules encompassed within the ESCP Regulation are explicitly limited, in terms of substantive scope, to cross-border disputes. One of the most extensively discussed decisions rendered by the Court of Justice is the

[9] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/ 1 ('Brussels I bis').

judgment in the *Inkreal*[10] case, wherein the Court clarified the interpretation of the prorogation of jurisdiction pursuant to the Brussels I bis Regulation. The implications of this judgment are wide-ranging; in this paper, however, we specifically address a somewhat overlooked dimension of these impacts, which extend into the realm of the ESCP Regulation.

The article employs a structural framework within its methodological approach. A comparative and systematic analysis of the Brussels I bis and the ESCP is undertaken, employing a reflective interpretative approach that emphasises the conceptual interplay between the concepts of 'cross-border dispute' and 'foreign element'. By applying both teleological and historical interpretation of the ESCP Regulation, the aim is to determine whether it is possible to extend the CJEU's conclusions in *Inkreal*[11] case regarding the Brussels I bis to the ESCP. This is a relatively recent judgment that has sparked considerable debate not only within the academic community, a matter to which we will devote further attention in this article. Precisely because of its groundbreaking and controversial nature, it is essential to begin examining its potential implications at this stage. In the present paper, we have chosen to focus specifically on its possible impact on the ESCP Regulation. The *Inkreal* case has given the question of the cross-border nature of disputes a new dimension, confirming what had long been speculated, that the choice of a foreign court *per se*, constitutes a cross-border element, even if made in the context of a purely domestic dispute. This issue, with its implications for the ESCP Regulation, is the subject of our analysis in the article. Through deductive reasoning, it will be necessary to determine whether the use of the ESCP for domestic disputes could be achieved by means of a prorogation of jurisdiction in favour of a foreign forum pursuant to Article 25 of the Brussels I bis Regulation. If we were to arrive at this conclusion, it could significantly contribute to expediting certain proceedings.

[10] Case 566/22 *Inkreal* EU:C:2024:123.

[11] Case 566/22 *Inkreal* EU:C:2024:123.

II The Evolution Of The Cross-Border Dispute Requirement In The Regulation Establishing The European Small Claims Procedure

The decision to create a fast, efficient, and more affordable alternative to regular civil procedure for citizens and businesses in the EU is undoubtedly positive.[12] The intent behind this alternative was to establish a civil procedure with a uniform process across all Member States, covering every procedural step from the initiation of the proceedings to the execution of the judgment.[13] The Regulation establishes mandatory time limits for individual procedural stages, ensuring that, under optimal conditions, a judgment can be issued within three months. Furthermore, it provides for a simplified mechanism for the recognition and enforcement of such judgments, and it is therefore indisputable that the Regulation constitutes a highly effective legal instrument for the recovery of small claims in cross-border disputes.

In 2000, the European Commission started a process leading to a legislative proposal by conducting a questionnaire survey on the availability of specific procedures for small claims in each Member State.[14] The Green Paper on a European order for payment procedure and on measures to simplify and

[12] This stems from factors such as the absence of any requirement to engage legal representation in order to initiate Small Claims Procedure, the expectation of expedited resolution of the claim, the simplified nature of the procedure, and similar considerations. See: Europa.eu, 'European Small Claims procedure' <https://europa.eu/youreurope/business/dealing-with-customers/solving-disputes/european-small-claims-procedure/index_en.htm> accessed 12 August 2025.

[13] European Commission, 'Commission adopts Proposal for a Regulation establishing a European Small Claims Procedure' <https://ec.europa.eu/commission/presscorner/detail/en/IP_05_296> accessed 04 September 2024.

[14] Commission, 'Practice guide for the application of the European Small Claims Procedure' <https://e-justice.europa.eu/177/en/small_claims_forms?init=true> accessed 04 September 2024.

speed up small claims litigation, adopted by the European Commission in 2002, served as the foundation for the adoption of the ESCP Regulation. The Green Paper itself already reflects on the necessity of a cross-border dimension for the activation of the Regulation and the use of this mechanism. The Commission correctly recognised in the Green Paper that the cross-border dimension may only become evident, for example, at the enforcement phase and it does not necessarily have to be apparent at the outset of the main proceedings. It was also suggested that it might seem inequitable for the effective functioning of the internal market if parties involved in disputes with a cross-border element have more effective recovery tools at their disposal than those involved in disputes confined within the borders of a single Member State. The question of whether access to equally efficient legal instruments is justified may arise, as equality for citizens and business partners in the internal market necessitates equal access to legal means available within the legal system to achieve justice and protect rights.[15]

In principle, it is difficult to disagree with the Commission's initial arguments. The ESCP itself is a response to the fact that several Member States have implemented specific, more efficient, faster, and less costly procedures for small claims litigation.[16] The freedoms of the internal market presuppose the effective exercise of the freedom of establishment for businesses, and the availability of efficient mechanisms for recovering small claims can, from our perspective, influence their choice of establishment in a particular Member State.[17] The disparities in the availability of this

[15] Commission, 'Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation' COM (2002) 0746 final, part 1.1.

[16] Simplified procedures for small claims existed, for example, in Spain, France, Ireland, Sweden, and the United Kingdom.

[17] It should be noted that where such a cross-border dispute falls within the scope of the Brussels I bis Regulation, its provisions on lis pendens prevent parallel

mechanism could be mitigated by extending the ESCP to cover not only cross-border disputes but also domestic disputes, thereby positively impacting the exercise of the freedom of establishment within the internal market. Conversely, considering the Union's competence in judicial cooperation, it is essential to recognise that this competence inherently involves matters with cross-border implications.[18]

The adoption of the Green Paper initiated a consultation process involving both Member States and all relevant stakeholders, for example associations representing legal professions, who agreed that the ESCP represents a significant advancement in the development of the area of freedom, security, and justice.[19][20] The consultation highlighted the increased prevalence of private law relationships with a foreign element due to the exercise of the freedoms within the internal market. It drew attention to the obstacles and, in particular, the heightened costs associated with recovering claims in such

proceedings from taking place before the courts of more than one Member State. On the issue of lis pendens, see: Section 9 of the Brussels I bis Regulation.

[18] Art. 81(1) of the TFEU.

[19] We recommend consulting the 'Need for action at Community level' section and the section titled 'Consultation on the Green Paper with all interested parties' in: Commission, 'Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation' COM (2002) 0746 final. On the need, for example from the perspective of the UK at the time of adoption, see Parliament.uk, 'Select Committee on European Union Twenty-Third Report - CHAPTER 2: The ESCP—Need and Scope' < https://publications.parliament.uk/pa/ld200506/ldselect/ldeucom/118/11805.htm?utm_source=chatgpt.com> accessed 15 July 2025.

[20] The proposal was supported by a meeting of experts of the Member States. Its benefits were highlighted by various associations, for example, the Association of District Judges (UK) and the Association of Personal Injury Lawyers (UK). There were more than sixty responses to the Green Paper (from institutions, governments of Member States, representatives of interest groups, representative bodies for lawyers, business and consumer associations, etc). See Commission, 'Commission staff working document' SEC(2005) 351 {COM(2005)87 final}.

disputes, including additional expenses for translation and interpretation, legal fees, evidence collection, potential travel, and other related costs.[21] It is also important to note that a party is highly unlikely to avoid the necessity of hiring an advocate established in the forum State for these proceedings. Consequently, the claimant may question whether it is financially viable to pursue a small claim in cross-border cases and might ultimately decide to abandon the claim.[22] We submit that this attribute may also influence small businesses when deciding whether to engage in legal relations with foreign entities, potentially acting as an overall impediment to the realisation of internal market freedoms.

The original draft of the ESCP Regulation states that: 'it would not only be inappropriate but even counterproductive to constrain the scope of application of the European Small Claims Procedure to cross-border cases.'[23] This limitation would create unequal treatment between domestic and cross-border cases, which undermines the goal of establishing a coherent area of justice.[24] This view was essentially supported by the European Economic and Social Committee ('EESC'), which stated that this initiative required substantial investment and would be justified if it applied, even optionally, to domestic disputes as well.[25]

As noted, while several Member States have small claims procedures in their legal frameworks, significant disparities remain in procedural rules,

[21] Commission, 'Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation' COM (2002) 0746 final, ch 2, art. 4.

[22] Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure {SEC(2005) 351} {SEC(2005) 352} /* COM/2005/0087 final - COD 2005/0020 */, part 2.1.1.

[23] Ibid.

[24] Ibid.

[25] Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure COM(2005) 87 final — 2005/0020 (COD) [2006] OJ C88.

thresholds, and other aspects,[26] with some lacking such mechanisms entirely. Given the arguments presented so far, at the Justice and Home Affairs Council in September 2005, despite support for the creation of such a mechanism, there was overwhelming backing for restricting it to cross-border cases.[27] The Commission's position was not endorsed by 21 out of 25 Member States, nor supported by the European Parliament.[28] Conversely, the EESC expressed its support for the proposal, referring to the parties' right to a fair trial. The voluntary extension of the procedure to domestic disputes would serve to guarantee that all parties, regardless of the cross-border nature of the case, benefit from equal rights to fair, expeditious, and accessible dispute resolution mechanisms throughout the Union.[29] Despite these efforts, the Council adopted conclusions that clearly limit the scope of the Regulation to cross-border disputes.[30]

Under the framework of judicial cooperation in civil and commercial matters, the European Union is vested with the competence to adopt

[26] Elisabetta Silvestri, 'Small Claims and Procedural Simplification: Evidence from Selected EU Legal Systems' [2019] 10 Civil Procedure Review 41.

[27] Council, 'Press release - 2696th Council Meeting, Justice and Home Affair Brussels, 1-2 December 2005' C/05/296.

[28] Xandra E. Kramer, 'A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure Accomplishments, New Features and Some Fundamental Questions of European Harmonization' [2008] The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports <https://repub.eur.nl/pub/14225/2008%20XIII%20World%20Congress%20Procedural%20Law%20-%20Harmonization%20of%20Civil%20Procedure-ESCP%20%28kramer%29.pdf?utm_source=chatgpt.com> accessed 20 January 2025.

[29] European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure (COM(2005) 87 final — 2005/0020 (COD))' OJ C88/61, 1.2.

[30] Council, 'Press release - 2696th Council Meeting, Justice and Home Affair Brussels, 1-2 December 2005' C/05/296.

harmonised procedural rules exclusively in respect of disputes involving a cross-border element. Accordingly, the adoption of such an instrument regulating purely domestic civil procedure would fall outside the Union's competences, unless unanimously authorised by all Member States. Consequently, the determination of *ratione materiae* in the wording of the Regulation currently in force remains as follows: 'This Regulation shall apply, in cross-border cases, to civil and commercial matters [...]'.[31] The upper limit for claim value was later raised from the initial EUR 2,000 to EUR 5,000, excluding expenses.[32] The Regulation itself defines the concept of a cross-border dispute in Article 3(1) as follows: 'For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal sei[z]ed.'[33]

The cross-border nature of the dispute thus constitutes a *conditio sine qua non* for fulfilling *ratione materiae* scope of the Regulation, serving as a prerequisite for triggering its application. In other words, the current legal framework provides that if a claimant wishes to recover a claim in a cross-border dispute, this efficient, rapid, and low-cost procedure can be used.[34] Conversely, if a claimant seeks to recover a claim in a purely domestic dispute, they rely entirely on the availability of an equivalent procedural mechanism under national law.

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[31] ESCP Regulation, art. 2(1).

[32] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, [2015] OJ L341/1.

[33] ESCP Regulation, art. 3(1).

[34] Europa.eu, 'European Small Claims procedure' <https://europa.eu/youreurope/business/dealing-with-customers/solving-disputes/european-small-claims-procedure/index_en.htm> accessed 12 August 2025.

III Relationship Between The ESCP Regulation And The General Jurisdiction Regime Under The Brussels I Bis

Determining which Member State's courts have jurisdiction to adjudicate a dispute—i.e., in which Member State the proceedings (not limited to small claims) will take place—requires applying the rules governing jurisdiction in civil and commercial matters set out in the Brussels I bis Regulation. These rules must be followed to establish which Member State's courts will have competence to hear the case. The ESCP is based on standardised forms. The claimant initiates proceedings by completing form A and serving it on the court with jurisdiction.[35] Notably, form A, available via the e-Justice portal,[36] specifically refers to the determination of jurisdiction under the rules in the Brussels I bis Regulation. In this section, the claimant must also indicate the grounds on which they believe the selected court has jurisdiction to adjudicate the claim.

Jurisdiction under the Brussels I bis Regulation is based on various criteria,[37] including prorogation through choice of court agreement.[38] The application of the Brussels I bis Regulation is indispensable, as the ESCP itself does not contain rules for determining jurisdiction. In addition to the Brussels I bis, it is also necessary for the claimant to apply the national law of the State whose

[35] Pursuant to the rules set out in the Brussels I bis Regulation, jurisdiction may lie either with the court having exclusive jurisdiction under Article 24—which cannot be derogated from by agreement—or with the court explicitly or implicitly chosen by the parties under Articles 25 and 26. Alternatively, jurisdiction may be determined based on special rules designed to protect weaker parties, or, in the absence of these, according to the general rule of the defendant's domicile under Article 4. As an alternative, jurisdiction may also be established pursuant to the rules on special jurisdiction set out in Articles 7 and 8 of Brussels I bis.

[36] E-justice, 'Small claims forms' <https://e-justice.europa.eu/177/en/small_claims_forms?init=true> accessed 05 September 2024.

[37] Articles 4-26 of the Brussels I bis Regulation.

[38] Art. 25 of the Brussels I bis Regulation.

courts have jurisdiction to decide the dispute, since it is precisely on the basis of the national rules that it is necessary to determine which particular court in that Member State will have jurisdiction in applying the ESCP. Both Regulations require autonomous interpretation under Union law, ensuring uniform application across Member States, as their concepts may differ from national legal definitions.

The ESCP and Brussels I bis Regulations apply only where their scopes of application are fulfilled —not only in terms of subject matter but also with respect to territorial, temporal, and personal scope. The determination of a dispute's cross-border nature must be explicitly stated in part 5 of form A, through which the claimant initiates the ESCP. As foreseen in Article 3(1) of the ESCP Regulation, the only condition for the cross-border nature of the dispute appears to be that at least one of the parties must be domiciled or habitually resident in a Member State other than the Member State of the forum. Such a definition, however, is absent in the Brussels I bis Regulation and cannot be extended to it. Brussels I bis applies autonomously, whereas the ESCP Regulation presupposes the cumulative application of the Brussels I bis for the determination of jurisdiction.

IV Extending The Application Of The ESCP To National Cases Through Prorogation

The *sine qua non* condition for the application of the ESCP Regulation—the presence of a cross-border element—is unequivocal. In light of the development of this condition within the material scope of application, it is evident that the legislator had no intention of extending the ESCP to purely national situations. These conclusions have been reinforced by subsequent case-law from the Court of Justice. The District Court of Dunajská Streda (Slovakia) initiated a preliminary ruling procedure in the case of *ZSE Energia*,[39] involving the Slovak company ZSE Energia, a.s. as Claimant No.

[39] Case 627/17 *ZSE Energia* EU:C:2018:941.

1 and the Czech company ZSE Energia CZ, s.r.o. as Claimant No. 2, against the defendant RG, an individual domiciled in Slovakia. The national court requested a correction of the submitted form A, as the claim was to be paid exclusively to Claimant No. 1. Following the correction, only the Slovak company remained as claimant, while the Czech company assumed the role of intervener in the proceedings. Consequently, the parties to the dispute were entities domiciled in Slovakia, with the intervener being the only foreign element. The referring court submitted two preliminary questions. The first question essentially asked whether the intervener could be considered a party within the meaning of the aforementioned Article 3(1) of the ESCP Regulation.[40]

The Court of Justice recognised that the Regulation does not explicitly address the first question. However, the exclusive completion of relevant procedural forms by the claimant and defendant indicates that the Regulation does not envisage the participation of interveners, limiting the term 'parties' to the principal litigants.[41] Subsequently, the Court of Justice addressed the second question, which inquired whether a dispute in the main proceedings could be considered a cross-border dispute for the purposes of the Regulation. The Court stated that 'the main proceedings, in which the applicant and the defendant have their domicile or their habitual residence in the same Member State as the court or tribunal seized, does not come within the scope of that regulation.'[42] As demonstrated, it is once again affirmed that, in addition to the cross-border element, it is crucial that at least one party is domiciled in a Member State other than the forum State. This condition is not present in the Brussels I bis and its substantive scope. Consequently, the cross-border element is not perceived in the same manner under both Regulations.

[40] Ibid paras 13-20, 49.

[41] Ibid paras 23-27, 30.

[42] Ibid para 36.

A question that has long been debated in legal scholarship in the context of the Brussels I bis Regulation is whether the choice of forum[43] of another Member State is sufficient as the only cross-border element of a dispute for the purposes of activating the Brussels I bis.[44] While some scholars have adhered to the traditional view that the foreign element must be objective and not solely dependent on the parties' will, others have long accepted alternative possibilities.[45] It has been widely accepted that the applicability of the Brussels I bis required an element of internationality; however, opinions differed on whether this criterion could be satisfied solely by the parties' choice of a foreign forum.[46] Some authors adopt a more progressive stance, arguing that choosing a foreign forum under Brussels I bis may be a relevant factor in determining jurisdiction in another Member State.[47] Here it is essential to note that, unlike the ESCP Regulation, the Brussels I bis does not define a cross-border dispute, and the definition found in the ESCP

[43] Prorogation of jurisdiction underscores party autonomy and serves as a key criterion in jurisdictional determination. However, its limitations apply to weaker parties, and it cannot override the exclusive jurisdiction provisions set out in art. 24 of the Brussels I bis Regulation.

[44] If we return to the original Convention, in Jenard's report, the presence of a connecting factor with the state whose courts were chosen is mentioned, but it is also not excluded that the parties from one Contracting State could choose the forum of another. See Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ C, C/59, 05.03.1979, p. 1).

[45] Advocate General Jean Richard de la Tour, in his opinion on the judgment in the Inkreal case, refers to the case law of the highest judicial authorities, such as in France and Germany, as well as doctrinal writings. See Case 566/22 *Inkreal* EU:C:2024:123, Opinion of J.R. de la Tour.

[46] Ulrich Magnus and Peter Mankowski, Brussels I Regulation (2nd ed., European Law Publishers 2012) 454.

[47] Ulrich Magnus and Peter Mankowski, Brussels I Regulation (European Law Publishers 2007) 386. For a comparison of views, I recommend the edition: Ulrich Magnus and Peter Mankowski, Brussels I Regulation (2nd ed., European Law Publishers 2012) 51.

Regulation cannot automatically be adopted for the general jurisdiction regime under the Brussels I bis. The fulfilment of the Regulation's scope does not necessitate the parties' domiciles being in different Member States. Notably, in matters of exclusive jurisdiction, the international element may be established solely by the location of the immovable property in another Member State.[48] As M. Pauknerová points out, even if that definition is present in the ESCP Regulation, it always relates exclusively to the *ratione materiae* of the Regulation in which it is contained[49] and cannot be adopted generally.[50]

This is not a matter of two separate and independent regulations, as the ESCP Regulation does not itself establish jurisdictional rules but presupposes the determination of jurisdiction under the Brussels I bis Regulation. Given that the ESCP Regulation remains silent on this matter, the application of the Brussels I bis is imperative, including its interpretation by the Court of Justice. However, it is not permissible to analogously transpose the definition contained within the ESCP Regulation to the Brussels I bis, as the Brussels I bis operates autonomously and independently of the ECSP Regulation. In this respect, the provisions of the ESCP Regulation may be regarded as a special regime, which cannot be extended to the general framework of the Brussels I bis Regulation. The latter is applied in the context of the ESCP solely for the purpose of determining jurisdiction.

The definition provided in the ESCP Regulation does not directly address whether the ESCP could be triggered in a purely national case if the parties have chosen to invoke the jurisdiction of a forum in another Member State.

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[48] Brussels I bis, art. 24. See, for example, Case 605/14 *Komu and Others.* EU:C:2015:833.

[49] This assertion cannot be accepted as a general rule, applicable to other areas. For example, in consumer protection the interpretation of the notion of 'consumer' remains coherent and uniform across all related legal instruments.

[50] Monika Pauknerová, *Evropské mezinárodní právo soukromé* (2nd ed., C.H. Beck 2013).

In such a scenario, the condition of a cross-border dispute would be met, as the parties would be domiciled in a Member State other than the forum State. However, the question remains whether it was the legislator's intention to extend this possibility to domestic disputes, in which the cross-border element lies specifically in the prorogation of a foreign forum. To resolve this issue, it is necessary to take a step back and determine jurisdiction according to the Brussels I bis Regulation. If a court in a Member State has general jurisdiction under the Brussels I bis, the party initiating a small claims procedure only needs to specify in form A which jurisdiction under Brussels I bis is applicable. The jurisdiction correctly established under Brussels I bis allows a court of a Member State having jurisdiction to proceed, and it is then up to the claimant, to decide whether to initiate proceedings under the procedural rules of the forum State or to opt for the ESCP, provided that the scope of the Regulation is fulfilled. In terms of the requirement for a cross-border element, it appears sufficient if at least one party is domiciled in a different Member State. Therefore, it is not anticipated that the court would assess the cross-border nature of the dispute under the ESCP Regulation from other perspectives.

Based on the above, the answer to the question of whether it is possible to initiate this procedure in domestic cases where the only foreign element is the choice of a foreign forum must be sought in the Brussels I bis Regulation. A relatively recent judgment by the CJEU in the *Inkreal* case has shed light on the issue. The Court declared that the provision concerning the choice of jurisdiction under Brussels I bis should be interpreted to mean that

> an agreement conferring jurisdiction by which the parties to a contract who are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising out of that contract is covered under that provision, even if that contract has no other connection with that other Member State.[51]

[51] Case 566/22 *Inkreal* EU:C:2024:123.

In this case, the matter concerned a private-law relationship in which two companies based in Slovakia agreed to confer jurisdiction on the courts of the Czech Republic. The entire situation was of a purely domestic nature, with the only cross-border element being the choice of a foreign forum. The simplified question was whether such a choice per se constitutes a sufficient cross-border element to trigger the application of the Brussels I bis Regulation, given that it is a subjectively introduced element based on party autonomy. As evidenced by the cited decision, and contrary to the opinion of the Advocate General, the Court of Justice considered this to be a sufficient cross-border element. This has sparked a wave of debates within scholarly circles. Some scholars explicitly endorse that the Court of Justice has, in effect, strengthened mutual trust in the administration of justice.[52] Through this interpretation, the free movement of civil and commercial proceedings across the EU, based on prorogation, is effectively facilitated. Conversely, some had expected that the Court would align more closely with the Advocate General's opinion[53] and highlight the implications and criticise the Court's decision.[54]

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[52] Geert Van Calster, 'CJEU does not follow its AG in Inkreal: Confirms wide, subjective scope of international element for choice of court' (GAVC LAW – Geert Van Calster, 8 February 2024) <https://gavclaw.com/2024/02/08/cjeu-does-not-follow-its-ag-in-inkreal-confirms-wide-subjective-scope-of-international-element-for-choice-of-court/?utm_source=chatgpt.com> accessed 19 January 2025; Matthias Weller, 'CJEU, Case C-566/22, Inkreal v. Dúha reality: Choice of another Member State's court in an otherwise purely domestic case is sufficient to apply Art. 25 Brussels Ibis Regulation' (Conflictoflaws.net, 17 February 2024) <https://conflictoflaws.net/2024/cjeu-case-c-566-22-inkreal-v-duha-reality-choice-of-another-member-states-court-in-an-otherwise-purely-domestic-case-is-sufficient-to-apply-art-25-brussels-ibis-regulation/> accessed 19 April 2025.

[53] Case 566/22 *Inkreal* EU:C:2024:123, Opinion of J.R. de la Tour.

[54] Gilles Cuniberti, 'Inkreal: Bypassing National Rules Governing Jurisdiction Clauses?' (The EAPIL blog, 26 February 2024) <https://eapil.org/2024/02/26/inkreal-bypassing-national-rules-governing-jurisdiction-clauses/> accessed 28 January

Based on the *Inkreal* judgment, it can be inferred that if the parties to a domestic dispute choose a foreign forum, this should be regarded as a standard choice of jurisdiction under the Brussels I bis Regulation. Consequently, when initiating a claim, there appears to be no reason why, provided that the conditions for the ESCP to apply are met, a party should not have the relatively efficient alternative of initiating an ESCP alongside the procedures otherwise available. In form A, the claimant would specify that the chosen court has jurisdiction based on the parties' prorogation agreement. The form should then include details regarding the cross-border nature of the dispute, indicating the domicile of the parties and the State of the forum, which will naturally differ from the domicile of the parties. Thus, if the parties to a purely domestic case agree that the court of another Member State will have jurisdiction, it cannot be excluded that, under the scope of the ESCP Regulation, they may have fulfilled the necessary conditions to trigger this procedure.

From this perspective, as a result of the *Inkreal* judgment, the parties are suddenly presented with the opportunity to use this procedure, and with the added obligation on Member States to provide assistance in completing the forms used during the proceedings.[55] The duration of the proceedings itself may be a key advantage compared to ordinary proceedings. The entire process is further simplified by the guidelines available on the e-justice website.

Naturally, this approach could be more appealing to entities from those Member States whose legal systems do not provide a special procedure similar to the ESCP, of which there are still several within the EU. This is a rather controversial issue, as the Commission's original intention was to

2025; Horatia Muir Watt and Dominique Bureau, 'Inkreal: Jurisdictional Barrier-crossing in Domestic Cases: A Threefold Critique' (The EAPIL blog, 1 March 2024) <https://eapil.org/2024/03/01/inkreal-jurisdictional-barrier-crossing-in-domestic-cases-a-threefold-critique/> accessed 28 January 2025.

[55] ESCP Regulation, art. 11.

open the possibility of using the ESCP even for purely domestic cases. However, this option was omitted from the final version of the Regulation due to a lack of consensus among Member States.[56] Ironically, the Court of Justice, through its judgment in the *Inkreal* case, has now opened the European judicial space,[57] allowing, as it were, the movement of proceedings across EU Member States at the discretion of the parties.[58] Despite the fact that parties cannot initiate the ESCP before their own courts, in light of the above, there is no reason why they should not be able to make use of this mechanism by choosing the jurisdiction of a foreign court. In this way, the opportunities available to parties are to some extent balanced, though exclusively through the prorogation of a foreign forum, not universally.

V Conclusion

The article focuses on the ESCP from the perspective of fulfilling one of the *sine qua non* conditions *ratione materiae*, namely the cross-border nature of the dispute. Although the Commission's original proposal aimed to extend this procedure to domestic disputes, the final Regulation requires the dispute to have a cross-border nature. However, the Regulation itself does not

[56] Council, 'Press release - 2696th Council Meeting, Justice and Home Affair Brussels, 1-2 December 2005' C/05/296.

[57] Views on the implications of this judgment vary, some Member States, for instance, have adopted political decisions allowing choice of court agreements in domestic law only for certain categories of parties, raising the question of the Union's legitimacy to intervene in such national choices and extend these options beyond their existing scope. See Gilles Cuniberti, 'Inkreal: Bypassing National Rules Governing Jurisdiction Clauses?' (The EAPIL blog, 26 February 2024) <https://eapil.org/2024/02/26/inkreal-bypassing-national-rules-governing-jurisdiction-clauses/> accessed 28 January 2025.

[58] *Forum shopping* has, in this respect, full scope for application, although in practical terms the parties must be aware not only of the advantages but also of the potential disadvantages, such as language barriers, the possible necessity of travelling to a foreign court, the potential requirement to provide translations of documents, and similar considerations.

establish jurisdictional rules, making it necessary to determine jurisdiction in accordance with the Brussels I bis Regulation. In light of the *Inkreal* judgment, the option to choose jurisdiction takes on new significance.

The aim of this article was to identify the opportunities available to parties in purely domestic cases to trigger the ESCP for facilitating the recovery of small claims. In light of the Regulation itself, the Brussels I bis, and current case-law interpreting the Brussels I bis Regulation, it cannot be excluded that parties in purely domestic disputes may confer jurisdiction on a court in another Member State pursuant to the Brussels I bis and subsequently invoke the ESCP as an alternative to the procedural mechanisms available under the *lex fori* of the designated court.

This places purely domestic disputes in a peculiar legal position: the parties are not entitled to make use of this procedural instrument before their own domestic courts. However, where the parties agree to prorogate jurisdiction in favour of a foreign forum, they may avail themselves of this mechanism, often resulting in a judgment delivered more expeditiously, at lower cost, without the requirement of legal representation, through a streamlined procedural framework, and with the benefit of automatic recognition and enforcement in their own Member State. The question remains whether the intention of the Court of Justice in the *Inkreal* judgment was to provide these opportunities to parties in Member States. The Court, in its ruling, affirmed the sufficiency of a subjective foreign element for triggering the application of the Brussels I bis Regulation. I had expected a different development in the Court's decision, namely that it would align with the Advocate General's proposals and not permit the 'free movement of proceedings' within the EU through prorogation under the Brussels I bis Regulation. The decision has been made, *alea iacta est*, and now we will gradually observe the practical implications of this ruling. In the presented article, We have focused on the impact of expanding the opportunities for domestic disputes to trigger the ESCP through the prorogation of a foreign forum. While this conclusion may seem to contradict the objective of excluding purely domestic disputes

from the ESCP's scope, no such general extension has been introduced. The Court identified prorogation of jurisdiction as an adequate foreign element to activate the Brussels I bis, which is equally relied upon for jurisdictional determination under the ESCP. Consequently, its application should adhere to the interpretative approach established by the Court regarding relevant provisions of the Brussels I bis.

INGRID LANDAU, *HUMAN RIGHTS DUE DILIGENCE AND LABOUR GOVERNANCE*

Luca Tenreira*

Ingrid Landau's *Human Rights Due Diligence and Labour Governance*[1] is a timely and cutting-edge contribution to the ongoing discussion of the business, human rights, and environment nexus. The current global context is marked by increasing regulatory attention on human rights and environmental abuses in global supply chains. Human rights and environmental due diligence require multinational corporations to identify, assess and mitigate any adverse impact on human rights and the environment caused by the activity of one of their suppliers. Landau's work offers a deep and reflexive exploration of whether this obligation can indeed drive transformative change. Since the 2013 *Rana Plaza* collapse,[2] business, human rights and environment scandals have been more mediatised across multiple value chains. From the prevention of child labour and chemical waste to the calculation of the greenhouse gases emitted by a service or a product, human rights and environmental due diligence now encompasses a broad, and still sometimes uncertain, range of obligations for multinational corporations.

In this book, both the meticulous use of transnational labour law concepts and empirical methods provide a robust analytical framework for understanding how due diligence obligations operate in practice. This

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1 Ingrid Landau, Human Rights Due Diligence and Labour Governance (Oxford University Press 2023).

2 Justine Nolan, 'Rana Plaza: The Collapse of a Factory in Bangladesh and Its Ramifications for the Global Garment Industry' in Dorothée Baumann-Pauly and Justine Nolan (eds), Business and Human Rights: From Principles to Practice (Routledge 2016) 27.

review essay takes the book as an opportunity to reflect on the notion of *reflexivity* – understood here as a methodological stance that not only investigates legal norms but also critically examines the conditions, assumptions and power dynamics underpinning their production, interpretation and application within the field. The development of this field has been quite unique, emerging in close interaction with institutions in the broadest sense, from international organisations, states, and corporations to civil society actors and NGOs.[3] This institutionally co-constitutive evolution has long shaped the dominant research orientation within business, human rights and environment, which tends to adopt and work with and within existing institutional frameworks. However, two recent shifts can be observed. First, scholars within the field have begun to adopt a more critical stance toward its own institutional and normative foundations. This includes growing attention to how these may reproduce or entrench power asymmetries, with critiques emerging from TWAIL, Global South perspectives, decolonial and ecofeminist lenses.[4] Second, the conceptual and

3 John Ruggie undertook an extensive global consultation process with states, corporations, civil society and affected communities, culminating in the Protect, Respect and Remedy Framework (2008) and the endorsement of the UN Guiding Principles on Business and Human Rights in 2011. Through this institutional process, business and human rights emerged as a distinct field grounded in governance pragmatism, policy negotiation and cross-sectoral legitimacy. For an account: Gilles Lhuilier, 'The Novel of the Lex Mercatoria: From the Old Lex Petrolea to the "New" Lex Environmentalis' (2022) International Business Law Journal 79.

4 See Caroline Omari Lichuma, 'Colonial Reverberations in Mandatory Human Rights Due Diligence Laws (mHRDD): Centering the West and Othering the Rest', Völkerrechtsblog (2023) (examining how mHRDD frameworks reproduce colonial patterns of global legal ordering); Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Cambridge University Press 2013) (critiquing the soft-law approach of the UN Guiding Principles and its

normative core of the Business, Human Rights and Environment field is increasingly being subjected to an intellectual encroachment—if not a quiet takeover—by other legal traditions as well as disciplines beyond law. Areas such as international environmental law, contract law, legal anthropology, and the semiotics of law have begun to reinterpret BHR's foundational assumptions through their own epistemological and methodological lenses, exposing internal tensions and blind spots. At the same time, disciplines like organisation and management studies, accountability scholarship, and global value chain analysis are engaging with BHR frameworks in ways that are often more empirical and often constructivist. [5] These interdisciplinary and

failure to embed accountability mechanisms); Fatimazahra Dehbi and Olga Martin-Ortega, 'An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective' (2023) 17(4) Regulation & Governance 927 (arguing for a holistic and critical approach to due diligence attentive to structural Global South concerns); Debadatta Bose, Are There Humans in Human Rights Due Diligence? (2025) SSRN Working Paper, available at: https://ssrn.com/abstract=5316055 (offering a critical interrogation of human agency and invisibility in HRDD frameworks); Fernanda Frizzo Bragato, 'The Colonial Limits of Transnational Corporations' Accountability for Human Rights Violations' (2021) 2 TWAIL Review 34 (highlighting how transnational corporate accountability mechanisms may reinforce colonial legal legacies); Fernanda Frizzo Bragato, Vicente de Paulo Barretto, and Alex Sandro da Silveira Filho, 'A interculturalidade como possibilidade para a construção de uma visão de direitos humanos a partir das realidades plurais da América Latina' (2017) 62(1) Revista da Faculdade de Direito UFPR 33 (exploring interculturality as a foundation for a pluralist and context-sensitive conception of human rights in Latin America); Sarah Cornell and Beate Sjåfjell, Feminist Theory in the Regulatory Ecology (University of Oslo Faculty of Law Research Paper No. 2024-11, 2024) (applying feminist theory to critique the ecological and structural dimensions of corporate regulation).

5 See Manifestos have sought to orient and structure emerging research. One foundational point of departure is the IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 London Review of International Law 57, which challenged the dominance of

cross-disciplinary interventions not only bring conceptual richness but also destabilise the field's dominant approaches. Together, they raise a broader question: how can we meaningfully locate the current state of BHR within the shifting paradigms it is undergoing, without artificially delimiting its scope or future potential? These shifts reflect a growing misalignment between institutional responses and the evolving social realities they are meant to address, raising essential questions about the normative assumptions of the field and future directions research might take. In this context, Ingrid Landau's book offers an invaluable position from which to explore a growing reflexive turn in business, human rights and environment. Her work neither rejects nor romanticises existing legal tools, but situates them critically within the shifting socio-legal terrain that demands new forms of analysis and engagement.

The book is structured across eight chapters that interweave theoretical, doctrinal and empirical insights to interrogate the evolution and operationalisation of human rights due diligence in transnational labour governance. Following a contextual introduction to transnational labour governance and the rise of human rights due diligence (Chapters 1 and 2), Landau explores how the concept has been interpreted through divergent logics depending on the conflicting rationalities of actors (Chapters 3 and 4),

economics in Global Value Chain (GVC) analysis and placed law—particularly contracts, legal personhood, and institutional design—at the center of inquiry. It called for interdisciplinary methods to understand how legal regimes construct and distribute power along value chains, drawing on legal theory, political economy, and sociology. Nearly a decade later, the Medellín Manifesto on Transnational Value Chains and International Law (2025) 13 London Review of International Law 117, advances and deepens this agenda by identifying what has remained unresolved: the under-theorization of transnational contract networks, and the fragmentation of legal regimes governing global production. It introduces the concept of Transnational Value Chains (TVCs) and incorporates analyses of "invisible economies" (criminal, informal, and domestic), colonial continuities, and the geopolitical functions of legal infrastructures—calling for a more systemic, materially grounded, and politically conscious approach to the legal study of such issues.

and how it has been institutionalized across international and regional regimes. She gives particular attention to international soft law regimes such as the UN Guiding Principles on Business and Human Rights (UNGPs), OECD guidelines, and the role of the International Labour Organization (Chapter 5), as well as emerging regional hard law instruments such as the French Duty of Vigilance Law, the German Supply Chain Act, and the EU's Corporate Sustainability Due Diligence Directive (CSDDD) (Chapter 6). These are contrasted with more limited disclosure-based laws prevalent in Anglo-Saxon jurisdictions. The final two chapters assess the implications of these developments for transnational labour law (Chapter 7) and propose a regulatory trajectory that could make human rights due diligence a more effective tool for labour protection and worker empowerment (Chapters 8 and 9).

I. Engaging with the Damaged Landscape of Human Rights and Environmental Due Diligence

Overall, Landau's book is an invitation for readers to critically consider whether human rights due diligence represents a new paradigm for labour rights protection or whether it is a reconfiguration of corporate self-regulation with no transformative change of the current state of affairs.

Such topical questions have been discussed further with the author during the Environmental Law and Governance Working Group event, 'Engaging with Human Rights and Environmental Due Diligence: Approaches, Gaps and Future Trajectories',[6] which took place on 23 September 2023 at the European University Institute. The event provided an opportunity to delve deeper into the themes explored in Landau's book, particularly around the

6 Ingrid Landau and Luca Tenreira, 'Engaging with Human Rights and Environmental Due Diligence: Approaches, Gaps, and Future Trajectories' (Conference, European University Institute, 23 September 2024).

challenges of 'hardening' human rights due diligence laws,[7] and the evolving role of the EU with emerging frameworks like the CSDDD.[8] With the entry into force of this text on 25 July 2024, the EU seemed until very recently to be moving towards new regulatory imaginaries characterised by renewed methods and tools.

These new pathways have recently been threatened as the EU has begun to scale back its sustainability policies, prioritising economic competitiveness over stringent environmental regulations, largely influenced by the Draghi Report.[9] The recent shifts in the European Green Deal, characterised by a regulatory retreat encapsulated in the Omnibus Law, exemplify the damaged landscapes within which human rights and environmental due diligence unfold. The 'stop-the-clock' mechanism and dilution of civil liability provisions, specifically in the CSDDD, signal a turning point, exposing how easily ambitious frameworks can be hollowed out under pressure from powerful business lobbies and shifting political winds. These developments show that the terrains of human rights and environment due diligence are not just complex – they are fractured, contested and increasingly compromised. Engaging with these damaged terrains requires more than doctrinal analysis; it demands a critical socio-legal lens attuned to power, institutional fragility and the gap between discourse and practices. As the

7 Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 MelbJIntlL 221; Luca Tenreira, 'Corporate Best Practice from Soft Law to Hard Law: The Case of Corporate Sustainability and Due Diligence Directive (CS3D)' (2024) 2 Revue de droit des affaires internationales – International Business Law Journal 269.

8 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, 5 July 2024.

9 Mario Draghi, 'The Future of European Competitiveness: A Competitiveness Strategy for Europe' (European Commission, 9 September 2024) https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en accessed 2 March 2025.

EU's green ambitions mutate into politically expedient simplifications, the very meaning of due diligence as a tool of accountability and transformation is at stake.[10] Landau's contribution adds significance in this context, as it equips us with the conceptual and institutional vocabulary to trace how these damaged landscapes are made and remade.

There is a seemingly contradictory shift between more regulation (in quantitative terms) and less legislative ambition (in qualitative terms). This poses challenges for the effectiveness of regulation and, more broadly, for socio-environmental transformation within GVCs. Landau accounts for these in her interdisciplinary approach to human rights due diligence, emphasising the need for tools that transcend traditional corporate risk management to genuinely address the root causes of GVCs' abuses. In the broader field of business and human rights, a more socio-legal approach could help align regulatory practices with stakeholders' diverse needs and lived realities.[11] Put differently, transformative changes in regulatory paradigms should be accompanied by parallel shifts in our foundational ways of knowing and being, fostering a more inclusive and socially responsive legal framework and practice.

II. Decoding Due Diligence with Innovative Approaches

What stands out in Landau's book is its rigorous interdisciplinary approach, blending insights from law, political economy, and sociology to unpack the evolving role of human rights and environment due diligence in transnational labour governance. Early in the book, Landau articulates a central research question: can human rights and environment due diligence be considered a transformative legal tool for addressing systemic labour

10 Luca Tenreira and Josephine van Zeben, 'Lost in Transition? The European Green Deal and the Disorienting Compass of Competitiveness' (EUI Working Paper LAW Series, forthcoming 2025).

11 Ingrid Landau, Human Rights Due Diligence and Labour Governance (OUP 2023) 4

rights violations, or does it function primarily as a mechanism for corporate risk management and reputational control?

The main added value relies on the application of the transnational labour law framework to the due diligence debate. Transnational labour law is not limited to the enforcement of workers' rights through traditional legal mechanisms; it extends to broader normative concerns such as redistributive justice, political agency and social equity.[12] Crucially, it also reflects the reality that labour governance is increasingly transnational in scope, shaped by diverse actors including states, multinational corporations, trade unions, civil society organisations and international institutions. Landau positions transnational labour law as a particularly apt lens through which to interrogate human rights due diligence, as both exist and operate across overlapping legal and normative orders. Her use of this framework enables a multi-level analysis that captures human rights due diligence as both a legal process and a socio-political phenomenon. Landau's approach weaves together doctrinal, empirical, and normative dimensions, situating human rights due diligence within the evolving dynamics of global governance while remaining attentive to its lived manifestations in practice.[13] Her account reflects a concern not just with formal legal instruments but with how human rights due diligence is shaped on the ground through strategic litigation, advocacy campaigns, and lobbying dynamics. In this regard, she captures both 'law in action' and 'law in the making'.[14]

A central thread in the book is the concept of 'multi-level governance', in which corporations are no longer seen solely as economic actors but as key players in the iterative development of legal norms across jurisdictions.[15] Landau presents human rights due diligence not as a fixed legal obligation but as part of an evolving ecosystem of rules, standards, and practices

12 ibid ch 4.

13 ibid ch 1.

14 ibid ch 3.

15 ibid.

involving diverse stakeholders. This perspective highlights the embeddedness of human rights due diligence within a contested and overlapping landscape of legal regimes, influenced as much by power and politics as by legal design.

Landau's practical experience with trade unions and international as well as regional organisations informs her departure from narrow legal positivism.[16] She conceives human rights due diligence not merely as a technical compliance mechanism, but as a lived experience that holds reconstructive and transformative potential. The recent adoption and subsequent weakening of such due-diligence-related provisions in the EU – especially under the CSDDD –illustrates the fragility of these instruments and the extent to which they are vulnerable to political compromise.[17] Against this backdrop, Landau underscores the importance of trade unions and worker organisations as counterweights to corporate influence, essential to enhancing the democratic legitimacy and substantive effectiveness of human rights due diligence frameworks.[18] In her view, empowering these actors is critical to closing governance gaps and resisting the capture of due diligence by corporate agendas. In other words, the theoretical framework serves as both a tool for diagnosis (III) and re-imagination from the ground up of human rights and environment due diligence (IV).

16 Landau engages with policy work and has collaborated with international bodies and NGOs on improving labour and human rights protections.

17 Nicolas Bueno, Nadia Bernaz, Gabrielle Holly and Olga Martin-Ortega, 'The EU Directive on Corporate Sustainability Due Diligence (CS3D): The Final Political Compromise' (2024) 9(2) Business and Human Rights Journal 294.

18 Landau, Human Rights Due Diligence (n 10) ch 7 and 8.

III. Cosmetic Compliance by Deference to Audit Culture: Mind the Gaps!

A key aspect of Landau's analysis is her critique of how human rights due diligence has been institutionalized.[19] This falls into the (too) simple hardening of previous soft law measures. *Strategic ambiguity* – a concept coined by John Ruggie when developing the UNGPs,[20] created an intentionally ambiguous framework to allow for flexibility in interpretation and adaptation by different actors (states, businesses, and NGOs). However, Landau critiques this ambiguity, suggesting that it has created opportunities for corporations to exploit due diligence as a tool for cosmetic compliance rather than genuine accountability.[21]

This strategic ambiguity has indeed led to inconsistencies in how human rights due diligence is implemented across sites, sectors and jurisdictions, creating what Landau refers to as 'governance gaps',[22] sometimes also referred as 'coherence gaps'. While human rights due diligence aims to fill governance gaps by setting standards for corporate behaviour, it often creates new challenges by allowing corporations to interpret their obligations in ways that align with their managerial interests. This tension between due diligence's potential to empower workers and its vulnerability to corporate manipulation is a central theme in Landau's critique. She explores the categorization of due diligence as a form of 'audit culture',[23] where companies rely heavily on third-party auditors to certify compliance

19 ibid ch 2, 4 and 7.

20 Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in R Mares (ed), The UN Guiding Principles on Business and Human Rights: Foundations and Implementation (Martinus Nijhoff 2012).

21 Landau, Human Rights Due Diligence (n 10) ch 8.

22 ibid; for an account of coherence gaps, see: Sarah Dadush, 'Prosocial Contracts: Making Relational Contracts More Relational' (2022) 85(2) Law and Contemporary Problems 153.

23 Landau, Human Rights Due Diligence (n 10) ch 2, 4.

with labour standards. This dynamic, she argues, often reduces human rights due diligence to a procedural formality aimed at mitigating reputational risks rather than genuinely improving conditions for workers, the so-called 'tick the box' approach.[24] Landau's use of the term 'audit culture' encapsulates the tension between the theoretical promise of human rights due diligence and its practical limitations. She demonstrates that audits frequently fail – if they even try – to capture more subtle or hidden forms of labour exploitation, raising concerns about the privatisation of human rights and environmental provisions enforcement within GVCs. In discussing this audit culture, Landau highlights the broader epistemological issues at play, particularly the crisis of expertise that surrounds human rights due diligence. She questions the validity of corporate-driven auditing processes and argues for a more reflexive and qualitative approach to monitoring labour conditions.[25] The privatisation of due diligence, which relies on corporate actors to police themselves, risks entrenching power imbalances between multinational corporations and their suppliers. The book calls for a shift in focus toward empowering workers and stakeholders directly affected by corporate activities, rather than continuing to rely on top-down audit mechanisms.[26]

A key point of this debate is tackled through the distinction between risk-based and impact-based (framed as 'business regulation oriented') approaches to due diligence[27]. She critiques the dominant framing of human rights due diligence as a risk management tool, primarily concerned with protecting corporations from legal and reputational harm.[28] This risk-based approach often prioritises the interests of the business over the rights of workers, reducing labour governance to a question of liability rather than justice. Landau contrasts this with business regulation approaches, which would focus on the actual effects of corporate practices on workers and

24 ibid ch 9.

25 ibid ch 8 and 9.

26 ibid.

27 ibid ch 3.

28 ibid.

communities.[29] This shift in perspective, from risk to impact, has profound implications for implementing due diligence. Landau argues that an impact-based approach would require companies to engage more deeply with the structural causes of labour exploitation, including the power imbalances within GVCs. It would also necessitate greater collaboration with civil society organisations, trade unions and worker representatives, ensuring that those directly affected by corporate activities are included in decision-making processes. In this way, Landau advocates for a more holistic and participatory model of human rights due diligence, one that moves beyond the current focus on risk mitigation.[30]

IV. Recoding Due Diligence Towards Transformative Change in Global Value Chains

In the last parts of the book, Landau calls for a reimagining of labour governance in GVCs, one that goes beyond the limitations of current human rights due diligence frameworks. She argues that while due diligence has potential, it cannot be the sole mechanism for addressing labour rights violations in global supply chains. Stronger state regulation, enhanced international cooperation and greater empowerment of workers and trade unions are all necessary components of a more effective governance model.31 This holistic approach would seek to balance the current corporate capture of due diligence mechanisms, ensuring that labour rights are protected in theory and practice. Landau posits that human rights due diligence, and by extension, transnational labour law, is not just about protecting workers' rights but also about organising resistance and countering corporate power.32 Human rights due diligence is an emerging

29 ibid.

30 ibid ch 8 and 9.

31 ibid ch 5 and 6.

32 ibid ch 2 and 8.

forum through which labour groups and other civil society actors can map out the different forms of resistance against corporate malpractice and push for redistributive justice and equitable working conditions. This conceptualisation is vital because it reframes due diligence from being a corporate compliance exercise to being a tool for empowerment, giving workers and labour groups a greater agency in global labour governance.33 In doing so, Landau builds on the arguments of transnational socio-legal scholars who have emphasised the recursive, iterative formation of law.34 The competing interests of various actors shape human rights due diligence – and it is through this recursive process that legal standards evolve.

Landau outlines a set of recommendations aimed at rendering human rights due diligence more effective, accountable and transformative. Central to this is the proposal for transnational institutional rights architectures: a regulatory vision that emphasises embedding enforceable rights for workers and affected stakeholders within human rights due diligence frameworks. These transnational architectures are designed to shift the balance of power by establishing participatory mechanisms such as rights to information, consultation and remedies thereby enhancing the agency of those most impacted by corporate practices. These agreements, often negotiated between global corporations and trade unions, set substantive standards for working conditions, wage structures and other labour rights protections, bypassing national legal limitations. In the context of human rights due diligence, transnational institutional rights architectures act as both a governance tool and a site of contestation, where different actors (corporations, workers, international organisations) negotiate the terms of compliance and responsibility.35 Landau's analysis positions these architectures as crucial instruments in filling governance gaps that are often

33 ibid ch 7 and 8.

34 ibid ch 2; for specific literature on this, see: Peer Zumbansen, 'Transnational Law, Evolving' in Jan M Smits (ed), Elgar Encyclopaedia of Comparative Law (2nd edn Edward Elgar Publishing 2012) 898–925.

35 ibid.

left by weak or fragmented national labour laws.36 In the context of the EU regulatory framework, such architectures could be seen as complementary or even supplementary to formal due diligence obligations under laws like the CSDDD.37 It is a matter of thinking a more relational and responsive form of corporate social responsibility where workers, trade unions and labour agreements are at the centre of the human rights due diligence framework. Alongside this, Landau calls for more institutional reconfiguration with the creation of national supervisory authorities, stronger roles for OECD National Contact Points, and specialised tribunals or commissions that can enforce and interpret human rights due diligence standards. She also supports liability regimes that allow for judicial scrutiny and redress in cases of corporate failure, pushing back against the tendency of due diligence to devolve into mere proceduralism. Underpinning these proposals is a call to move beyond managerial and technocratic approaches, urging instead a regulatory architecture rooted in democratic accountability, transparency and structural empowerment of labour actors.

V. Critical Limitations and Reflexive Openings for the Business, Human Rights and the Environment Scholarship

Landau's book offers a timely contribution to the field of business, human rights and environment, particularly in mapping the institutional and legal architectures that shape human rights due diligence. However, a first limitation of the book itself lies in its implicit institutional bias, which privileges formal legal and regulatory frameworks while giving less attention

36 ibid.

37 This goes hand in hand with the proper observation of these law as deference to audit culture, which involve consultancies and contractual implementation tools. Transnational institutional rights architectures are then one of the available tools to make this deference align substantively with the overarching normative goals of human rights due diligence laws.

to the grassroots struggles and informal practices through which human rights due diligence is contested and reshaped from below. Local NGOs, worker collectives, and community organisers—often operating with limited resources and outside formal legal channels—play a vital role in resisting cosmetic compliance and articulating alternative visions of accountability. By foregrounding the voices of institutional actors, the book risks sidelining these ground-level dynamics, where the everyday work of translating, challenging and reimagining due diligence often takes place. A fuller engagement with these struggles could have enriched the book's critical reflexivity and offered a more plural account of how due diligence is both imposed and resisted. This institutional design bias seems to affect the contribution both in its substantial and formal focus.

On the substance, one could say that the relationship between labour and ecological protection is notably absent. A growing body of critical scholarship argues that both environmental degradation and labour exploitation are structurally tied to the legal institutionalisation of global value chains. The underlying concern here is that failing to interrogate this institutional embeddedness risks reproducing the very extractivist and exploitative logics that due diligence frameworks are meant to challenge.

On the form, uncovering this institutional veil might reveal even more hidden forms of cosmetic compliance, but requires other epistemological commitments more attuned to ambiguity, appropriation and performance. Such approaches could be drawn from ethnography: investigating the files, the data behind how an impact on human rights or on the environment is characterised. Landau's contribution nonetheless lays the groundwork for such future inquiries by providing a typology of institutional configurations that enables us to recognise how human rights due diligence becomes domesticated within corporate-friendly logics and contested through

transnational struggles. Indeed, this is the terrain of her current research on Southeast Asian and Australian supply chains.[38]

A second limitation concerns the theoretical positioning of the book within the broader law-and-society tradition. While Landau engages conceptually with human rights due diligence, there is a missed opportunity to situate her findings more explicitly within a critique of the underlying political economy and its embedded legal rationalities. In this moment of polycrisis, geopolitical and economic agendas highly intersect with – if not overshadow – the human rights and sustainability one. What may be lacking from Landau's account, then, is a more explicit conceptual toolkit capable of operationalising the reflexive, grounded inquiry that the current moment demands.

These two limits reflect the specific contours of the field itself – a field that, as argued in the introduction, is undergoing a reflexive turn. This turn is characterised by a growing tension between its institutional co-constitution by practitioners themselves and its more recent critical re-articulation, between working within and against dominant legal frameworks. The value of Landau's work lies precisely in its capacity to expose the internal contradictions and normative tensions within current human rights and environment due diligence paradigms. Her account opens space for a more grounded critique – one that does not reject the legal form outright but holds it accountable to the transformative aspirations it claims to uphold. As the business, human rights and environment field matures, such critique is vital for confronting not only the regulatory limitations of due diligence but also the deeper epistemic and political commitments shaping the way rights, responsibilities and risks are distributed across global production landscapes.

38 See Ingrid Landau and others, 'Regulatory Pluralism and the Resolution of Collective Labour Disputes in Southeast Asia' (2023) 65(4) Journal of Industrial Relations 472.

In this sense, Landau's contribution can be understood as part of a growing body of socio-legal scholarship that seeks to move beyond the binary between rejectionist critique and anti-critique. Rather than either dismantling the normative infrastructure of human rights and environment due diligence outright or uncritically affirming its promise, Landau's work charts a space of immanent critique. A mode of inquiry that is receptive to 'matters of concerns', as Loïc Azoulai puts it, and sensitive to the socio-material realities that such technocratic legal frameworks too often abstract away.[39] Landau's reflexivity lies not in producing a fully formed alternative, but in inviting a more careful calibration between legal design and lived experience – between the conceptual promises of human rights and environment due diligence and their fractured landscapes of implementation. Recent multidisciplinary projects investigating GVCs such as those led by Gustafsson & Schilling-Vacaflor,[40] Beckers,[41] Kajer,[42] and others have demonstrated the value of ethnographic attention in uncovering how norms travel, mutate or vanish in GVCs. A future reflexive business, human rights and environment agenda might do well to draw on this emerging repertoire – not only to gear towards an external critique of law, but also a practice of critical receptivity that interrogates how society itself is entangled in the conditions it claims to address.

39 Loïc Azoulai, Reconnecting European Law to European Societies (EUI Working Paper LAW 2024/01, European University Institute 2024) <https://cadmus.eui.eu/handle/1814/76798> accessed 18 April 2025.

40 Maria Gustafsson and Claire Methven O'Brien, 'Towards More Sustainable Global Supply Chains? Company Engagement with the French Duty of Vigilance Law' (2023) Environmental Politics <https://doi.org/10.1080/09644016.2023.2221983> accessed 24 April 2025.

41 European Research Council, Starting Grant, CHAINLAW: Responsive Law for Global Value Chains, Grant agreement No.101076292.

42 European Research Council, Consolidator Grant, Global Value Chain Law: Constituting Connectivity, Contracts and Corporations (GLOBALVALUE), Grant agreement No. 101054237.

Human Rights Due Diligence and Labour Governance is a thought-provoking contribution: challenging conventional understandings of human rights due diligence, offering a critical analysis that exposes its limitations, while also suggesting ways to enhance its transformative potential. Landau's work is a must-read for anyone engaged in the complex and evolving debate over how to protect labour rights in a globalised economy.