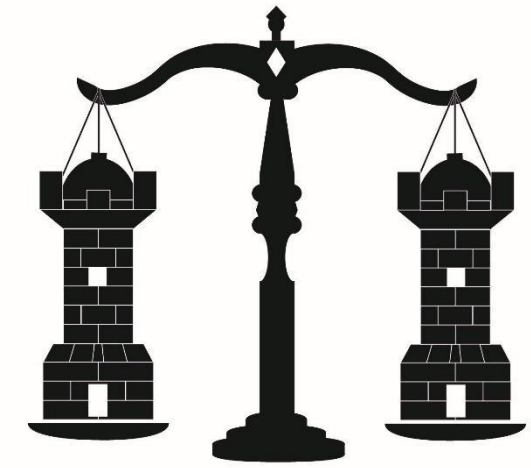

Cork Online Law Review

Proudly Supported by

ARTHUR COX

Edition 23

2024

The Cork Online Law Review

The Cork Online Law Review is published annually on our website: https://www.corkonlinelawreview.com/

For all matters concerning rights and permissions, please contact the Editorial Board, Cork Online Law Review, UCC Accommodations Office, College Road, Cork, Ireland.

Email: editor@corkonlinelawreview.com

All errors and omissions are the authors' own.

This edition may be cited as (2024) 23 COLR

SUBMISSIONS

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 24th Edition. All submissions should be on a legal topic and be between 3,000 and 9,000 words in length. Articles are welcome in English, Irish or French. All interested parties should submit their articles and enquiries to:

The Editor-in-Chief

editor@corkonlinelawreview.com

Submissions are also invited for the Roundtable blogs section. Submissions should be on a topic of current legal relevance, whether domestic or international, and be between 800 and 2,500 words in length. All interested parties should submit their blogs and enquiries to:

The Blogs Editor

blogs@corkonlinelawreview.com

Case Note submissions are also invited as part of our Case Notes Competition. Submissions should be no more than 1,500 words, written on a judgment of the Irish national courts, the European Court of Human Rights or the Court of Justice of the European Union. All interested parties should submit their case notes and queries to:

The Case Notes Editor

casenotes@corkonlinelawreview.com

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

On behalf of the Cork Online Law Review, I would like to express our sincere appreciation for and gratitude to the faculty of the School of Law, UCC. The success of this year's edition is sincerely attributable to their guidance, expertise and advice.

We would like to thank the Hon. Ms Justice Siobhan Stack for doing us the honour of launching the 23rd Edition.

The Editorial Board would like to extend our sincere thanks to the Dean of the Law School, Professor Mark Poustie and the Deputy Dean of the Law School, Professor Conor O' Mahony, for their unending help and support the Law Review throughout its lifetime. We would also like to thank the Executive Committee of the UCC Law Society for their unwavering support and guidance over the past year.

This Edition could not have been possible without the support of our continued sponsors, Arthur Cox, whose patronage and sponsorship we could not be more grateful for. We would like to thank them for all that they have allowed us to achieve.

On a personal note, I would like to sincerely thank the Editorial Board of the 23rd Edition. Their hard work and diligence in producing this edition is a testament to their tenacity and dedication. In particular, I would like to thank our Deputy Editor-in-Chief, Luke Kirrane. Without his academic prowess and exceptional work ethic, this edition would not have been possible to create.

Finally, we would like to congratulate all of the authors who have contributed to the 23rd Edition. The outstanding articles contained herein each represent a truly remarkable contribution to the dynamic field of legal scholarship in each of their respective areas of law. We would also like to thank the participants who have contributed to the Roundtable and to our Case Notes Competition. We hope each contribution will ignite minds, foster a passion to write and inspire the development of further legal academia.

Is mise le meas,

Cathal Flynn,

Editor-in-Chief of the 23rd Edition.

FOREWORD TO THE 23rd EDITION

As an alumna of University College, Cork, it gives me great pleasure to write a foreword for the Cork Online Law Review, now in its 23rd edition.

It is no surprise that the next generation of lawyers who have contributed an impressively diverse range of articles to this edition should show the enthusiasm necessary to tackle the challenges of the Digital Age, and in particular artificial intelligence. Not only that, but articles such as Le Quan Hoang's review of the regulation of distributed ledger technology in securities transactions and Lauren Ní Fhloinn's discussion of the regulation of online disinformation I think demonstrate also the need for law journals such as this which have a much greater capacity than textbooks, to provide timely and incisive secondary legal material at a time of rapid change.

How the legal systems in Ireland and abroad meet the challenges of our times will, I suspect, depend to some degree on how they manage to adapt existing legal concepts to the realities of modern technology. It will not be enough to simply accommodate technological advances within a regulatory regime: it will be necessary also to remind stakeholders – applying appropriate sanctions if necessary – of the core concepts of contract law and the law of torts, the need for regulation in the interests of consumers, and the importance of fundamental rights. Lucy Walsh's contribution reminds us that the rather dry language surrounding data protection law tends to obscure the enormous significance for all of us of the protection of the data subject rights of individuals. She also rightly highlights the need to develop the protection of the fundamental right to privacy.

The modern increase in statutory regulation has led to numerous calls for statutory bodies with greater powers of enforcement. There has, at times, been some impatience in the public discourse with the delays and expense involved in court proceedings. However, as Liam Brunton's comparative analysis of the enforcement of competition law in Canada and the EU demonstrates, the desire for more effective enforcement cannot come at the expense of procedural fairness. It is vital as we meet the challenges ahead that we never lose sight of the importance of a fair and just outcome or of the importance of the hearing itself.

Indeed, the recent COVID-19 pandemic provided a useful experiment in the use of technology in the courtroom. As a judge, I have no doubt that it is at least somewhat easier for a losing party to accept an adverse decision if they feel it has been fair, and that is more likely if they feel they have had a hearing. While there are situations where online hearings have great benefits, such as in allowing those in detention to attend and participate in a wider range of hearings than before, or to accommodate those who reside abroad, I have to say that I feel that it is very important not to underestimate the value of an in-person hearing. This is particularly so in sensitive cases, where judges are called upon to make decisions in matters of enormous personal significance, but I think there is at least some argument that an oral, in-person hearing can help the courts to navigate the now enormous amounts of information which technology has made it ever easier to produce. Advocates play an enormous role here in absorbing ever larger briefs and distilling them, in an accurate and accessible manner, not only for the benefit of the judge (or jury) but also for the parties, witnesses, and anyone else who may be observing the proceedings. The traditional skills of solicitors and counsel are, I think, as valuable as ever and perhaps even more vital in securing the administration of justice.

Finally, we live in a world that is growing smaller by the day. Technology and climate change do not recognise borders and greater international cooperation is inevitable. As Brexit has perhaps demonstrated, popular loyalty to those institutions should not be taken for granted. Saoirse Flattery's analysis of the European Court of Human Rights' approach to the interpretation of the European Convention on Human Rights is a timely reminder that the somewhat esoteric topic of the correct approach to textual interpretation is in fact vitally important to the legitimacy of the institutions established by the Convention.

Closer to home, as Aoife Muckian's discussion of mandatory reporting of historic child sexual abuse demonstrates, classic principles of statutory interpretation are not just a necessary component of an Introduction to Legal Systems course, but a vital boundary between the legitimate role of the courts on the one hand and the Oireachtas on the other. The topical and very important issue of constitutional environmental rights, discussed by Julián Suárez, can perhaps be best understood in light of similar concerns about the proper roles of the judiciary, on the one hand, and the legislature and Government, on the other.

I have greatly enjoyed reading these articles and am particularly pleased that one is written in French. The wide range of themes has provided excellent food for thought which will be of

great benefit to any reader. The Editor, the Editorial Board, and the contributors all deserve congratulations for this most recent collection.

Siobhán Stack,
The High Court,
Four Courts,
Dublin 7.

16 April, 2024

EDITORIAL BOARD OF THE 23rd EDITION OF THE CORK ONLINE LAW REVIEW

ADVISORY BOARD OF THE 23rd EDITION OF THE CORK ONLINE LAW REVIEW

RETROSPECTIVE DISCLOSURES OF CHILD SEXUAL ABUSE BY ADULTS ACCESSING THERAPY: A LAW IN UNCERTAINTY?

Aoife Muckian*

A INTRODUCTION

Disclosure of sexual abuse experienced as a child by an adult client to a counsellor is a significant occasion with profound impact on the client themselves. Disclosure can be an extraordinarily difficult, and at times, insurmountable task. Often survivors do not disclose at all or until adulthood due to secrecy, trauma, shame and stigma.[1] Many countries including the US, Canada, New Zealand and Australia have mandatory reporting legislation with the aim of promoting child welfare and safety and deterring and punishing offenders.[2] In Ireland, following a recommendation from the Commission to Inquire into Child Abuse Report ("the Ryan Report"),[3] the Children First Act 2015 ("2015 Act") codified mandatory reporting. The 2015 Act mandates that certain professions, including therapists must report to Tusla reasonable suspicions of harm (including sexual abuse), in cases, *inter alia*, a child has been harmed.[4] This particular provision under section 14(1)(a) under a judicial review application in *McGrath v HSE*,[5] was held by the Court of Appeal not to include reporting of retrospective disclosures of child sexual abuse by adults ("retrospective disclosures"), overturning the High Court decision,[6] bringing the law in this area in a state of uncertainty.

Arguably, mandatory reporting serves a positive social good. In contrast to situations where historically, serial child abusers were moved along institutions, abusing further victims, mandatory reporting at an early stage can minimise the amount of harm and victims of a perpetrator. It also sends out a message that such abuse is not tolerated since any reasonable suspicion must be disclosed to Tusla who has an investigatory remit. Since such an

* The author is a graduate of Law with Politics at the University College Dublin, and is currently pursuing a solicitor qualification through the Solicitor Qualifying Exam route in England and Wales, having recently passed the first component of the exam. The views expressed in the article are the author's own.

[1] Joseph Mooney, 'Barriers or Pathways? Aiding Retrospective Disclosures of Childhood Sexual Abuse to Child Protection Services' (Disclosure of Sexual Abuse: Encouragement, Facilitation, and Support Conference, Dublin, October 2021).

[2] Ben Mathews and Maureen Kenny, 'Mandatory Reporting Legislation in the United States, Canada, and Australia: A Cross-Jurisdictional Review of Key Features, Differences, and Issues' (2008) 13(1) Child Maltreatment 50, 51.

[3] Commission to Inquire into Child Abuse, *CICA Investigation Committee Report Volume 4* (2009), ch 7.

[4] Children First Act 2015, section 14.

[5] *McGrath v HSE* [2023] IECA 293.

[6] *McGrath v HSE* [2022] IEHC 541.

investigation could lead to the identification and exposure of perpetrators to criminal sanction, it serves the role of deterrence. By tackling the issue of underreporting due to stigma and shame, as well as highlighting the issue in the broader consciousness, the welfare and safety of children are promoted and protected.

In the High Court and Court of Appeal decisions of *McGrath*, however, the problems of mandatory reporting when applied to retrospective disclosures were briefly highlighted. These included the detriment to the client's mental health, the negative impact on the client-counsellor relationship, and infringement on the client's privacy. In contrast to current disclosures of abuse, mandatory reporting of retrospective disclosures can do more harm than good, particularly where the perpetrator is deceased.

Therefore, this article submits that while serving a positive social good regarding children, mandatory reporting legislation that includes retrospective disclosures would be reactive and fail to adequately consider the views of those adult victims. It shall demonstrate the reactive nature of mandatory reporting legislation when it comes to adult victims by tracing the development of child sexual abuse legislation in Ireland, particularly considering the extent of such abuse in institutions. It will highlight the potential constitutional issues posed by such legislation by reflecting on *McGrath v HSE* such as the right to privacy. After comparative jurisdictions are viewed and the rationale behind mandatory reporting is examined, reforms will be suggested in the domain of adults in therapy, to ensure both the rationale of protecting children and also ensuring privacy for adult victims.

B MANDATORY REPORTING IN IRELAND: AN OVERVIEW

The Children First Act 2015 introduced mandatory reporting for cases of child abuse, including child sexual abuse. Section 2(b) of the 2015 Act provides that "harm" refers to sexual abuse of the child "whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise". Mandated persons are defined under Schedule 2 and includes but is not limited to medical practitioners, psychologists, An Garda Síochána, social care workers, dentists, and teachers.[7] Part 3 of the Act deals with reporting, and section 14 stipulates that where a mandated person knows, believes or has reasonable grounds to suspect that a child has been harmed, is being harmed at present, or is at risk of

[7] The 2015 Act (n 4) schedule 2.

being harmed they will make a report to Tusla.[8] Originally, the 2015 Act had taken the definition of child in the Child Care Act 1991 which excluded persons under seventeen who were married;[9] the provision allowing minors to marry was repealed under section 45 of the Domestic Violence Act 2018 ("2018 Act").[10]

Since the commencement of this Act, the vast majority (93% in June 2022) of disclosures by adults of child abuse (known as "retrospective referrals") have been through mandated reporting to Tusla, and 87% of these reports concern child sexual abuse.[11] The highest number of mandated reports in June 2022 were from psychotherapists, standing at 40% followed by an Garda Síochána.[12]

In the *Children First: A National Guidance for the Protection and Welfare for Children* (2017),[13] a section is dedicated to retrospective disclosures. The guidance states that where an adult in counselling or otherwise discloses sexual abuse experienced as a child, the mandated person should report it to Tusla, the rationale being that the abuser may still pose a risk to children presently. It notes that counsellors should inform clients of the mandatory reporting requirements, so they are aware of this exception to confidentiality. It further observes, "[i]f your client does not feel able to participate in any investigation, Tusla may be seriously constrained in their ability to respond to the retrospective allegation".[14]

I History of Child Sexual Abuse Legislation in Ireland

On the 11th of May 1999, the then Taoiseach Bertie Ahern made an "... overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue". Ireland has a long and dark history regarding child abuse, including sexual abuse, perpetrated in residential and non-residential settings by persons with authority over the child and underreported for decades.[15]

[8] ibid section 14(1).
[9] The 2015 Act (n 4), section 2.
[10] *McGrath* (n 6) [22]-[23].
[11] Child and Family Agency, *Monthly Service and Performance Report* (December 2022). Tusla's Performance Reports stopped tracking retrospective disclosures in 2023.
[12] ibid.
[13] Department of Children and Youth Affairs, *Children First: A National Guidance for the Protection and Welfare for Children* (2017).
[14] ibid 23.
[15] *McGrath* (n 6), [51].

As observed by the European Court of Human Rights in *O'Keeffe*,[16] the 1980s and 1990s saw a number of public controversies and disclosures about clerical child abuse in educational institutions including industrial and reformatory schools. The Law Reform Commission noted that while the publicity may have led to an increase of reporting, which saw sexual abuse reports to health boards increase from 465 in 1986 to 929 in 1987, there was cause to believe the level of reporting was still quite low, as the average annual number of children believed to be abused from a population of 395,000 was 850, a higher figure than the number of annual reports reflected.[17] The later Report of the Commission to Inquire into Child Abuse ("Ryan Report")[18] provided a chapter about a serial sexual offender, "Mr. Brander" where they noted that complaints to the Department of Education in the 1980s about his abuse were ignored. The Department acknowledged to the European Commission that there was no defence for their inaction even by the standards of the time.[19]

The Consultation Paper of the Law Reform Commission in 1989 recommended mandatory reporting on the basis that it would send "... a clear and unequivocal public statement that child sexual abuse is something that society will not tolerate and that its potential for damaging children is such that the uncomfortable feelings that many professionals have about reporting must be put aside".[20] The Commission in its later report in 1990 observed that there was support for the notion that the confidentiality between child care professionals and child victims or alleged abusers should be put aside.[21] No reference was made to adults who were victims as children in the report itself; the consultation paper in discussing reluctance to attend therapy only refers to parents of children who may be abused or adult offenders.[22] The Law Reform Commission did not believe suspicions that a child may be abused at a future date should ground a mandatory report.[23]

The Child Care Act commenced in 1991, however, it did not have a system of mandatory reporting. The explanatory memorandum to the legislation stated it was to update the law

[16] *O'Keeffe v Ireland* App No 35810/2000 (ECtHR 28 January 2014), para 75.
[17] Law Reform Commission, *Consultation Paper on Child Sexual Abuse* (LRC CP 2-1989), para 2.02.
[18] Commission to Inquire into Child Abuse, *CICA Investigation Committee Report Volume 1* (2009), ch 14.
[19] *O'Keeffe* (n 16) para 79.
[20] Law Reform Commission (n 17) para 2.04.
[21] Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990).
[22] Law Reform Commission (n 17) para 3.03.
[23] ibid.

regarding care of protection, especially for children who are ill-treated, sexually abused or at risk.

The Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 created a criminal offence for withholding material information regarding commissions of serious offences including sexual offences against a child or a vulnerable person where the person either knows or believes the offence has been committed and the information would be of material assistance.[24] It would not be an offence where the child concerned made it known to the person that they did not wish the information about the offence to be disclosed.[25]

In response to the judgement of the Grand Chamber of the European Court of Human Rights in *O'Keeffe v Ireland*, the government issued an action plan in July 2014,[26] which referred to legislation already before parliament at the time that would implement mandatory reporting of child abuse by certain professions, including teachers; counsellors are not explicitly referred to nor are they explicitly excluded either. Retrospective disclosures are not mentioned, though in *O'Keeffe*, the applicant had suppressed her abuse and did not disclose until adulthood when she was contacted by police.[27]

II Judicial Developments

The scope of reporting and the response of child protection services to disclosures of abuse has been clarified through legislation and case law. The case law demonstrates a strong support for a proactive approach by child protection services with retrospective disclosures as well as disclosures of current harm included. It illustrates one of the rationales for the mandatory reporting system encompassing retrospective disclosures of abuse - the principle of protecting future children from harm. The precedent did not deal with adult survivors of abuse submitting their rights to privacy were infringed by a report, and therefore should be understood with that limitation.

[24] Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, section 3.
[25] ibid section 4.
[26] Government of Ireland, *Action Plan O'Keeffe v Ireland,* (24 July 2014).
[27] *O'Keeffe* (n 16) [19]; The Court notes the applicant's mother in 1973 did ask the applicant if the abuser had touched her to which the applicant replied something of a sexual nature occurred, but the conversation did not go any further.

In *MQ v Gleeson,*[28] the applicant was undertaking a vocational programme to become a social worker, however there had been complaints about sexual abuse allegedly committed by him against his stepchildren to the health board who formed the opinion he would be unsuitable for social work and felt under a duty to communicate this view to the vocational college. He challenged the decision to pass on this information as a violation of his rights. While the judgment did not focus specifically on retrospective disclosures, it was subsequently used in *McGrath* as a rationale behind mandatory reporting of such disclosures as Barr J held when an allegation of abuse is received, there is not a distinction between current and past abuse.*[29]* The judge laid down what became known as the Barr Principles which, in sum, seek to ensure child protection services take a proactive approach to investigations of abuse whether they be current or historical while maintaining due regard to the rights of an alleged abuser. Significantly, the case elucidated the principle that historic allegations of abuse should be proactively acted upon as they may reveal a future risk of abuse to either identifiable or unidentifiable children.[30]

This principle was illustrated when Barr J stated that, "[i]n my opinion once a situation comes to the knowledge of a health board relating to children being put at risk, there is no real distinction between present and future risk." [31] He was of the view under section 3 of the Child Care Act 1991, that where the Health Board is charged with the function of protection of vulnerable children, the duty is not solely focused on identified children at immediate risk however, also future unidentifiable children who may be put at risk due to a potential hazard that is currently within the Health Board's sphere of knowledge. As the Health Board is not a prosecutorial body with the objective of convicting child abusers but rather has the function of child protection, therefore a reasonable suspicion that someone is or likely to be a child abuser does not have to meet civil or criminal standards of proof.

Following the principles of fair procedures as laid down in *McDonald v Bord na gCon,*[32] and considering the gravity of such allegations and the accompanying consequences for the applicant, the Board prior to submitting its concerns to the college must: give ample opportunity for the applicant to attend an interview, outline the allegations to the applicant prior

[28] *MQ v Gleeson* [1998] 4 IR 85.
[29] *McGrath* (n 6),[47].
[30] Joseph Mooney, 'Adult Disclosures of Childhood Sexual Abuse and Section 3 of The Child Care Act 1991: Past Offences, Current Risk' (2018) 24(3) *Child Care in Practice*, 245-257.
[31] *MQ* (n 28) [22].
[32] *McDonald v Bord na gCon* [1965] IR 217.

to the interview in short form, to provide reasonable opportunity to allow the applicant to mount a defence, and conduct a further investigation in light of any information the applicant gives.[33]

The 2014 Tusla Policy was underpinned by the Barr principles,[34] which provided that fair procedures should be offered to potential abusers but that this may be sometimes secondary to the protection of children at risk. This is reflected in *MI v HSE,*[35] where Hedigan J commented that child protection services while conducting an investigation should not have to look over their shoulder continually in case of potential litigation from alleged abusers; it is envisaged that the child protection services have full awareness of the right to fair trial and fair procedures and be proactive, where there is a vulnerable child at risk, it should be investigated at the earliest possible stage before the risk crystallises into abuse.

Some confusion arose following *PDP v Board of Management*,[36] where O'Neill J found the investigatory process against the alleged abuser who was the applicant was wanting in the norms of justice. He held that the investigation was inadequately carried out, with insufficient information provided to the alleged abuser. He reiterated the Barr Principles however stated that the alleged abuser is entitled to all relevant and material information pertaining to the allegation against them as a matter for the presumption of innocence and the right to a fair trial as well as a right to question testimony. Mooney noted that while the judgment did not displace the Barr Principles, it undoubtedly caused apprehension among social workers and child protection services, particularly in instances of retrospective disclosures.[37]

C MCGRATH V HSE: THE BOUNDARIES OF MANDATORY REPORTING

McGrath v HSE, both in the High Court and Court of Appeal is significant for the analysis of mandatory reporting as it raised the issues of mandatory reporting when applied to adults accessing therapy. Though in the limited setting of statutory interpretation, it could act as a precedent for potential future legal challenges to mandatory reporting of retrospective disclosures.

[33] *MQ* (n 28) [26].
[34] Annual Report by the Special Rapporteur on Child Protection, *Policy & Procedures for Responding to Allegations of Child Abuse & Neglect* (June 2020).
[35] *MI v HSE* [2010] IEHC 159.
[36] *PDP v Board of Management* [2010] IEHC 189.
[37] Mooney (n 30) 250.

This case concerned a challenge by way of judicial review to the 2015 Act by the Director of the National Counselling Service in Sligo. He had raised with the HSE, issues about the interpretation of section 14 of the 2015 Act that were included in a new HSE National Counselling Service interim procedures policy, as he had concerns that mandatory reporting of retrospective disclosures would have detrimental effects on the therapeutic relationship between the counsellor and client, as well as on the client's own mental health.[38] The HSE reiterated the position following legal advice that retrospective disclosures must be reported by counsellors as mandated persons under the legislation,[39] and so the applicant sought clarification on the legislative interpretation.

The applicant submitted that "child" for the purposes of the legislation and section 14(a) should be interpreted as a person under 18 years of age and therefore, excludes retrospective disclosures. He pointed to the fact that the definition of child prior to amendment by the 2017 Act incorporated that of the Child Care Act 1991, which created an exemption for persons under 18 who were legally married thereby demonstrating the Oireachtas' intention to exclude adults and those of "deemed" adulthood, reflecting a policy to respect the dignity of adults.[40] Furthermore, under section 14(3) which deals with direct reports of harm to a mandated person, only the present tense is used, meaning prior abuse does not have to be disclosed and yet under section 14(1), where the mandated person has a reasonable suspicion of past harm, this must be disclosed which, the applicant argued if a 19 year old came to report abuse experienced at the age of 15, it would lead to an absurdity.[41]

The HSE in its argument pointed to section 14(1)(a), submitting that the language is in the past tense and it mandates a report where a child has been harmed, which does not require the child to be currently a child at the time the disclosure has been made, where it has been met that they have been harmed as a child some time in the past.[42] The purpose behind the section is to entrust Tusla with child protection and allow it to assess risks, and to ensure disclosures to mandated persons irrespective of the complainant's consent are made so that Tusla, not the mandated person, can evaluate the risk.[43] Furthermore, unlike the Criminal Justice (Withholding of

[38] *McGrath* (n 6) [7].
[39] ibid [8].
[40] ibid [22]-[25].
[41] ibid.
[42] ibid [27]-[34].
[43] ibid.

Information on Offences against Children and Vulnerable Persons), which provides a defence to the failure to disclose information that may of be of assistance to An Garda Síochána regarding believed or known offences committed against a child where the child made known their view that they did not wish the information to be disclosed, the Act has no such provision.

Phelan J held that section 14(1)(a) included instances where a mandated person such as a counsellor had a reasonable suspicion an adult had been harmed as a child. Had the Oireachtas intended to create an exemption for retrospective disclosures, it would have explicitly done so but unlike the exemption under the 2012 Act, none was provided for which was significant.[44] Phelan J stated that a wide interpretation of legislation designed for child protection was consistent with precedent and cited *HSE v McAnaspie* to the effect that a person reaching the age of eighteen does not rewrite history, in this instance that a child still has been harmed in the past.[45]

The effect of the previous inaction with regards to handling complaints of child sexual abuse as reflected in the Ryan Report was an undercurrent in the interpretation of the section, as Phelan J highlighted in this passage,

> Such a measure is tied to a desire to enhance child protection and to provide a remedy in respect of past wrongs. One only has to think of a report of historic child abuse made to a school or a religious institution at the hands of a teacher or cleric. It is not for the school or the religious institution to decide not to report to Tusla as the statutory agency on the basis of their view that there is no current or future risk to a child because a teacher or priest or nun is retired or has died.[46]

Therefore, Phelan J held that the 2015 Act does not require the consent of the person who has been harmed before a report is made to Tusla even where they are an adult, however this did not mean that the counsellor had no onus to seek informed consent from the client regarding the limits to confidentiality due to the obligations under the 2015 Act.[47]

[44] *McGrath* (n 6) [55].
[45] *HSE v McAnaspie* [2011] IEHC 477.
[46] *McGrath* (n 6) [50].
[47] ibid [58].

This decision was overturned by the Court of Appeal.[48] Binchy J, with Ní Raifeartaigh J and Donnelly J concurring, held that there was no ambiguity about the meaning of child under section 14(1)(a), and it does not extend to include persons over the age of 18 years old in any circumstances. Applying the dictum of Murray J in *Heather Hill v An Bord Pleanála,*[49] Binchy J noted that the wording in the legislation is the primary reference, though ambiguity is analysed not just through the specific section, but also when viewed in light of the Act, the Acted viewed through the prism of relevant history, canons of construction and the legislation's purpose.[50]

Binchy J noted that the word "child" was the object of the provision, and in the absence of any qualifying language, it could not include an adult who was harmed as a child; the phrase "a child who has been harmed" only applies to a disclosure in respect of someone who is a child when that disclosure is made.[51] Binchy J held that due to the nature of a disclosure of harm, the harm will inevitably be past tense under section 14(1)(a).[52]

Notably, Binchy J addressed whether his dictum would undermine legislative intent of the Oireachtas, noting that the trial judge contended the appellant's interpretation would leave a gap in mandatory reports since retrospective reports would be excluded.[53] He stated that this was a matter of debate between the parties which did not fall for determination and the trial judge's conclusion appeared to be based on an assumption.[54] He stated it could not be presumed any particular interpretation would be more supportive as, both situations could lead to more or less reporting but the court did not have that information to determine nor was it a matter for determination.[55]

Binchy J also commented on the fact that such a change would have had a profound impact on adult victims and since it would be a significant change, the intention should have been clearly highlighted in the long title and/or main body of the 2015 Act. He applied the judgment in *Irish Life and Permanent v Dunne,*[56] to the effect that the respondent's contention to define child in

[48] *McGrath* (n 5).
[49] *Heather Hill v An Bord Pleanála* [2022] IESC 43.
[50] *McGrath* (n 5) [79] (Binchy J).
[51] ibid.
[52] Ibid [80].
[53] ibid [85]-[87].
[54] ibid, [89].
[55] ibid.
[56] *Irish Life and Permanent plc v Dunne* [2015] IESC 46; [2016] 1 IR 92, 109.

section 14(1)(a) to include cases of retrospective abuse would be to rewrite the legislation to include a provision that there is "legitimate debate" whether the Oireachtas would have intended it.[57] Furthermore, he distinguished the definition of child in the 2012 Act from the 2015 Act, noting that it does not exclude children who are married (unlike the 1991 Act), and the obligations on the person in the 2012 Act are when they receive knowledge an offence against a child has been committed in the past which can encompass any time in the past. By contrast, a mandated person under the 2015 Act has to report when they have a suspicion that a child has been harmed, provided that they are still a child.[58]

The judgments of the Court of Appeal and the High Court in *McGrath* throw a light on the issue. Binchy J took a more reserved approach to the interpretation of the provision, emphasising the whole of the word "child" as the primary reference point and similar to the trial judge, expressed a wish not to be involved in the policy debate surrounding the provision.[59]

Although the interpretation in the High Court seems initially correct particularly given the lack of an explicit exclusion for retrospective abuse unlike in the 2012 Act, the cautious and literal approach in the Court of Appeal provided the definition of child in the 1991 Act and the profound effect such a change would have on victims appears to be more legally defensible.

There is the question to be asked whether in interpretation, that every significant change must be flagged through the long title or main body of the provision and to whom should it be a significant change, to the Oireachtas or to the courts. It could be questioned which interpretation is more accurate as a statement of the law as it is rather than as it should be; it could be argued Binchy J fell into error by inserting an exception that was not explicitly in the Act by considering the profound impacts on adult victims when the Oireachtas itself had declined to allow the exclusion of retrospective disclosures of abuse in a later proposed amendment.[60] Equally, it is arguable that Phelan J may have stretched the definition of child under section 14, clouded by the consideration of ameliorating historical failures to acknowledge and address child sexual abuse.

---

[57] *McGrath* (n 5) [91].
[58] Ibid [96]-[97].
[59] ibid.
[60] General Scheme of the Child Care (Amendment) Bill 2023, Head 45. Note: the Joint Committee on Children, Equality, Disability, Integration and Youth noted the regret of victims when disclosing particularly for retrospective disclosures but did not make a comment that these reports should not be mandatory. Joint Committee on Children, Equality, Disability, Integration and Youth, *Report on pre-legislative scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023* (June 2023).

Binchy J found that the orders sought by the appellant, namely to quash the HSE National Counselling Service interim procedures policy and a declaration that this policy was based on an error of law, were too wide and would result in quashing the policy and so invited the parties to agree on an appropriate form of order and if they could not agree, they should inform the registrar so the court could hear submissions on the appropriate form of order.[61] If the decision is not appealed, it will have a profound effect for mandated persons reporting to Tusla, as it represents a shift from the previous system of mandatory reports for retrospective disclosures. Ironically, in avoiding a significant change for adult victims, the Court of Appeal's dictum if unchallenged will lead to its own profound change due to the assumptions that had been around the mandatory reporting framework in Ireland.

D DISCUSSION OF MANDATORY REPORTING FOR RETROSPECTIVE DISCLOSURES

The policy rationale behind mandatory reporting in Ireland followed from the series of reports that identified an epidemic of child sexual abuse in Ireland, that was facilitated in part by a series of failures at a systemic level to report and prevent such abuse in residential, clerical, educational and other settings which allowed serial sexual abusers to harm multiple children as complaints were often ignored.

The advantages and disadvantages of mandatory reporting will be analysed critically in the context of Ireland's social history. The advantages and disadvantages of mandatory reporting generally will be discussed separately to the arguments for and against mandatory reporting for retrospective disclosures due to the unique nature of it as raised in *McGrath*.

Proponents of mandatory reporting submit that the system generally would combat underreporting of child sexual abuse, raise awareness to both mandated persons and the general public the nature of the problem and the reporting measures in place, prevent future child abuse by perpetrators and sends out a message that such abuse would not be tolerated in society.[62]

The benefit of awareness and mandatory reporting may have assisted in the Irish context had it been implemented earlier, as often child sexual abuse occurs within a culture of secrecy and

[61] *McGrath* (n 5) [102] (Binchy J).
[62] Emma Davies, Ben Mathews, and John Read "Mandatory Reporting? Issues to consider when developing legislation and policy to improve discovery of child abuse" (2014) 2(1) IALS Student Law Review 9.

offenders can have multiple victims whereas if mandatory reporting is implemented at an earlier stage, the scale of abuse could be lessened as future abuse may be prevented. The Ryan Report highlighted how serial abusers moved around educational settings with access to children that they could abuse.

It appears that mandatory reporting systems do increase detection of child sexual abuse. Research demonstrates that abuse is rarely reported by the child victim or perpetrator themselves as abuse occurs in a dynamic of power imbalance and can operate within a culture of secrecy.[63] Institutions would often protect the perpetrator as demonstrated by the chapter of the Ryan Report on Mr. Brander and they would move across schools, often abusing multiple children.[64] Data comparing Ireland prior to the implementation of mandatory reporting and the province in Victoria, Australia which has had mandatory reporting in place over a longer period of time, the number of reports were double in the jurisdiction that had mandatory reporting and Victoria had 4.73 times more children identified than in Ireland for the same year, a significantly higher number.[65] Comparisons between two Australian provinces, one with mandatory reporting and one without yielded similar results, insofar as that in a two year period, teachers in the province without mandatory reporting made three times fewer substantiated reports than in the province with mandatory reporting.[66]

Opponents of the mandatory reporting system submit concerns over overreporting that would divert from scarce resources, the potential for ostracisation of the victim within their own community, and that it would generally hinder the child welfare system.[67] A meta-synthesis of research across 12 countries found that mandated persons had negative experiences with the mandatory reporting system, some of them have been classified as "very concerning", with examples of children not being removed from risky situations following submission of the report, the abuse intensifying following the report, retraumatisation of children, and even the death of children.[68] In Ireland, frustrations have been expressed at the ostensible delay in processing the report, the lack of transparency and communication following submission of the

[63] Davies et al. (n 62) 10.
[64] Commission to Inquire into Child Abuse (n 3) ch 14.
[65] Ben Mathews, 'Mandatory Reporting Laws and Identification of Child Abuse and Neglect: Consideration of Differential Maltreatment Types, and a Cross-Jurisdictional Analysis of Child Sexual Abuse Reports' (2014) 3 Social Sciences 360, 473.
[66] Davies et al. (n 62) 19.
[67] ibid, 20.
[68] Seán Pellegrini, Philip Moore, Mike Murphy and Daniel Flynn, 'Experiences of Psychologists in Applying Mandatory Reporting in Ireland (Children First)' (2022) Journal of Public Child Welfare 1, 4.

report, as well as the loss of agency and sense of powerlessness mandated persons and victims experience once the report is filed.[69]

It is submitted that the benefits of mandatory reporting outweigh the disadvantages generally. As identified in the Ryan Report, adult survivors of institutional child abuse had significant problems with mental health, including substance abuse and unemployment. Four-fifths of those surveyed had insecure attachment styles, finding it difficult to have satisfying intimate relationships. Mandatory reporting can help stop further abuse or prevent abuse to other children, mitigating against these damaging effects, particularly where survivors or their families may not be willing to report due to shame, or where the child does not understand what is happening is abuse. The disadvantages of mandatory reporting are evident in the Irish system, however these are arguably issues of resourcing and allocation rather than inherent flaws in mandatory reporting. Suggestions to alleviate this issue elsewhere have included training of professionals to minimise inaccurate reporting. Furthermore, while resourcing poses an issue and may lead to difficulties in early investigations of child sexual abuse.

I Advantages and Disadvantages of Mandatory Reporting of Retrospective Disclosures

Since retrospective disclosures by adults operates in a different context, there are specific arguments pertaining to mandatory reporting of such disclosures. These include helping to prevent abuse of future, unidentifiable victims in situations where the perpetrator may still be active in the community, and empowerment of the survivors of child sexual abuse by allowing their participation in the reporting process.[70]

The operation of mandatory reporting is an influential factor for adults who disclose their experience of child sexual abuse, with 54% stating it was either extremely or very influential in their decision, though the primary incentive appeared to be concern for other children, as 82% of participants considered it extremely or very influential in their decision.[71]

[69] Joseph Mooney, 'How Adults Tell: A Study of Adults' Experiences of Disclosure to Child Protection Social Work Services' 30 Child Abuse Review, 193-209.
[70] Mooney (n 1) 39.
[71] ibid.

There may be unique disadvantages to mandatory reporting of retrospective disclosures, particularly when disclosed in a therapeutic context, owing to their nature and the setting in which they are disclosed. These include retraumatisation of the survivor by having information they may not wish to disclose to child protection services reported by the replication of the dynamics of abuse such as a loss of control and autonomy, and disengagement or withdrawal with counselling in order to avoid reporting.

Pellegrini et al. observed that psychologists' concerns regarding mandatory reporting was that clients could be harmed in the process due to the legally mandated report, and this was more commonly found for retrospective disclosures rather than disclosures of current risk.[72] Psychologists observed clients would engage in self-policing and conceal certain aspects or traumas so as not to trigger the mandatory reporting procedure.[73] One psychologist commented that the mandatory reporting procedure was silencing the client, and that there would be a "missing piece" in the therapy the client did not feel at liberty to discuss due to the mandatory reporting.[74] Therefore, many clients could not avail of evidence-based interventions where it would have to involve discussing the trauma in detail. Some clients chose to disengage from therapy altogether to avoid mandatory reporting or after the report had been submitted, the authors noting a loss of trust in the relationship.

In contrast to current disclosures, it is argued that mandatory reporting of retrospective disclosures, particularly in a psychotherapeutic setting, has more negative consequences than positive ones. The weight of mandatory reporting may lead many adults to never disclose at all, which means that they might not be fully able to process what had happened to them together with a therapist. This may lead to further negative mental health outcomes. While it is true that mandatory reporting of retrospective disclosures may lead to discoveries of perpetrators, some of those perpetrators may be already deceased or the threat of mandatory reporting may never lead an adult to disclose, whereas if the adult client was allowed to process their trauma in a therapeutic setting and then make the choice to disclose, this would both allow disclosure while respecting the client's dignity and autonomy. Furthermore, because clients will often refuse to speak about their abuse once they discover it will trigger mandatory reporting, it can lead to incomplete reports. It could be argued that while the adult themselves

[72] Pellegrini et al. (n 68) 10-11.
[73] ibid.
[74] ibid.

is not currently at risk from the abuse experienced, future unidentifiable children might be, however psychotherapists have identified that it could do more harm to the client than benefit future children.[75]

II Mandatory Reporting in Comparative Jurisdictions

The earliest common law jurisdiction to implement mandatory reporting for child abuse cases was the United States between the years 1963 and 1967, following research into "battered child syndrome".[76] This resulted in legislation requiring medical professionals to report suspected physical abuse of children by parents or caregivers which has since expanded in part by federal legislation such as the Child Abuse Protection and Treatment Act 1974 ("CAPTA").[77]

The scope and extent of mandatory reporting in the United States varies from state to state.[78] The majority of states limit mandated persons to professionals who by virtue of their occupation are likely to come into contact with children and would have an ability to detect child abuse, the majority of which include psychologists and mental health professionals, though as of May 2023,[79] four states imposed mandatory reporting on all citizens. All states require physical abuse, sexual, emotional or mental abuse of children to be reported though Illinois and Idaho do not explicitly require psychological abuse to be reported.[80] The CAPTA defines abuse of a child by that of the child's parent or caretaker.[81] Many states limit mandated reporting to instances where the perpetrator is a specified person, including a parent, caregiver, a person having care, custody and control of the child, or a partner of the child's parent. Michigan also includes a teacher, teacher's aide or clergy member.[82] There are a number of states that are either silent about the category of perpetrator, or which define the perpetrator as "any person".[83] The majority of states do not require a specific extent of harm for sexual abuse, though Louisiana requires that the abuse seriously endangers the child's health and safety.[84]

---

[75] ibid.
[76] Mathews and Kenny (n 2) 51.
[77] ibid.
[78] ibid.
[79] Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect* (May 2023). States include Indiana, New Jersey, North Carolina and Wyoming.
[80] Mathews and Kenny (n 2), 53.
[81] Section 1191 Child Abuse Prevention and Treatment Act 42 USC 5101 (1974), section 3.
[82] Michigan Legislature, Child Protection Law (Excerpt) Act 238 of 1975, section 722.623.
[83] Child Welfare Information Gateway, (n 79). States include Delaware, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming.
[84] Mathews and Kenny (n 2), 59.

Information regarding retrospective referrals is not provided, though for example, Illinois does not appear to mandate reports for disclosures as adults, only referring to instances when a child discloses abuse. [85]

All Canadian provinces save for the Yukon territory require all citizens to report child abuse, and all provinces include sexual abuse as a category of harm that must be reported.[86] In Ontario, the Child, Youth and Family Services Act 2017 requires all persons to report suspicions of sexual abuse by a person in charge or a child or where a person in charge of the child knows or should know of the abuse but fails to prevent it to a child protection society.[87]

The scope and extent of the mandatory reporting requirement in Australia also depends on the province in question. In all eight jurisdictions, any kind of sexual abuse must be reported,[88] different to other forms of abuse which may have to reach a threshold of significance, as sexual abuse always creates a suspicion of significant harm, though in Victoria technically such abuse must only be reported if the parents have failed to prevent such harm or are unlikely to prevent harm.[89] Mandated persons also vary, from the requirement of "any person" in Northern Territories,[90] to more specific categories in the other jurisdictions, though the majority include psychologists save for Western Australia[91] which does not but includes "family counsellors" and "dispute resolution practitioners" and Queensland.[92] Some of the provinces appear to explicitly limit mandatory disclosures to non-retrospective disclosures, such as South Australia,[93] others use the past tense however it is unclear if they apply to retrospective disclosures as well.[94]

[85] Illinois Department of Child and Family Services, *Manual for Mandated Reporters* (September 2020).
[86] Mathews and Kenny (n 2), 53.
[87] Ontario Ministry for Children, Community and Social Services, *Reporting Child Abuse and Neglect: It's Your Duty* (August 2021).
[88] Child Family Community Australia, *Mandatory Reporting of Child Abuse and Neglect - CFCA Resource Sheet* (June 2020).
[89] ibid.
[90] Care and Protection of Children Act 2007 (NT), section 15.
[91] Family Court Act 1997 (WA).
[92] Child Family Community Australia (n 88), 6.
[93] Children and Young People (Safety) Act 2017 (SA), section 17.
[94] ibid. The Children and Young People (Safety) Act 2017 (SA) defines what must be reported as, "Reasonable grounds to suspect a child or young person is, or may be, at risk; and the suspicion was formed in the course of the person's employment"

Ireland's common law neighbour, the United Kingdom, does not currently have a mandatory reporting system in place.[95] There is statutory guidance for practitioners who work with children to report to the local authority children's social care if they suspect abuse or neglect and where there is a failure to do so, reasons must be provided. There is also a disciplinary process in place for a failure to report.[96]

III Right to Privacy and Mandatory Reporting

In *McGrath,*[97] the applicant raised issues of privacy and the mental wellbeing of the clients that may make retrospective disclosures and urged for a reading of the legislation that was consistent with a rationale that upheld the dignity and privacy of adults. Phelan J correctly observed absent a constitutional challenge, the court could not be asked to evaluate the policy behind the legislation.[98]

This leads to the question whether such a constitutional challenge could be mounted, and what would the court's reaction be to such a challenge be given the separation of powers.

The right to privacy, though not explicitly referenced in the constitution, was elaborated on in *Kennedy v Ireland* as an unenumerated right that would protect an individual's dignity and autonomy in a democratic, sovereign and independent state.[99] Hamilton J was of the opinion in *Kennedy* that such a right would be interfered with if a person's private communications were intercepted with in a deliberate, conscious and unjustifiable manner.[100] This demonstrates the qualified nature of the right, which is subject to the exigencies of the common good, public order and morality. The Supreme Court held that the circumstances did not exist in this case which involved wiretapping of two journalists' phone communications.

Other case law demonstrates instances where the common good has been an overriding justification - the disclosure of telephone communications in a criminal prosecution, the public interest in an effective investigation into a serious crime justified overrode the right to privacy in one's medical records in *DPP v Harty*.[101]

[95] Davies et al. (n 62) 11.
[96] ibid.
[97] *McGrath* (n 6) [11].
[98] ibid [37].
[99] *Kennedy v Ireland* [1987] 1 IR 587.
[100] ibid 592.
[101] *DPP v Harty* [2016] IECA 142.

The question is whether mandatory reporting could infringe upon the right to privacy and if so, would it be justified under the exigencies of the common good. In *Herrity v Associated Newspapers*, Dunne J distilled the predominant principles from leading precedent on the right to privacy which are as follows:

> (i) There is a constitutional right to privacy;
> (ii) The right to privacy is not an unqualified right;
> (iii) The right to privacy may have to be balanced against other competing rights or interests;
> (iv) The right to privacy may be derived from the nature of the information at issue – that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or to the public generally;
> (v) There may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make a complaint in relation to the manner in which the information was obtained;
> (vi) The right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions.[102]

Information that would be the subject of a mandatory report is likely to be such that it affects a person's dignity and autonomy in a democratic society, particularly given the traumatic nature of such information. By contrast, an overriding public interest could be identified to justify mandatory reporting in all cases, such as the protection of children which has been raised in case law such as *MQ v Gleeson* and cited in *McGrath.*[103] This would echo one of the competing interests referred to by Henchy J in *Norris v Attorney General* as the protection of "those who should be deemed to be in need of protection".[104] Where a retrospective disclosure highlights the presence of a current risk to children or a real future risk to children, even if not identifiable, it could be argued that this is a competing interest that the courts would highlight as justifying the interference with one's right to privacy in a democratic society. This could be particularly within the context of the cover-up of child sexual abuse by institutions such as the Catholic church, and as echoed by Phelan J in *McGrath*, wherein she stated in the context of historic reports of abuse by a teacher or clergy person made to a school to religious institution, it is not for that institution to decline to report just because that alleged perpetrator has retired or died.[105]

[102] *Herrity v Associated Newspapers* [2008] IEHC 249, [56].
[103] *McGrath* (n 6) [47].
[104] *Norris v Attorney General* [1984] IR 36, 79.
[105] *McGrath* (n 6) [50].

Where the alleged abuser however is deceased, this argument could be said to be weakened as there is no potential for harm by that individual to future children. It could be argued however, that there is a benefit in a report against that person nonetheless or the institution where that person operated in (if the abuse was committed in an institutional setting) as it could demonstrate the incidence of abuse in that institution and the systems in place. Phelan J's statement as cited above is pertinent in this regard.[106] It could be queried however if such a benefit demands a mandatory report against the transgression of an individual's privacy, particularly in a deeply sensitive area concerning an intrinsic part of the human condition, which is one's sexual autonomy.

[106] ibid.

IV Discussion of Mandatory Reporting and a Victim-Centred Approach

The regime of mandatory reporting was borne out of, and informed by a history of secrecy and non-disclosure of systemic abuse by perpetrators who had access to children and often were entrusted with care for the child in institutions that played a significant role in Irish society.

Due to the stigma associated with the abuse arising from this history, the power imbalance involved and at times, the incapacity to understand sexual abuse due to the child's young age, disclosure will often occur years, even decades after the abuse itself. This can be a significant occasion for the victim themselves, and therefore, it is important to have a victim-centred approach. This is bolstered by the EU Victim's Directive 2012, which places an obligation on member states under Article 1 to "... ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings".[107] Though the mandatory reporting process is not explicitly a criminal proceeding, the content of the disclosure and report concern the commission of what is a criminal offence and therefore as argued by Mooney,[108] is ancillary to criminal proceedings and therefore the process could benefit from the principles in the Directive. It was found that majority of adult survivors who did engage with Tusla did not find their experiences to be respectful, sensitive, or appropriate to meet their needs as victims of abuse.[109] For those who have a report made against their explicit consent, it could be questioned whether that is respectful, sensitive or appropriate.

Pellegrini et al. found that psychologists surveyed felt that there were contextual factors regarding mandatory reporting of retrospective disclosures at play that they could account for which child protection services could not necessarily.[110] The mandatory reporting regime constrains the flexibility to respond to retrospective disclosures therapeutically and prioritise therapy over an immediate reporting response where there is not a current immediate risk to a child, and at times, to have discretion over whether to make a report.[111] The current scheme however does not allow therapists that latitude or discretion to provide therapeutic services and

[107] Directive 2012/29/EU of The European Parliament and of The Council of 25 October 2012 Establishing Minimum Standards on The Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA.
[108] Mooney (n 1) 39.
[109] ibid.
[110] Pellegrini et al. (n 68) 15.
[111] Pellegrini et al. (n 68) 15.

many felt that once the disclosure was made, the reporting took front and centre stage as opposed to an intervention to deal with the trauma from such abuse. This is different to where an adult discloses directly to the police, as they have a different intention in mind for formal legal proceedings to be pursued.

As observed in *McGrath,*[112] the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 provided for a defence where the child had made it known to the accused that they did not wish for the information pertaining to the offence against the child to be disclosed, which was not replicated within the 2015 Act. Under the interpretation accepted in the High Court, reasoning for this could be either that the Oireachtas had not considered the possible trauma that those who retrospectively disclose abuse in therapy would face upon realisation that a report would be filed, or that the Oireachtas did consider such an impact however this was weighed against the social good of the protection of potential future children at risk, and engagement in the counselling process constitutes as informed consent to a mandatory report as a limit on confidentiality.

It is submitted that both of those rationales are wanting in a victim-centred approach. The first can be dispensed with briefly as victims are not supported or centred where the legislation neglects to consider the detrimental impacts upon them. The second rationale requires a more considered argument, as it is supporting either identifiable or unidentifiable potential children who may be at risk. Pellegrini et al. note however that child protection services face difficulties with increased referrals with limited information and resources particularly where the source of the referral does not wish to engage with Tusla which further constrains its ability to act upon the referral.[113] There may also be retrospective disclosures where the alleged abuser is deceased and therefore does not pose a current risk of harm to children but a report is nonetheless mandated against the wishes of the adult survivor who feels a replication of the loss of control and autonomy in the process.

Informed consent and the onus of the psychologist to discuss the limitations on confidentiality due to mandatory reporting is not a panacea to the issue of retraumatisation and the privacy of the adult survivor. The issue of a psychologist or therapist failing to mention the limits at the

[112] *McGrath* (n 6) [30].
[113] Pellegrini et al. (n 68) 18.

confidentiality at the outset until the adult discloses child sexual abuse could be cured by an emphasis of such confidentiality and the importance of informing the client at the outset of mandatory reporting obligations. It raises problems however, as clients may not fully appreciate such obligations until the point of their disclosure which as noted, or clients may not realise what they experienced was child sexual abuse until the point of disclosure to the therapist.

It is also unsatisfactory to state that informed consent by remaining in the therapy session is sufficient and the corollary option presented to adult survivors is to disengage with therapy. This proposition raises two problems; one is that it leads to a series of non-referrals, whereas if survivors were allowed to give consent for a disclosure, they may after engaging with the therapeutic process, decide to make a disclosure to Tusla and participate in the process. This would be empowering for the survivor as they would be an active participant in the investigatory process, or leaving therapy with an unsolved trauma from child sexual abuse which is known to affect later outcomes in life. As noted above, child protection services face difficulties with limited resources and referrals where little information is given due to in part the survivor's refusal to engage. Often the perpetrator and survivor are the only witnesses to such abuse and therefore, it is difficult to conduct a full investigation without the victim's testimony as often a perpetrator would not be willing to incriminate themselves.

Secondly, if the adult does not withdraw from therapy but nonetheless does not wish for a report to be made, they will be either a reluctant participant in a mandatory reporting process providing little information to Tusla, engaging in self-policing in therapy.[114] The psychologist also must prioritise the mandatory reporting over the interventions, which if the adult client does not wish to divulge enough information to amount to a full investigation, they may not fully benefit from such interventions which would be not fully informed. This would result in a referral with insufficient information for Tusla to be fully proactive in its duty of investigation as outlined in *MQ,*[115] and *MI.*[116] This would also detrimentally affect the adult survivor, as they would feel a loss in autonomy in the report being made against their wishes and their psychologist-client relationship would be affected due to a loss of trust and confidence.

[114] Pellegrini et al. (n 68) 15.
[115] *MQ v Gleeson* (n 28).
[116] *MI v HSE* (n 35).

It could be argued that because of the informed consent the client tacitly gives by continuing to engage, the loss of confidence would not happen since it was never guaranteed, however this betrays the fact that a client in therapy may be in a vulnerable state, especially when discussing abuse they experienced as a child and possibly for the very first time in their life. This is not to suggest that adults in this therapeutic space are incapable of providing informed consent, but instead that consent to the report should be a positive and explicit assent rather than a negative absence of refusal to consent. This would allow the adult autonomy and control over their own decisions regarding matters pertinent to their sexual independence and thus would be more empowering for them as well as less traumatic.

E CLARIFICATION AND REFORM

The Court of Appeal decision has placed mandatory reporting in a state of uncertainty as either interpretation of section 14(1)(a) would demand a significant change; either adult survivors are profoundly impacted by mandatory reports of retrospective abuse, or mandated persons have to become accustomed to a new reporting regime without retrospective disclosures of abuse. Therefore, maintaining mandatory reporting regime as a whole while creating an exemption for psychologists and therapists who receive a disclosure from an adult client would serve a dual objective of child protection and upholding the dignity and privacy of adults who were victims as children.

It could be arguable that the right to privacy if argued before the courts may not be sufficient to find the legislation repugnant, as precedent demonstrates that such a right is subject to overriding interests and is not regularly successful as a constitutional argument. In addition to the public interest of child protection, ensuring that institutions proactively report such allegations as opposed to concealing them could be cited as a rationale against recognising a right to privacy against mandatory reporting as observed by Phelan J in *McGrath*. As noted by Binchy J however, mandatory reporting of retrospective abuse could result in adult victims who outright refuse to engage with counselling out of fear when they could have otherwise participated and eventually consented to onward reporting to Tusla.[117]

Therefore, reform would be most likely a matter for the legislature. It has been argued by O'Leary that a privilege could be recognised for the psychologist-client relationship following

[117] *McGrath* (n 5) [89] (Binchy J)

the Wigmore principles,[118] and the US Supreme Court decision in *Jaffee v Redmond* where such privilege was recognised against the admission of records taken while in psychotherapy.[119] The American Psychological Association in its amicus curiae brief submitted that confidentiality should be recognised as it is the basis for a successful relationship in therapy and is at the core of the psychologist-client relationship particularly since clients will often disclose very intimate details about their lives.[120] Stevens J for the majority of the court recognised the privilege on the basis that the confidentiality was at the essence of the relationship and it would serve the public good as the nation's interest in the mental health of its society was no less than the interest in its physical health.[121] He found the evidentiary weight of the records would not be of sufficient benefit to override that privilege.

However, the US Supreme Court added that:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.[122]

This statement could be seen as the exception that mandatory reporting covers, as potential child sexual abuse is a serious threat of harm to others. However, where there is no current or potential risk identified from the abuser due to the circumstances, be it that they are incarcerated or deceased, the evidentiary weight and the threshold of risk may be outweighed by the privilege in that instance. O'Leary submits that the evidentiary weight would be "worthless" if the client refuses to provide any evidence and while it would be much diminished,[123] particularly to the point of frustrating an investigation, it could be argued there is still worth to an extent in encouraging vigilance on the part of mandated persons to report and drawing a fuller picture of the scale and scope of abuse.

If there was reform through the legislature, it could be replicated in a similar way to the 2012 Act, which provides under section 4(1)(a) which provides the defence that the child communicated to the accused person that they did not wish the information to be disclosed to

[118] Simon O'Leary, 'A Privilege for Psychotherapy?' (2007) 12(1) Bar Review 33.
[119] *Jaffee v Redmond* 116 S Ct 1923 (1996).
[120] American Psychological Association, *Jaffee v Redmond: Brief Amicus Curiae in Support of the Respondents* (1995).
[121] *Jaffee* (n 120) (Stevens J).
[122] ibid.
[123] Simon O'Leary, 'A Privilege for Psychotherapy?: Part 2' (2007) 12(2) Bar Review 76.

an Garda Síochána.[124] Therefore, it could be worded so that a psychologist, therapist or person providing mental health counselling would not be subject to make a mandated report where the source of their suspicion under section 14(1)(a) of the 2015 Act was (i) the child in question for the purposes of section 14(1)(a), (ii) is now over 18 years of age, and (iii) has made known their view that they do not wish for a report to be made to the Child and Family Agency.[125] Alternatively, similar to some States, the legislation could explicitly deal with privileged communications,[126] as opposed to having it judicially recognised and create an exemption for the psychologist-client relationship.

F CONCLUSION

Mandatory reporting has been demonstrated to have a positive social good in the literature, as shown by the aim of child protection and welfare through combatting underreporting. This social policy is significant in Irish history when institutional failures to address child sexual abuse were highlighted in the Ryan Report, which recommended such legislative change. *McGrath v HSE* however, while being a judicial review application, has highlighted the problems of mandatory reporting being reactive and not victim-centred when applied to retrospective disclosures of abuse by adults accessing therapy.[127] While the Court of Appeal decision arguably took a more victim-considered approach in considering the significant impact on adult victims and probable disengagement with therapy, that was not its determination and arguably, the legislation itself should be explicit that it does not apply to retrospective abuse as a point of policy instead of leaving it to technical statutory interpretation. These problems have been addressed through the article and include infringement on privacy, the negative impact on mental health, the negative impacts on reports as a whole that come from retrospective disclosures and the detriment to the client-therapeutic relationship.

Some of the suggested rationales for mandatory reporting of retrospective disclosures can also be detrimental to the client. In particular, adult survivors of child sexual abuse in therapy should not be made to feel that they are failing future generations of children by a refusal to make a

[124] The 2012 Act (n 24) section 4(1)(a).
[125] ibid.
[126] It appears that the privilege is usually evoked for attorney-client, and in New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, West Virginia, and Guam disallow the use of the clergy- penitent privilege as grounds for failing to report suspected child abuse or neglect. In Louisiana, mental health services providers do not have to report if engaged by an attorney for the child.
[127] *McGrath* (n 6).

report against their abuser, and it is important that policy rationales for mandatory reporting do not create this implication.

This article has sought to argue that mandatory reporting should be excluded for retrospective disclosures, at least where no immediate risk is posed to children such as where the perpetrator is deceased or incapable of committing an offence, for example if they are comatose. In the context of societal failures to address child sexual abuse, the High Court's interpretation would probably not be repugnant to the constitutional right to privacy however, this is debatable given, as the Court of Appeal acknowledged, the profound impact mandatory reporting would have on adult victims. This legislative change could be brought about by either explicitly creating an exemption similar to the 2012 Act, or recognising privileged communications, the former being more preferable, as it centres the survivor's consent and allows reports to be made with their permission.

DISINFORMATION IN THE DIGITAL AGE: THE IMPACT OF THE DIGITAL SERVICES ACT

Lauren Ní Fhloinn*

A INTRODUCTION

From the repeal of censorship legislation[1] to the use of social media to spread disinformation and organise riots,[2] the flow of information and freedom of expression are to the fore of the public consciousness in Ireland. This heightened awareness coincides with the gradual coming into force of the Digital Services Act (DSA),[3] which at time of writing, is on the cusp of being fully implemented. The DSA aims, *inter alia*, to tackle online disinformation.[4] Misinformation is shared without harmful intent, but its sinister cousin, disinformation, is spread with intent to deceive.[5] The focus of this article will be the DSA's co-regulatory regime, and after outlining its main provisions (Part B), this article will examine various critiques thereof (Part C). While certain scholars contend that the DSA goes too far in the fight against disinformation, thereby imperilling fundamental rights, many others posit that it is too weak and deferential to the platforms it regulates to have any true impact. The contradiction between these opposing critiques will be explained by reference to a mismatch in the logics traditionally underpinning EU disinformation policy (Part C). This article will address the question of freedom of expression in the Internet Age, positing that the libertarian model of minimal regulatory interference is no longer tenable (Part D). Finally, this article will briefly address some recent events that are testing the DSA for the first time (Part E), all with a view to ascertaining and evaluating the impact of the DSA on disinformation.

---

* Lauren is currently undertaking an LLM at University College Cork, having previously worked as an Irish-language Lawyer Linguist at the Court of Justice of the European Union. She holds a BCL (Law and French). The views expressed in the article are those of the author alone and she wishes to thank the staff and students of the Editorial and Advisory Board for their work in reviewing the article.

[1] Department of Justice, 'Minister McEntee proposes new bill to repeal almost century old Censorship of Publications Act' (Press release, 21 November 2023) <https://www.gov.ie/en/press-release/dfd8b-minister-mcentee-proposes-new-bill-to-repeal-almost-century-old-censorship-of-publications-act/> accessed 27 November 2023.

[2] Brian O'Donovan, 'Regulator concerned over spread of disinformation on social media' (*RTÉ News,* 24 November 2023) <https://www.rte.ie/news/business/2023/1124/1418324-coimisiun-na-mean-on-dublin-riots/> accessed 27 November 2023.

[3] Council Regulation (EU) 2022/2065 of 19 October on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277/1.

[4] European Commission, 'The Digital Services Act' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en> accessed 4 December 2023.

[5] Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, *National Counter Disinformation Strategy Working Group Scoping Paper* (September 2023) <https://assets.gov.ie/286028/37ceb147-b155-4655-af17-df6189be7928.pdf> accessed 27 November 2023.

B DSA PROVISIONS

Though the spreading of misleading information to influence public opinion has existed since the invention of the printing press,[6] the growing sophistication of disinformation and its serious consequences have led many jurisdictions to shift their regulatory approach from one of minimal interference to active regulation.[7] The EU is no exception, and the DSA is a product of this shift. Though the DSA deals with a broad range of internal market concerns, one of its goals is the mitigation of disinformation.[8] It builds on and complements existing self-regulatory measures, most notably the voluntary Code of Practice on Disinformation.[9] Co-regulation, in the form of the DSA, was the next rational step, particularly in light of platforms' resistance to true transparency and accountability.[10] This combination of self- and co-regulatory measures aligns with the recommendation of the High-Level Expert Group on fake news and online disinformation established by the Commission which suggested dealing with disinformation in a multi-dimensional manner in light of its multi-faceted and evolving nature.[11] The most relevant DSA provisions for the purpose of this article are as follows:

Firstly, under Article 34, Very Large Online Platforms (VLOPs), that have more than 45 million users in the EU per month, will undertake risk assessments of systemic risks that arise from the design or functioning of their systems.[12] The systemic risks to be considered are:

a) the dissemination of illegal content through their services;
b) actual or foreseeable negative effects for the exercise of fundamental rights;
c) actual or foreseeable negative effects on civic discourse, electoral processes and public security;
d) actual or foreseeable negative effects regarding gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being.[13]

[6] Ethan Shattock, 'Lies, Liability and Lawful Content: Critiquing the Approaches to Online Disinformation in the EU' (2023) 60(5) Common Market Law Review 1313, 1313-1314.
[7] Caio C. V. Machado and Thaís Helena Aguiar, 'Emerging Regulations on Content Moderation and Misinformation Policies of Online Media Platforms: Accommodating the Duty of Care into Intermediary Liability Models' (2023) 8(2) Business and Human Rights Journal 244, 244.
[8] Veronika Datzer and Luigi Lonardo, 'Genesis and evolution of EU anti disinformation policy: entrepreneurship and political opportunism in the regulation of digital technology' (2023) 45(5) Journal of European Integration 751, 759-760.
[9] European Commission, *The Strengthened Code of Practice on Disinformation 2022* (2022) <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation> accessed 28 November 2023.
[10] Fabrizio Di Mascio and others, 'Covid-19 and the Information Crisis of Liberal Democracies: Insights From Action Against Disinformation in Italy and the EU' (2021) 14(1) Partecipazione e conflitto 221, 229-230.
[11] ibid 228.
[12] Regulation on a Single Market for Digital Services (n 3) article 34(1).
[13] ibid article 34(1)(a)-(d).

Secondly, under Article 35, VLOPs must establish 'reasonable, proportionate and effective' measures to mitigate the systemic risks identified.[14] Thirdly, under the Article 36 crisis response mechanism, the Commission has wide powers to compel VLOPs to take certain actions, from, for example, adapting content moderation practices ensuring the expeditious removal of certain content, to prominently displaying information on the crisis situation provided by Member State or Union authorities.[15] Fourthly, under Article 37, VLOPs will undergo an independent audit at least once a year to assess their compliance with their DSA obligations and voluntarily-made commitments.[16] The auditor will indicate in a report whether the platform is compliant, and if not, will make recommendations to achieve compliance.[17] Platforms must take "due account" of these recommendations and either adopt them or detail reasons for not doing so, including the alternative measures adopted to achieve compliance.[18] Further requirements oblige smaller platforms (as well as VLOPs) to, *inter alia*, provide transparency reports on content moderation practices,[19] to put mechanisms in place to allow individuals to notify them of illegal content[20] and to provide reasons for restrictions made to what is considered illegal content.[21]

C CRITIQUING THE DSA

I Does the DSA go too far?

Many are concerned that the DSA goes too far and represents a disproportionate interference with the freedom of expression.[22] Vagueness in drafting coupled with more stringent requirements to act against disinformation on pain of significant financial penalties may lead to over-suppression, thereby imperilling users' freedom of expression. The UN Special Rapporteur on Freedom of Expression expressed concern about regulatory models in which government agencies – in this case the Digital Services Coordinators or the Commission – rather than judicial authorities, are arbiters of lawful expression.[23] The Digital Services

[14] ibid article 35(1).
[15] ibid article 36(1).
[16] ibid article 37(1).
[17] ibid article 37(4).
[18] ibid article 37(6).
[19] ibid article 15.
[20] ibid article 16.
[21] ibid article 17.
[22] Shattock (n 6) 1346; Nataliia Filatova-Bilous, 'Content moderation in times of war: testing state and self-regulation, contract and human rights law in search of optimal solutions' (2023) 31(1) International Journal of Law and Information Technology 46, 62.
[23] ibid.

Coordinators are bodies that must be set up in every Member State under the DSA to oversee its application and enforcement and act as a contact point for all other authorities, such as the Commission or the Digital Services Coordinators of other Member States, that may be involved in implementation and enforcement.[24]

A further concern is that the crisis response mechanism established in Article 36, which allows the Commission to unilaterally declare a crisis and to temporarily intervene in a platform's operations, confers excessive power on the Commission.[25] This provision was a late addition to the DSA, included in response to the invasion of Ukraine, and it was heavily opposed by civil society groups.[26] Article 36(2) provides that a crisis will be deemed to have occurred 'where extraordinary circumstances lead to a serious threat to public security or public health in the Union or in significant parts of it'.[27] Armed conflicts, acts of terrorism, natural disasters and pandemics or other serious cross-border threats to public health are cited as examples of crises.[28] There are concerns that this broad definition of 'crisis' could be used to justify significant interferences with content moderation and thus, freedom of expression.[29] This concern seems particularly relevant in light of the European Council's 2022 decision to ban Russian media outlets Russia Today and Sputnik from broadcasting in the EU following the invasion of Ukraine on the basis that those outlets were a channel for the Russian Federation's propaganda and disinformation campaigns which aimed to justify its aggression against Ukraine and which constituted a threat to public order and security in the EU.[30] As an executive order adopted by the Council, the ban was implemented without a court order, and there are concerns that the Commission might feel empowered by this drastic step, which has been questioned by journalists, media lawyers and human rights organisations, to adopt similarly radical measures under Article 36, particularly where a third-country government that is perceived as a threat to EU values is involved.[31]

---

[24] Regulation on a Single Market For Digital Services (n 3) recital (110).
[25] Katie Pentney, 'The DSA, Due Diligence & Disinformation: A Disjointed Approach or a Risky Compromise?' (*TechReg Chronicle*, December 2022) <https://www.competitionpolicyinternational.com/wp-content/uploads/2022/12/5-THE-DSA-DUE-DILIGENCE-DISINFORMATION-A-DISJOINTED-APPROACH-OR-A-RISKY-COMPROMISE-By-Katie-Pentney-.pdf> accessed 20 November 2023, 6.
[26] Ronan Fahy, Naomi Appelman and Natali Helberger, 'The EU's regulatory push against disinformation: What happens if platforms refuse to cooperate?' (*VerfBlog,* 8 May 2022) <https://verfassungsblog.de/voluntary-disinfo/> accessed 27 November 2023.
[27] Regulation on a Single Market for Digital Services (n 3) article 36(2).
[28] ibid recital (91).
[29] Fahy, Appelman and Helberger (n 26).
[30] Council Decision 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 65/5, 5–7.
[31] Fahy, Appelman and Helberger (n 26).

Moreover, many Member States, including France, Malta and Romania, have introduced laws which make spreading disinformation illegal.[32] As 'illegal content' is defined under the DSA as any information not in compliance with Union law or the law of a Member State,[33] it can capture disinformation as a result of those national provisions.[34] The dissemination of illegal content is one of the systemic risks cited in Article 34, which must be assessed and mitigated by VLOPs under Articles 34 and 35. The inclusion of disinformation within the concept of illegal content vastly broadens the scope of the DSA provisions, potentially excessively so.[35] It undermines the traditional EU approach of distinguishing between illegal information and merely inaccurate information, potentially thereby undermining the fundamental right to freedom of expression.[36] To ensure compatibility with the right to freedom of expression Shattock suggests the issuing of interpretive guidance explaining that the notion of "illegal content" should only extend to Member State laws that comply with fundamental rights standards.[37]

Finally, beyond the impact on fundamental rights, the heightened due diligence framework under the DSA will also have economic implications for platforms.[38] Significant resources will be required to ensure compliance with the new obligations under the DSA, from conducting risk assessments to complying with transparency mechanisms, which may negatively impact innovation and growth in the area. Admittedly, however, smaller platforms are subject to fewer obligations than VLOPs under the DSA's asymmetrical regulatory model. Other practical concerns include the ability of platforms to deal with the growing volume of disinformation, and their use of automatic or AI-tools to this end, which can lead to over-removal of content.[39]

II Not far enough?

Though the DSA represents a step beyond the self-regulatory Code of Practice, it remains a co-regulatory instrument and therefore reliant on platform cooperation. This has led to critiques that it does not go far enough to be effective, and affords platforms too much discretion in its

[32] ibid.
[33] Regulation on a Single Market for Digital Services (n 3) article 3(h).
[34] Fahy, Appelman and Helberger (n 26).
[35] Shattock (n 6) 1346.
[36] ibid.
[37] ibid 1347.
[38] Machado and Aguiar (n 7) 251.
[39] ibid 248.

interpretation.[40] For example, VLOPs must identify systemic risks and take action to mitigate them under Articles 34 and 35. Disinformation is not listed as one of the systemic risks, but it could be considered so as it could fall under the definition of 'illegal content' as explained above, or could be considered to have actual or foreseeable negative effects on the factors outlined in Article 34.[41] It is for platforms to determine if disinformation could have such negative effects and how to mitigate them, however, which seemingly affords them a large measure of discretion,[42] particularly considering the difficulty in precisely determining what constitutes a 'foreseeable negative effect'. The legitimacy of platforms weighing up competing fundamental rights is a further concern.[43] Pentney suggests that allowing tech billionaires not only to balance competing fundamental rights, but also to decide what should weigh on the scales, may prove unwise.[44]

The co-regulatory approach is questionable in light of Elon Musk's takeover of Twitter, now X, a mere day after the DSA was published in the Official Journal.[45] What followed his takeover was the proliferation of hate speech across the platform and the dismissal of X's human rights team.[46] Musk is a self-proclaimed 'free speech absolutist', and though he stated in 'an awkwardly staged video' with the Commission's Thierry Breton that he agrees with the DSA provisions,[47] it is difficult to see how he will reconcile his commitment to absolute free speech with X's obligations under the DSA to combat disinformation, which will inevitably involve at least some restriction of freedom of expression. In fact, in December 2023, the Commission opened formal proceedings against X to assess, *inter alia*, its compliance with DSA obligations to prevent the spread of illegal content and the effectiveness of measures adopted to combat the manipulation of information on the platform.[48] It is thus suggested that the finely balanced self- and co-regulatory framework against disinformation could be undermined by Musk's leadership of X,[49] or by other platforms' unwillingness to genuinely engage with the DSA.

[40] Fahy, Appelman and Helberger (n 26).
[41] Regulation on a Single Market For Digital Services (n 3) article 34(1)(b), (c) and (d); Fahy, Appelman and Helberger (n 26).
[42] Fahy, Appelman and Helberger (n 26).
[43] Machado and Aguiar (n 7) 248.
[44] Pentney (n 25) 9.
[45] Fahy, Appelman and Helberger (n 26); Pentney (n 25) 3.
[46] Pentney (n 25) 3.
[47] Fahy, Appelman and Helberger (n 26).
[48] European Commission, 'Commission opens formal proceedings against X under the Digital Services Act' (Press release, 18 December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6709> accessed 13 March 2024.
[49] Fahy, Appelman and Helberger (n 26).

Nevertheless, it is arguably justified to hold platforms responsible for risk identification and mitigation as they can better judge the risks associated with their systems, they have access to the data collected and the cost of compliance should be allocated to them.[50]

Pentney criticises the vague drafting of the DSA, lamenting the lack of guidance given to platforms on a plethora of matters, from the threshold to be reached to class a risk as systemic, to what constitutes taking 'due account' of audit recommendations.[51] Imprecise drafting may lead to inconsistencies,[52] or indeed the interpretation "down" of provisions as imposing less stringent obligations than intended. She notes that disinformation is mentioned only in the recitals and not in the substantive provisions of the DSA, and is nowhere defined.[53] At best, this could be considered a glaring oversight, and at worst, an intentional omission.[54] It is suggested that this disjointed and conciliatory approach to disinformation may result from the contentious drafting process, and the opposition of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament to including disinformation in any form in the DSA.[55] Whether the fraught compromise that had to be reached between the public, the regulators, civil society and the platforms has stripped the DSA of all utility remains to be seen.

Finally, it is arguable that the DSA does little to change the core nature of platforms and will therefore not bring about true change.[56] The ultimate goal of platforms is profit maximisation, without (perhaps until now) much consideration for the harm that might be caused in pursuit of that goal.[57] As platforms are commercial entities, it seems a somewhat unrealistic goal to shift their primary focus from profit maximisation, but whether the DSA goes far enough in promoting an approach whereby fundamental rights concerns, such as the rights to freedom of expression, non-discrimination and consumer protection, figure as important considerations for platforms in the structuring and operation of their services, is as of yet unclear. VLOPs such as Google and TikTok have untold influence over the lives of millions. They affect the information we consume, constitute our public space, structure our interactions with others and shape our

[50] Mark Leiser, 'Reimagining Digital Governance: The EU's Digital Service Act and the Fight Against Disinformation' (24 April 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4427493> accessed 27 November 2023, 5.
[51] Pentney (n 25) 6.
[52] ibid 8.
[53] ibid.
[54] ibid.
[55] ibid 9.
[56] Leiser (n 50) 5.
[57] ibid.

opinions, thereby directly impacting fundamental rights. It is thus essential that their influence is tempered by respect for fundamental rights. It is also arguable that the DSA is overly reliant on transparency mechanisms, such as under Articles 15, 24 and 27, rather than provisions requiring substantive action from platforms, such as Articles 34 and 35, which require platforms to identify and mitigate systemic risks.[58] This is potentially problematic as evidence does not necessarily show that users behave more rationally when presented with additional information,[59] and platforms do not necessarily have the best reputation when it comes to open disclosure and transparency.

III Just right?

It is suggested that the reason for the contradictory critiques that the DSA either goes too far or not far enough is that EU disinformation policy has traditionally been based on two opposing logics; the geopolitical and the regulatory.[60] The geopolitical logic conceives of disinformation as a threat to democracy weaponised by foreign rivals and legitimises strong intervention, while the regulatory logic conceives of it as an undesirable result of the otherwise positive shift to digitalisation to be tackled via public and private means.[61] This mismatch is demonstrated by the Council's exceptional decision to ban Russian media outlets from the EU following the invasion of Ukraine in comparison to the Union's soft regulatory approach to disinformation when US tech companies are involved.[62] It is submitted, however, that the DSA is beginning to address this internal contradiction,[63] and the author would argue that it in fact strikes a balance between these two logics. No longer are platforms solely subject to purely voluntary measures under a system of minimal interference; fines of up to 6 % of annual global turnover hang in the balance.[64] If profit maximisation is the all-encompassing goal of these platforms, significant financial penalties may be the most efficient way of ensuring their compliance. Neither, however, is the DSA draconian or overly interventionist. Though certain scholars are concerned that the crisis response mechanism gives the Commission too much discretion in

[58] ibid 11.
[59] ibid.
[60] Andreu Casero-Ripollés, Jorge Tuñón and Luis Bouza-García, 'The European approach to online disinformation: geopolitical and regulatory dissonance' (2023) 10(1) Humanities & Social Sciences Communications 1, 1.
[61] ibid 3.
[62] ibid 8.
[63] ibid.
[64] Regulation on a Single Market for Digital Services (n 3) article 52(3).

adopting measures to combat disinformation in times of crisis, any action the Commission takes must be strictly necessary, justified, proportionate and limited in time.[65]

It must not be forgotten that there is much to be commended in the DSA and that it ought not be written off in an overly precipitous manner. At the time of writing, the DSA remains only partially implemented, and will apply to all online platforms from 17th February 2024 onwards.[66] It is clearly very early days. To list but a few of the DSA's strengths, firstly, it contributes to compliance with the otherwise voluntary Code of Practice on Disinformation, as the preamble of the Code states that signing up to all relevant obligations under the Code is considered a risk mitigation measure under the DSA.[67] Though the Code remains voluntary, this complementary provision operates as both a carrot and a stick in encouraging platforms to sign up to and comply with the Code, strengthening the regulatory framework in its entirety.[68]

Secondly, the asymmetrical nature of the DSA means that VLOPs are subject to additional obligations and smaller companies are exempted from the financial burden of implementing complex and costly measures. This ensures fair competition and protects the freedom to conduct a business, thereby encouraging innovation and supporting start-ups and small to medium enterprises.[69] This supports the EU's broader digitalisation policy, which includes policies such as the Commission's package of measures to support startups and small to medium enterprises to develop AI tools,[70] and funding for increased connectivity in Europe and beyond.[71]

Finally, the DSA will harmonise platforms' approaches to disinformation within the EU, approaches that varied widely following the invasion of Ukraine. From Meta's blatantly pro-Ukraine approach which included prohibiting ads from Russian state media and reducing the

[65] ibid article 36(3).
[66] DSA Overview (n 4).
[67] Strengthened Code of Practice on Disinformation (n 9) preamble (j); Regulation on a Single Market For Digital Services (n 3) recital (104); Fahy, Appelman and Helberger (n 26).
[68] Council Decision (n 30).
[69] Leiser (n 50) 4.
[70] European Commission, 'Commission launches AI innovation package to support Artificial Intelligence startups and SMEs' (Press release, 24 January 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_383> accessed 29 January 2024.
[71] European Commission, 'Over €250 million to support secure connectivity across the EU under the CEF Digital Programme' (Press release, 10 January 2024) <https://digital-strategy.ec.europa.eu/en/news/over-eu250-million-support-secure-connectivity-across-eu-under-cef-digital-programme> accessed 29 January 2024.

application of hate speech policies to Ukrainian accounts,[72] to TikTok's approach which blocked Russian users from seeing content from anywhere except Russia, enclosing its users in an information bubble,[73] the wide range of reactions lacked not only transparency, but consistency across platforms. The DSA creates harmonisation and legal certainty for both platforms and users within the EU.[74] Outside the EU, however, a lack of consistency remains. This raises the question of a growing splinternet, whereby different jurisdictions have different rules and their own piece of 'network property'.[75] This can lead either to platforms avoiding certain jurisdictions entirely, or applying the most stringent existing obligations to simplify and harmonise their content moderation policies,[76] thereby excluding users in certain jurisdictions, or subjecting them to overly strict or suppressive policies. This problem is not easily solved, and considering the difficulties that persist in achieving agreement between 27 Member States that are committed to common values, the idea of a common worldwide approach to disinformation seems little more than a fantasy.

D FREEDOM OF EXPRESSION IN THE INTERNET AGE

Beyond the balance struck by the DSA between the geopolitical and regulatory logics as outlined above, I believe that the escalation from self-regulatory measures to a more stringent co-regulatory regime is necessary and appropriate in the Internet Age. The freedom of expression requires an alternative protective framework today compared to that of the past, due to the different prevailing social landscape that is characterised by the ubiquity of social media and alternative news sources. Despite being prized above all other freedoms,[77] free speech has never been absolute, even in its original form in ancient Athens.[78] It remains restricted today, and one needs only to look to Article 10 of the European Convention on Human Rights which guarantees its protection, and simultaneously provides a long list of competing interests that may restrict its operation, such as, for example, the 'rights of others'.[79] In fact, a failure to impose some restrictions on the freedom of expression can have an overall chilling effect on speech, whereby, for example, minority groups do not feel safe exercising their right to freedom

[72] Filatova-Bilous (n 22) 51.
[73] ibid 54.
[74] Leiser (n 50) 11.
[75] Filatova-Bilous (n 22) 63.
[76] ibid.
[77] Paul Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (1st edn, Cambridge University Press 2018) 102.
[78] Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (1st edn, Cambridge University Press 2005) 96.
[79] Bernal (n 77) 105.

of expression.[80] Interestingly, Bernal notes that the restrictions imposed on speech largely protect things that people want, such as national security or public safety.[81]

Barendt listed four rationales for free speech, namely, (i) the discovery of truth; (ii) self-fulfilment; (iii) to enable citizens to participate in democracy; and (iv) suspicion of government.[82] While the internet can help to achieve these goals, it can also hinder them.[83] Social media is seen as championing free speech, when in fact it often endangers it. Facebook, for example, has been charged with censorship on one hand, for removing content related to breast cancer awareness due to nudity,[84] and yet failing to control extremism and hate speech on the other.[85] Invoking free speech to spread fake news runs counter to the goal of pursuing the truth, thereby undermining free speech generally.[86] Using free speech solely for abusive purposes could be seen as undermining the self-fulfilment rationale. Events such as the storming of the Capitol in the US have demonstrated how disinformation can threaten democracy, and therefore citizens' ability to engage therewith, and suspicion of government has escalated among certain cohorts far beyond a healthy cynicism to full-blown conspiracy-level.[87] It goes without saying that this can also undermine democracy.

The notion of a marketplace of ideas, which propounds free public debate and discourse, posits that good, correct and accurate speech will prevail because of its superiority over inferior, incorrect and false speech.[88] It suggests that the antidote to 'bad', misleading speech is argument.[89] While this theory may have had legitimacy in the past, it does not hold water in a modern society in which it has been seen time and time again that disinformation can win out because it is fabricated to seem more convincing than the complexity and messiness of reality.[90] Many scholars including John Stuart Mill believed in the importance of being confronted with

[80] ibid 102.
[81] ibid 111.
[82] ibid 108.
[83] ibid 124-125.
[84] ibid 125.
[85] ibid 126.
[86] ibid 141.
[87] Such conspiracy theories include Pizzagate or Trump's unsubstantiated claims of election rigging, see Mike Wendling, 'The saga of 'Pizzagate': The fake story that shows how conspiracy theories spread' (*BBC News,* 2 December 2016) <https://www.bbc.com/news/blogs-trending-38156985> accessed 1 December 2023; Reality Check team 'US election 2020: Fact-checking Trump team's main fraud claims' (*BBC News,* 23 November 2020) <https://www.bbc.com/news/election-us-2020-55016029> accessed 1 December 2023.
[88] Bernal (n 77) 137.
[89] ibid.
[90] ibid.

opposing opinions in the pursuit of truth, but it is suggested that his ideas were formed in 'a gentler age', when opinions, however hotly debated in parliament, didn't include death or rape threats hollered by thousands online.[91]

The advertising business model, which requires platforms to create more 'attention-grabbing and identity-confirming content' to continue growing, has created echo chambers, where certain political views and even understandings of reality prevail over contradictory but true information.[92] Highly personalised algorithms show us content that aligns with our worldview. Furthermore, platforms, as private entities, operate in their own interest (and the interest of profit maximisation) which can and does conflict with the greater interests of society.[93] It was once widely believed that social media would facilitate a greater flow of information, thereby strengthening free speech.[94] In reality, the explosion of alternative information sources has led to a growing political polarisation and distrust of mainstream media and democratic institutions.[95] We live in a post-truth society, in which people search for information that aligns with their beliefs rather than the truth, and information consumption is increasingly emotionally and ideologically driven.[96] To this toxic concoction we can add influential political figures who employ disinformation for personal gain.[97]

This dangerous combination requires robust regulation. Social media platforms have come to define our public space, influence the ideas and arguments we see and therefore influence our beliefs and political choices.[98] This has implications for fundamental rights and democracy, which justifies regulatory intervention.[99] In this context, it cannot be said that the DSA goes too far. It is clear that the laissez-faire libertarian approach to platform liability has become untenable. The specificities of the digital age have fundamentally altered the playing field, and a more stringent stance on freedom of expression is thus justified, in the form of the DSA.

[91] ibid 137-138.
[92] Machado and Aguiar (n 7) 245.
[93] Datzer and Lonardo (n 8) 751-752.
[94] Di Mascio and others (n 10) 222-223.
[95] Casero-Ripollés, Tuñón and Bouza-García (n 60) 3; Di Mascio and others (n 10) 222-224.
[96] Casero-Ripollés, Tuñón and Bouza-García (n 60) 3.
[97] ibid.
[98] Giovanni De Gregorio and Roxana Radu, 'Digital constitutionalism in the new era of Internet governance' (2022) 30(1) International Journal of Law and Information Technology 68, 86.
[99] ibid.

E RECENT EVENTS

The November 2023 riots in Dublin were the first test of the DSA provisions on disinformation. Ireland became the first Member State to trigger an alert under the DSA incident protocol, in order to involve the Commission, which already had oversight powers of VLOPs, in meetings with platforms.[100] The DSA facilitated meetings between Ireland's newly-established Digital Services Coordinator – Coimisiún na Meán – the Commission, platforms and Gardaí within less than 24 hours,[101] which highlighted the exceptional and urgent nature of the situation, thereby (theoretically) requiring a prompt response from platforms. While the first use of the incident protocol was cited by a Commission official as a success – "it worked"[102] – there were reports that X was less responsive than other platforms in removing illegal content during and after the riots,[103] with Minister for Justice Helen McEntee stating in the Dáil that, unlike TikTok and Meta, X "didn't engage" with Gardaí to remove "vile posts".[104] X refutes her claims as inaccurate, indicating that it responded promptly to any formal requests from Gardaí.[105] Later, in December 2023, X declined to appear in front of the Oireachtas Media Committee, attended by Meta, TikTok and Google, to discuss disinformation following the riots, citing ongoing legal actions as its reason for being unable to attend.[106] This seems to suggest an ongoing element of resistance to the new regulatory regime, but it is difficult to see how X will be able to withstand the mounting pressure from national authorities as well as the Commission for too long, particularly in light of the formal proceedings initiated by the Commission against X in December 2023,[107] and with the threat of fines of up to 6 % of global turnover hovering in the background.

---

[100] Tony Connelly, 'How the Dublin riots collided with new EU laws' (*RTÉ News,* 4 December 2023) <https://www.rte.ie/news/ireland/2023/1203/1419689-riots-eu/> accessed 6 December 2023.
[101] ibid.
[102] Tony Connelly, 'Ireland used new EU alert as riots broke out in Dublin' (*RTÉ News,* 29 November 2023) <https://www.rte.ie/news/ireland/2023/1129/1419257-ireland-riots/> accessed 6 November 2023.
[103] Connelly (n 100).
[104] Brian O'Donovan, 'X says McEntee comments on riot response "inaccurate"' (RTÉ News, 5 December 2023) <https://www.rte.ie/news/ireland/2023/1205/1420210-dublin-riots/> accessed 13 March 2024.
[105] ibid.
[106] The Journal, 'Meta and TikTok explain response to Dublin riots and misinformation to Oireachtas Committee' (*The Journal,* 6 December 2023) <https://www.thejournal.ie/meta-tiktok-oireachtas-committee-dublin-riots-6242091-Dec2023/> accessed 7 December 2023.
[107] European Commission, 'Commission opens formal proceedings against X under the Digital Services Act' (Press release, 18 December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6709> accessed 13 March 2024.

F CONCLUSION

The traditional laissez-faire approach to the regulation of speech on the internet is no longer viable and the DSA's more stringent regime thus appears more than justified. I would argue that the DSA seems to strike a satisfactory balance between the somewhat opposed geopolitical and regulatory logics that underpin EU disinformation policy, establishing a robust and yet cooperative regime, thereby creating coherence and consistency. While some platforms may seem a little resistant to the new regime it is worth remembering that the DSA remains, until 17th February 2024, only partially functional. It is also worth noting that when the DSA does come fully into force that time will be needed to test its boundaries, identify weak spots and consolidate compliance and enforcement. In light of this recognition, it would be wholly premature to make any concrete assertions about the DSA's true efficacy in combatting disinformation, but it appears, at least, a welcome step towards enhanced platform responsibility and protection of fundamental rights that takes account of the complexities of the digital world.

AN EARLY REVIEW OF THE EU'S DLT PILOT REGIME: WILL THE PURPOSE OF THE DIGITAL FINANCE STRATEGY BE FULFILLED?

Le Quan Hoang[*]

A INTRODUCTION

The application of advanced technology in such a blistering pace has changed and transformed the financial sector profoundly, especially during and post COVID-19 pandemic.[1] The financial innovation is 'an ongoing and unceasing phenomenon',[2] and at the centre of this wave is the rise of digital finance.[3] Having realised that "[t]he future of finance is digital" and Europe must take the chance to recover its social and economic damage after the pandemic as well as become 'a global digital player', the European Commission released the Digital Finance Strategy for the European Union (EU) in 2020.[4]

Under the Digital Finance Strategy, notable trends in digital innovation are identified, and based on such grounds, strategic objectives, priorities and key actions for the EU are also set out. Among other things, such Strategy has been considered as a concrete start for the EU's ambition towards regulation of financial technology (FinTech) because one of its core actions is to adapt legal frameworks to facilitate the financial digitalisation in the context of novel technologies being adopted.[5] The Digital Finance Strategy clearly states that:

The purpose of the digital finance strategy is to ensure that the EU regulatory framework for financial services is fit for the digital age. This includes enabling the use of innovative

[*] The author is currently undertaking an LLM in Business Law at University College Cork. He is particularly interested in technology and media law, with focuses on FinTech, privacy and data protection, and the legal implication of novel technologies. He is a fully qualified to practice in. Vietnam and has been working as a TMT lawyer at Lexcomm Vietnam LLC, a Vietnamese commercial law firm, prior to his LLM Study. This article was originally the author's final assignment of module LW6660 'Digital Finance and Fintech: Law and Regulation', which had been delivered by Dr Jonathan McCarthy in semester 1 of the academic year 2023/24. The author expresses his sincere thanks to the editors of the Cork Online Law Review for their anonymous view and valuable comments. The opinion expressed in this article is of the author's own and does not represent that of the above-mentioned institutions and/or individuals.

[1] Iris H-Y Chiu and Gudula Deipenbrock (eds.), *Routledge Handbook of Financial Technology and Law* (Routledge 2021); See also Emilios Avgouleas and Heikki Marjosola (eds.), *Digital Finance in Europe: Law, Regulation, and Governance* (Vol. 5, De Gruyter 2021).

[2] Iris H-Y Chiu, 'Fintech and Disruptive Business Models in Financial Products, Intermediation and Markets - Policy Implications for Financial Regulators' (2016) 21 Journal of Technology Law & Policy 55.

[3] Avgouleas et al (eds) (n 1).

[4] European Commission, 'A Digital Finance Strategy for the EU', COM(2020) 591 final.

[5] ibid Section 4.2; Jonathan McCarthy, 'Evaluating the EU's digital finance strategy: ambitious glimpses of future regulation?' (2021) 36(9) Journal of International Banking Law and Regulation 379.

technologies and making the framework compatible with prevailing best practice in software production and deployment.[6]

Originally proposed under the Digital Finance Strategy for the abovementioned goal, three legislative initiatives have been enacted, namely the Markets in Crypto Assets Regulation,[7] the Distributed Ledger Technology Pilot Regime Regulation (DLT PilotR),[8] and the Digital Operational Resilience Act.[9] This article would focus on critically analysing the DLT PilotR to evaluate its likely efficacy in light of the purpose of the Digital Finance Strategy quoted above.

As a background, DLT PilotR was adopted on 30 May 2022 and have been fully effective since 22 March 2023.[10] DLT PilotR governs the application of distributed ledger technology (DLT) in securities transactions. It focuses on DLT market infrastructures and their operators, as well as governs the granting, withdrawal and modification of specific permissions including exemptions, compensatory or corrective measures. It also covers the operation of DLT market infrastructures, the supervision over such operation, along with the cooperation among operators of DLT market infrastructures, national competent authorities and European Securities and Markets Authority (ESMA).[11] Overall, DLT PilotR allows DLT market infrastructures to seek exemptions from certain existing requirements under applicable regulations to apply DLT in the trading and settlement of securities transactions relating to DLT financial instruments.[12] It also amends existing financial regulation, including the Markets in Financial Instruments Regulation (MiFIR),[13] the Central Securities Depositories Regulation (CSDR),[14] and the second Markets in Financial Instruments Directive (MiFID II).[15]

---

[6] Digital Finance Strategy (n 4) 9.
[7] Council Regulation (EU) 2023/1114 of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150/40.
[8] Council Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU [2022] OJ L 151/1.
[9] Council Regulation (EU) 2022/2554 of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L 333/1.
[10] DLT PilotR (n 8) article 19.
[11] ibid article 1.
[12] Luxembourg's Commission de Surveillance du Secteur Financier, 'DLT Pilot Regime' (*Commission de Surveillance du Secteur Financier,* 5 April 2023) <https://www.cssf.lu/en/dlt-pilot-regime/> accessed 29 November 2023; See also DLT PilotR (n 8) recital 8.
[13] Regulation (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L 173/85.
[14] Regulation (EU) No 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 [2014] OJ L 257/1.
[15] Council Directive (EU) 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L 173/349.

Beginning with an introduction and roadmap in this Section A, the article then conducts an efficacy test based on two factors mentioned in the Digital Finance Strategy. In particular, Section B assesses whether DLT PilotR enables the use of DLT. Subsequently, Section C focuses on examining to what extent the Regulation is compatible with best practice in developing and applying DLT. Finally, Section D concludes.

B ENABLING THE USE OF INNOVATIVE TECHNOLOGIES

DLT has been regarded as one of the innovative technologies having potential to facilitate and improve the financial services.[16] However, as self-declared by the EU multiple times, the existing EU legislation 'was not designed with DLT in mind' and consequently, the use of DLT may be hindered.[17] Therefore, DLT PilotR has been designed to, among other objectives, support the application and development of crypto-assets qualified as financial instruments and DLT.[18] To critically evaluate to what extent the Regulation can reach that goal at this early stage, it is important to understand the nature of the Regulation. Starting with the analysis of definitions and key concept under DLT PilotR, this Section will subsequently look into the Regulation's main themes, namely (I) DLT financial instruments, (II) exemptions granted to the DLT market infrastructures, (III) amendments to the existing financial legislation, and (IV) the "EU passport" scheme.

I Definitions and key concept

Being the centre of the Regulation, DLT is defined as 'a technology that enables the operation and use of distributed ledgers',[19] with 'distributed ledger' means 'an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism'.[20] This definition is more complex and

[16] Digital Finance Strategy (n 4); See also Commission, 'Proposal for a regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology' COM(2020) 594 final; Commission, 'Impact assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology' SWD(2020) 201 final.
[17] ibid; DLT Pilot Proposal (n 16) 1; Impact Assessment (n 16) 13; DLT PilotR (n 8) recital 4.
[18] DLT PilotR (n 8) recitals 1, 6 and 7.
[19] ibid article 2(1).
[20] ibid article 2(2); To further clarify, Art 2(3) of DLT PilotR defines "consensus mechanism" as "the rules and procedures by which an agreement is reached, among DLT network nodes, that a transaction is validated", and art 2(4) defines a "DLT network node" as "a device or process that is part of a network and that holds a complete or partial replica of records of all transactions on a distributed ledger".

descriptive than the definition under the DLT Pilot Proposal, which defined 'DLT' as 'a class of technologies which support the distributed recording of encrypted data'.[21] It should be noted that the Proposal's DLT definition was criticised for being deceptive simple and consequently, technically broad and ambiguous.[22] Reviewing such proposed definition, experts then suggested that the definition should reflect DLT's most prominent factor which was the involvement of participants in the network as nodes.[23] Looking into the current DLT definition under DLT PilotR, it is clear that such suggestion has been taken into account, and thus making the official definition relatively similar to some previous definitions which have been widely understood and accepted by the public.[24]

Key concept of DLT PilotR is a DLT market infrastructure. Three types of DLT market infrastructures introduced under DLT PilotR are DLT multilateral trading facilities (DLT MTF), DLT settlement systems (DLT SS) and DLT trading and settlement systems (DLT TSS).[25] DLT MTF is 'a multilateral trading facility that only admits to trading DLT financial instruments',[26] noting that a multilateral trading facility is defined under MiFID II as 'a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments'.[27] DLT SS is 'a settlement system that

[21] DLT Pilot Proposal (n 16) article 2(1).
[22] Jonathan McCarthy, 'Distributed Ledger Technology and Financial Market Infrastructures: An EU Pilot Regulatory Regime' (2022) 17(3) Capital Markets Law Journal 288, 293-94); See also Dirk A. Zetzsche and Jannik Woxholth, 'The DLT sandbox under the Pilot-Regulation' (2022) 17(2) Capital Markets Law Journal 212, 219.
[23] McCarthy (2022) (n 22).
[24] See for example Bank for International Settlements (BIS), 'What is distributed ledger technology?' (BIS Quarterly Review, 17 September 2017) <https://www.bis.org/publ/qtrpdf/r_qt1709y.htm> accessed 3 December 2023 (defining DLT as "protocols and supporting infrastructure that allow computers in different locations to propose and validate transactions and update records in a synchronised way across a network"); OECD, 'Recommendation of the Council on Blockchain and other Distributed Ledger Technology' (*OECD*, 10 June 2022) <https://www.oecd.org/daf/blockchain/oecd-recommendation-on-blockchain-and-other-dlt.htm> accessed 3 December 2023 (describing DLT as "a combination of technologies that together create a digital, shared and self-updating ledger of verified transactions or information among parties in a network based on innovative database technologies"); Nolan Bauerle, 'What is a Distributed Ledger?' (*CoinDesk*, updated 6 March 2023) <https://www.coindesk.com/learn/what-is-a-distributed-ledger/> accessed 3 December 2023 (providing that in its simplest form, distributed ledger is "a database held and updated independently by each participant (or node) in a large network"); Scott Nevil, 'Distributed Ledger Technology (DLT): Definition and How It Works' (*Investopedia*, updated 31 May 2023) <https://www.investopedia.com/terms/d/distributed-ledger-technology-dlt.asp#:~:text=Distributed%20ledger%20technology%20is%20a,involved%20in%20too%20many%20transactions.> accessed 3 December 2023; DLT is "the technological infrastructure and protocols that allow simultaneous access, validation, and record updating across a networked database" and "maintained by a network of nodes, each of which has a copy of the ledger, validates the information, and helps reach a consensus about its accuracy".
[25] DLT PilotR (n 8) recital 12 and article 2(5).
[26] ibid DLT PilotR, art 2(6).
[27] MiFID (n 15) article 4(1)(22); For a detailed analysis of a MTF's characteristics, see Giovanni Zaccaroni, 'Decentralized Finance and EU Law: The Regulation on a Pilot Regime for Market Infrastructures Based on Distributed Ledger Technology' (2022) 7(2) European Papers 601, 606.

settles transactions in DLT financial instruments against payment or against delivery',[28] while DLT TSS is the system performing tasks of both DLT MTF and DLT SS.[29] Essentially, DLT TSS was not included in the DLT Pilot Proposal, and the fact that it has been added into the official DLT PilotR has solved the previous uncertainty about the eligibility of hybrid systems on which DLT financial instruments can be both traded and settled.[30]

II DLT financial instruments

Regarding the scope, DLT PilotR governs crypto-assets which are qualified as financial instruments under MiFID II,[31] and are issued, recorded, transferred and stored using DLT.[32] Such crypto-assets are named as DLT financial instruments. However, not all forms of DLT financial instruments will be admitted for the purpose of DLT PilotR. Currently, three admitted types of DLT financial instruments include shares, bonds or other forms of securitised debt (exclusive of derivatives) and 'units in collective investment undertakings'.[33] There are also value limits on DLT financial instruments which are imposed in two ways: per issuance and per authorised entity.[34] In the former way, shares will be allowed if the issuer has a market capitalisation, or tentative market capitalisation, of less than €500 million; bonds or other forms of securitised debt are included if their issue size is less than €1 billion; for the units in collective investment undertakings, the market value of their assets under management must be less than €500 million.[35] In the latter restriction, the aggregate market value of all DLT financial instruments admitted to trading or recorded in the DLT market infrastructures must not exceed €6 billion at the moment of admission to trading or initial recording. If subsequently such aggregate value reaches €9 billion, the transition strategy under Article 7(7) of DLT PilotR must be activated.[36]

It is noteworthy that all above thresholds have been increased in comparison with those under

[28] DLT PilotR (n 8) article 2(7).
[29] ibid article 2(10).
[30] McCarthy (2022) (n 22) 295; See also Randy Priem, 'A European distributed ledger technology pilot regime for market infrastructures: finding a balance between innovation, investor protection and financial stability' (2022) 30(3) Journal of Financial Regulation and Compliance 371, 378; Briseida Sofia Jimenez-Gomez, 'Distributed Ledger Technology in Financial Markets. The European Union Experiment' (2023) 15(2) Cuadernos Derecho Transnacional 665, 672.
[31] MiFID II (n 15) article 4(1)(15) and Section C of Annex I.
[32] DLT PilotR (n 8) article 2(11).
[33] ibid article 3.
[34] Zetzsche et al (n 22) 220.
[35] DLT PilotR (n 8) article 3(1).
[36] ibid article 3(2) and 3(3).

DLT Pilot Proposal[37] which were criticised for being too low and not supporting the use of DLT in practice.[38] Such increases are welcome because of its likely positive effect on the operators who wish to implement DLT market infrastructures as main businesses, not only experiments.[39] Having said that, the thresholds may be lowered by competent authorities based on the market size and average capitalisation of DLT financial instruments trading or stored in the DLT market infrastructures in the respective Member States. This raises a concern about the divergence of the markets among Member States,[40] which may consequently hamper the EU's efforts in removing market fragmentation.[41]

III Exemptions and amendments to the existing financial regulations

DLT PilotR exempts DLT market infrastructures from certain obligations under the existing financial regulations and each type of market infrastructures will have a different set of exemptions. In particular, a DLT MTF shall be exempted from requirements applicable to a traditional multilateral trading facility under MiFIR and MiFID II, including those on persons admitted as members or participants investment firms under Article 53(3) of MiFID II, and transaction-reporting obligations under Article 26 of MiFIR.[42] For a DLT SS, this market infrastructure is generally treated as a CSD, but it will be exempted from a number of obligations under CSDR.[43] The exemptions include obligation on maintaining book-entry forms, taking measures on settlement fails, requesting authorisation when outsourcing a core service to a third party, providing and disclosing information, and on cash settlement rules.[44] The exemptions for a DLT TSS are basically a combination of those granted for a DLT MTF and a DLT SS.[45] Nevertheless, the exemptions are not automatically granted for the DLT market infrastructures: the infrastructure operator must request the competent authority for such exemptions with the prerequisite that certain requirements and compensatory measures are

[37] The thresholds under DLT Pilot Proposal were a €200-million cap on market capitalisation of share issuers, €500-million cap on bonds' issuance size, €2.5-billion cap on total market capitalisation of trading or recorded DLT financial instruments and €2.25 billion is the value point activating the transition strategy.
[38] Zetzsche et al (n 22) 230.
[39] Jimenez-Gomez (n 30) 673.
[40] ibid.
[41] Digital Finance Strategy (n 4) 4.
[42] DLT PilotR (n 8) article 4.
[43] ibid article 5.
[44] ibid.
[45] ibid article 6.

fulfilled.[46] Apart from the specific requirements, there are also common obligations applicable to all DLT market infrastructures, including the obligations to (1) establish business plan, (2) provide and disclose information, (3) implement IT, cybersecurity and other safeguard mechanisms, as well as (4) be responsible for a loss of funds, collaterals or DLT financial instruments.[47] Furthermore, operators are required to obtain specific permission to operate DLT market infrastructures by submitting applications to competent authorities to consider.[48] It is understood that only permitted DLT market infrastructures following this procedure may request for the above exemptions.

Also, DLT PilotR amends currently applicable financial legislation in some respects.[49] For MiFIR, Article 54(2) is amended to allow a trading venue to 'apply to its competent authority for permission to avail itself of transitional arrangements'.[50] For CSDR, DLT PilotR amends the requirement on the settlement discipline measures.[51] For MiFID II, the amendment adds DLT financial instruments into the existing list of financial instruments.[52]

Echoing with the EU's own statement[53] and experts' view that the existing EU legislation does not support the application of DLT in securities transactions,[54] it can be observed that the exemptions and amendments under DLT PilotR are the Union's attempts to remove such regulatory barriers on DLT. To some extent, the amendments to the existing law reinstate the principles of technology neutrality under Recitals 9 and 10 of DLT PilotR as they make rooms for DLT's future variants by avoiding mentioning a specific type of DLT.[55] However, the complexity in application dossier for permission, conditions for exemption, especially the responsibility burden when there is a loss of crypto-assets, may prevent operators from participating in the pilot regime.[56] Additionally, the requirements may be not friendly enough

[46] Each DLT market infrastructure is required with different requirements and compensatory measures; See ibid article 4-6.
[47] ibid article 7.
[48] DLT PilotR (n 8) article 8 (procedure applicable to DLT MTF), 9 (procedure applicable to DLT SS) and 10 (procedure applicable to DLT TSS).
[49] See Zaccaroni (n 27) 607-08 for detailed analysis of the amendments to MiFIR, CSDR and MiFID II under DLT PilotR.
[50] DLT PilotR (n 8) article 16.
[51] ibid article 17.
[52] ibid article 18.
[53] ibid recital 4 and 5.
[54] See for example Emilios Avgouleas and Alexandros Seretakis, 'Governing the Digital Finance Value-Chain in the EU: MIFID II, the Digital Package, and the Large Gaps between!' in Avgouleas et al (eds) (n 1) (pointing out the MiFID II "is not fit for the new digital era").
[55] Zaccaroni (n 27).
[56] ibid 611.

for new entrants who wish to participate,[57] although the Regulation insists otherwise.[58] Those factors, consequently, may impose a detrimental effect on the innovation boosting purpose of DLT PilotR.

IV The "EU passport" scheme

'Passport' (and its other word forms) is a widely used term to describe the right to operate across the EU Member States' borders.[59] DLT PilotR offers this passport scheme by allowing DLT market infrastructures which obtain the permission to be operated across the EU for up to six years from the permission issuance date.[60] ESMA will publish on its website the list of DLT market infrastructures which have been granted with specific permissions to operate, along with the exemptions.[61] This scheme is expected to boost innovation, especially in the market where every transaction is cross-border, because as explained by Zetzsche et al, it 'grants not only exemptions from rules that restrain their activities, but also allows the inclusion of participants across the Single Market which are then also covered by [DLT] PilotR'.[62] Nevertheless, the fact that the permission is temporary and can be revoked, or refused to be granted in many circumstances, again, raises a question about the efficacy of the scheme on startups and new entrants who may feel struggling with the Regulation's requirements to obtain and/or maintain the permission.[63]

C MAKING THE FRAMEWORK COMPATIBLE WITH PREVAILING BEST PRACTICE IN SOFTWARE PRODUCTION AND DEPLOYMENT

The purposes of FinTech regulatory attempts are to support the technological innovation while still maintain the financial stability and customer protection.[64] However, the challenge is that the rapid change of technology makes regulation become outdated quicker,[65] and consequently,

[57] Jimenez-Gomez (n 30) 678.
[58] DLT PilotR (n 8) recital 11.
[59] Zetzsche et al (n 22); *See also* Wolf-Georg Ringe and Christopher Ruof, 'The DLT Pilot Regime: An EU Sandbox, at Last!' (Oxford Business Law Blog, 19 November 2020) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/11/dlt-pilot-regime-eu-sandbox-last> accessed 5 December 2023; McCarthy (2022) (n 22).
[60] DLT PilotR (n 8) article 8(11), 9(11) and 10(11).
[61] ibid.
[62] Zetzsche et al (n 22) 229.
[63] Jimenez-Gomez (n 30) 677-78.
[64] Cristie Ford, 'A regulatory roadmap for financial innovation' in Chiu et al (eds.) (n 1).
[65] Kuan-Jung Peng, Regulating FinTech: The Perspectives of Law, Economics, and Technology (PhD Thesis, Universitaet Hamburg, 2023).

the aforesaid purposes may not be fulfilled. As such, the FinTech regulation should be adaptive, or compatible, to the pace of technology. In order to assess such regulatory adaptiveness, as proposed by Peng, three factors must be considered, namely costs of obsolescence, costs of regulation implementation, and possibility to collect information.[66] Obsolescence costs refer to the values gained when experimenting technology at an early stage. Implementation costs refer to the impacts of early regulation to the future development of the technology. The remaining factor refer to the ability to obtain information from the technology and use such collected information to keep pace with the new development as well as benefit both regulators and market participants.[67] Considering such factors, this Section will assess whether DLT PilotR creates an environment for (1) technology experiment, (2) regulation review, and (3) communication between regulators and participants.

I Experimentation

Although there are different opinions on whether DLT PilotR is a regulatory sandbox,[68] it is undeniable that the Regulation bears some sandbox's characteristics:[69] it has an entry test (i.e. prerequisites conditions for obtaining specific permissions to operate),[70] it imposes restrictions on product types and market's size value,[71] there are exemptions to existing regulations,[72] and there is a time limit for permission.[73] Therefore, similar to a regulatory sandbox, DLT Pilot creates a so-called 'structured experimentalism', a safe environment for eligible participants within the existing framework for a determined time period.[74]

On a separate note, DLT PilotR demonstrates its experimenting characteristic by following a different path when regulating technical distribution of functions across ledgers. To clarify, instead of adopting "the node perspective" (i.e. the allocation of responsibilities to each

[66] ibid chapter 5 section 2.2.2.
[67] Ibid.
[68] Ringe et al and Zetzsche et al considered DLT PilotR as a regulatory sandbox; see Ringe et al (n 59); Zetzsche et al (n 22). Meanwhile, McCarthy and Jimenez-Gomez held the same view that DLT PilotR was not a sandbox; see McCarthy (2022) (n 22); Jimenez-Gomez (n 30).
[69] For a detailed analysis of a sandbox's characteristics, see Dirk Zetzsche, Ross Buckley, Janos Barberis and Douglas Arner, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) 23 Fordham Journal of Corporate and Financial Law 31.
[70] See section BIII).
[71] See section BII).
[72] See section BIII).
[73] See section BIV).
[74] Jonathan McCarthy, 'From childish things: the evolving sandbox approach in the EU's regulation of financial technology' (2023) 15(1) Law, Innovation and Technology 1, 8.

participants and making them liable for their activities) like other existing initiatives, DLT PilotR introduces a novel approach which is to appoint one operator.[75] Under DLT PilotR, the operator has the right to define rules for the operation of DLT market infrastructure and itself, along with 'rights, obligations, responsibilities and liabilities of operators of DLT market infrastructures, as well as those of the members, participants, issuers and clients', and such contents must be fully reflected in the business plan.[76] The business plan will be reviewed along with other documents and requirements by the competent authority for the purpose of granting specific permission to operate the DLT market infrastructure.[77] This approach is regarded to boost innovation and be suitable in the context of using DLT in practice.[78]

However, the experimenting effect of DLT PilotR may be restricted by its own legislative nature as a regulation. As explained by Ringe et al, by being a 'regulation', the pilot regime may not be adaptive enough for any technological changes because of the law-amending process at the EU level.[79]

II Reviewing process

The experiment-reviewing process under DLT PilotR will be conducted through the reporting regime in which ESMA acts as the main rapporteur. There are three types of reports to be prepared: the annual interim reports,[80] the report at the three-year's anniversary of DLT PilotR implementation (the three-year report),[81] and the additional report requested by the Commission. The annual interim reports serve two purposes which are (1) to inform the market participants of the market functioning, any inappropriate behaviours of the DLT market infrastructures' operators, clarification on the Regulation and updates of any previous indications, and (2) to report to the European Parliament, Council and Commission about the application of the pilot regime, focusing on the market's trends and risks.[82] The three-year report includes a much more detailed set of information and shall be presented to the

[75] Ross P. Buckley, Douglas W. Arner, and Dirk A. Zetzsche, *FinTech: Finance, Technology and Regulation* (Cambridge University Press, 2023) chapter 8; See also Zetzsche et al (n 22) 224-225.
[76] DLT PilotR (n 8) article 7(1).
[77] ibid article 8(4), 9(4) and 10(4).
[78] Buckley et al (n 75).
[79] Ringe et al (n 59); Georgios Pavlidis, 'Europe in the digital age: regulating digital finance without suffocating innovation' (2021) 13(2) Law, Innovation and Technology 464, 476-77 (raising the same concern as to whether the EU's policy-making process can keep pace with technology and innovation because it is a lengthy process).
[80] The first interim report shall be published by 24 March 2024; See DLT PilotR (n 8) article 15.
[81] The report shall be presented by 24 March 2026; ibid article 14(1).
[82] ibid article 15.

Commission first.[83] Based on ESMA's report, the Commission shall present a cost-benefit report to the European Parliament and Council about the potential future of DLT PilotR: whether it should be extended in terms of time and types of DLT financial instruments, or it should be amended, or permanent, or terminated.[84] Additionally, the report will propose amendments to the regulations or harmonisation of national laws to facilitate the use of DLT, and transition-strategy for DLT market infrastructures post piloting.[85] Lastly, the additional report shall be prepared by ESMA at the request of the Commission should the Regulation be extended.[86]

Interestingly, compared to DLT Pilot Proposal, interim reports and additional reports are newly added, while the three-year report used to be a five-year report.[87] Such five-year timeframe, with only one report to be prepared close to the expiration of the regime, was considered too long in light of the technology pace; therefore, it was amended as suggested by the European Parliament, and thus, the Regulation now can be reviewed sooner and more regularly, attributing to its adaptiveness to the technology.[88]

III Stakeholders' communication

DLT PilotR sets up a communication channel among operators, national competent authorities and ESMA: operators shall inform, notify and report to competent authorities, competent authorities request and receive information from operators, then forward such information to ESMA, and in reverse, ESMA also inform national competent authorities of submitted reports and actions related to specific permissions and exemptions.[89] In this communication process, ESMA acts as a coordinator among the stakeholders to build a common understanding of DLT

[83] ibid article 14(1); The reporting information includes (a) the functioning of DLT market infrastructures throughout the EU, (b) number of DLT market infrastructures, (c) types of requested and granted exemptions, (d) the number and value of DLT financial instruments, (e) the number and value of transactions on DLT market infrastructures, (f) the types of DLT and related technical issues, (g) the in-place procedures by operators of DLT SS and DLT TSS, (h) any risks, vulnerabilities and inefficiencies posed by the use of DLT which are not covered adequately by the EU's existing financial regulation, (i) issues of regulatory arbitrage and other issues affecting the level playing field between the DLT market infrastructures, (j) interoperability issues, (k) benefits and costs arising from the use of DLT, (l) refusals, modifications or withdrawals of permissions and exemptions, as well as compensatory or corrective measures, (m) cessation of business by DLT market infrastructures, (n) the threshold appropriateness, and (o) overall costs and benefits of the pilot regime and a recommendation (with conditions) on whether the regime should be extended. This is an exhaustive list.
[84] ibid article 14(2).
[85] ibid.
[86] ibid.
[87] DLT Pilot Proposal (n 16) article 10(1).
[88] Zetzsche et al (n 22) 235.
[89] DLT PilotR (n 8) article 11.

and market consistency throughout the EU.[90] Information gained will then be used to establish reports submitted to the European Parliament, Council and Commission.[91] The role of ESMA in this communication process can be observed through its recent released reports, where it called for evidence on DLT PilotR, responded to questions of the public, or studied the best-practice approach.[92]

This lively and multidimensional communication will assist the learning process of the regulators and accelerate the regulation-updating process to adapt with the innovation.[93] Additionally, the ESMA's role set out under DLT PilotR is expected to be effective, to the extent that it has been until now in its interaction with the EU's existing financial regulation.[94]

D CONCLUSION

DLT PilotR is one of the main initiatives under the EU's Digital Finance Strategy. The Regulation aims to support the use of DLT in securities trading and settlement, while maintain the financial stability and protecting customers' and investors' rights. Setting this as a background, this article assesses the likely efficacy of DLT PilotR based on two criteria which are also the EU's purposes when adopting legal frameworks on FinTech: (1) the ability to enable the use of new technologies in practice, and (2) the adaptiveness to technology pace.

In terms of the tech-friendly test, main components of the Regulation have been considered, namely the definitions and key concept, DLT financial instruments, exemptions and amendments to existing financial regulation, as well as the "EU passport" scheme. In light of such analysis, it can be seen that the EU's attempts to enable the use of DLT in securities trading and post-trading are incorporated into the Regulation. Especially, when compared with DLT Pilot Proposal, some provisions have been updated considerably to further ensure the smoothly practical application of DLT and uphold the tech-neutrality principles. However, there are still concerns about the market fragmentation when allowing Member States to lower the thresholds

[90] ibid.
[91] ibid; See section CII.
[92] See for example ESMA, 'Report on the DLT Pilot Regime. On the Call for Evidence on the DLT Pilot Regime and compensatory measures on supervisory data' (ESMA70-460-111, 27 September 2022); ESMA, 'Questions and Answers. On the implementation of Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology' (ESMA70-460-189, 2 June 2023); ESMA, 'Report on the DLT Pilot Regime. Study on extraction of transaction data' (ESMA12-2121844265-3182, 5 October 2023).
[93] Ringe et al (n 59).
[94] Zetzsche et al (n 22) 234.

of market value, and the "unfriendliness" of the pilot regime to new entrants. Those factors may hamper the innovation and consequently, adversely impacting the Regulation's purpose.

Regarding the test on adaptiveness, the Regulation's abilities to experiment, review and communicate have been weighed. Overall, all three abovementioned factors are embedded in DLT PilotR. With its nature similar to a *de facto* sandbox, in addition to its novel approach on governing the legal relationship in a distributed ledger, it creates a safe environment for testing DLT in securities transactions. The Regulation also sets up mechanisms to regularly update and learn the real-world developments of the intersection between regulatory attempts and DLT adoption. The communication channel among stakeholders with ESMA's central role is expected to accelerate the said learning process. Nevertheless, the nature of a regulation raises a concern over the adaptiveness because of the lengthy law-making process at the EU level, considering the rapid change of technology.

It can be observed that the theoretical test of the efficacy of DLT PilotR demonstrates some scepticisms about its practical application. There are numerous factors that have been improved in comparison to the original Proposal, but there are more that need to be done. Having said that, the article only offers an early test at this stage. The use of a word "early" highlights the fact that it may be too soon to draw any conclusion about the Regulation, considering it has been effective since March 2023 and the fact that there has been no information on DLT market infrastructures available on ESMA's website yet. Further empirical evidence and time are required, at least until the first interim report is presented, to assess the effectiveness of DLT PilotR fully, adequately, and exactly.

DATA SUBJECT ACCESS REQUESTS: AN EFFECTIVE MEANS OF PROTECTING INDIVIDUAL DATA PROTECTION RIGHTS IN IRELAND?

Lucy Walsh[*]

A INTRODUCTION

The right of an individual to have their data protected was born ancillary to other fundamental rights, primarily to the right to privacy.[1] In the context of the 'digital age' in which we currently live and the vast amount of personal data continuously collected and processed, effective data protection is now more imperative than ever.[2] While this period of rapid technological progress brings with it efficiencies, it also increases the scope for abuses of the personal rights of others.[3] Quirke opines that the legal landscape as it relates to data protection law has drastically changed since the establishment of the General Data Protection Regulation (the GDPR),[4] she resembles the current landscape to 'the hills of Donegal' in that it possesses many twists, turns and challenges.[5]

On the regulatory front, 2024 has already proven to be a busy year for legislative professionals in relation to data protection. Notably, the ink has almost dried on the EU's Artificial Intelligence Act (the AI Act), after unanimous approval of the consolidated text by the EU Council of Ministers.[6] The AI Act will become applicable, subject to some exceptions, 24

[*] Lucy is currently a third year BCL Law (Clinical) undergraduate student at University College Cork. She has recently finished her placement year in Matheson LLP's Cork Office, where she was working as a legal intern within the Commercial Litigation Department. Lucy initially developed her interest in data protection law through completing the Privacy and Data Protection module in University College Cork during her second year of college. She subsequently was involved in various data protection matters during the course of her work placement in Matheson LLP which further advanced this interest. Lucy is the current House Style Editor of Cork Online Law Review, having previously been a general board member for the 22nd Edition of the Review. Opinions expressed within this piece represent the author's own view. The author sincerely thanks the COLR faculty for their work in reviewing this piece.

[1] Giacomo Bonetto, 'Data Protection and the Exercise of the Judicial Function in Ireland' [2020] 4(2) Irish Judicial Studies Journal 61.

[2] Mr Justice Peter Charleton, 'The Impact of the Digital Age on Law' [2018] 2(1) Irish Judicial Studies Journal 65.

[3] Dr Val Corbett, 'Say "Cheese": The Legal Implications of Workplace Surveillance' (2023) 20(2) Irish Employment Law Journal 39.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[5] Maria Quirke, 'Data Matters: Data Protection Issues' [2022] 6(2) Irish Judicial Studies Journal 46.

[6] Europa, 'Artificial Intelligence Act: Deal on Comprehensive Rules for Trustworthy AI' (News European Parliament, 9 December 2023) <Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI | News | European Parliament (europa.eu)> accessed 1 March 2024.

months after it is adopted and will largely ensure that EU AI systems and models are used in an ethical, safe and respectful manner.[7] An example of an exception to this timeframe is that a shorter deadline of 6 months which will apply for prohibited AI practices. Other topical ongoing legislative developments include the Digital Services Act Package, of which the Digital Markets Act (DMA) aims to improve fairness and contestability of digital markets, and the Digital Services Act (DSA) aims to safeguard the fundamental rights of digital services users.[8] Very relevant currently is that the compliance period for the designated 'gatekeepers' under the DMA has now ended as of 6 March 2024, meaning going forward gatekeepers are expected to have made the necessary provisions to comply with obligations including, limits on data collection and use, interoperability and consumer choice, and transparency and data access.[9] Legislative developments have also included the Digital Operations Resilience Act (DORA), which applies from January 2025, and the Online Safety and Media Regulation Act 2022, which partially came into force in March 2023.[10] Despite this amalgam of key developments in the sphere of data protection, the scope of this review shall be narrowed to specifically focus on Data Subject Access Requests (DSAR's) under the GDPR.[11] The abovementioned developments, however, remain relevant, as some organisations have sought to make the DSAR process more efficient by using AI solutions, so new legislation such as the AI Act may be seen to have overlap with the DSAR process going forward.[12]

This article will firstly, in Section B, examine and provide a comprehensive background of the concept of data protection, its derivation from the right to privacy, and the correlation between the two. This will lay a contextual foundation prior to the substantive portion of this review. Subsequently, Section C of this article will engage in a detailed analysis of the legal protective measures which have been afforded to individuals' data in Ireland under the GDPR. In particular, DSAR's will be critically analysed in Section D in order to assess their effectiveness in protecting individual data protection rights in Ireland. Section E will succinctly provide concluding remarks.

---

[7] Europa Article (n 6).
[8] Mason Hayes and Curran, 'Legislative Developments in Technology Law in 2024' (6 December 2023) <Legislative Developments in Technology Law in… | Mason Hayes Curran (mhc.ie)> accessed 7 March 2023.
[9] Megan Kirkwood, 'The Digital Markets Act Deadline Has Arrived. What Does That Mean?' (Tech Policy Press, 7 March 2024) <The Digital Markets Act Deadline Has Arrived. What Does That Mean? | TechPolicy.Press> accessed 10 March 2024.
[10] MHC Article (n 8).
[11] The GDPR, (n 4).
[12] Urm Consulting, 'Is AI the Answer to Managing DSARs?' (17 October 2023) <Is AI the Answer to Managing DSARs? (urmconsulting.com)> accessed 25 March 2024.

B THE OVERLAP AND DIVERGENCE BETWEEN PRIVACY AND DATA PROTECTION

There has been considerable academic discussion as to whether the fundamental right to data protection is a subset of the right to privacy or, conversely, whether the two are merely closely linked but distinctive from one another.[13] The concept of data protection at large could be said to have derived from the concept of privacy to provide another dimension of protection to individual rights, and many of the ideologies as to the meaning of privacy overlap with the objectives that data protection measures set out to achieve.[14] As such, for the purposes of this review, it is submitted that privacy and data protection need to be considered in conjunction with one another to an extent in order to account for their substantive overlap, but ultimately they are their own separate entities with a divergence in their scope and objectives. It is informative to examine both, due to the fact that one informs the other, and to get a clearer picture as to the legal framework encompassing these areas.

I The Concept of Privacy

The scope of what the word 'privacy' covers, both in a colloquial and legal context, is vast. The philosophical grounding of the notion of privacy can be dated back as far as Ancient Greece when Aristotle equated the word *idios*, meaning ‘private’ or ‘one’s own’ to the household and treated the private in contradistinction to the public.[15] This concept was revisited and redefined numerous times by various philosophers since then to keep up with rapid societal changes. Westin’s ideology contended that privacy is all about information control and that it is the claim of every person to determine for themselves ‘when, how, and to what extent information about them is communicated to others’.[16] In a similar vein, Moor asserted that the crux of the idea of privacy is a restriction of access; which includes protection from intrusion, observation and surveillance by others.[17] These two ideologies in particular highlight the expansion of the parameters of what constitutes privacy to account for those remote privacy invasions which can occur as a result of technological developments.[18]

[13] Juliane Kokott and Christoph Sobotta, ‘The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR’ (2013) 3(4) International Data Privacy Law 222.
[14] Alan F Westin, *Privacy and Freedom* (Atheneum 1967).
[15] Judith A Swanson, The Public and the Private in Aristotle’s Political Philosophy (Cornell University Press 1994) 1.
[16] Westin (n 14).
[17] James H Moor, ‘Towards a Theory of Privacy in the Information Age’ (1997) 27(3) Computers and Society.
[18] Samuel D Warren and Louis Brandeis, ‘The Right to Privacy’ (1890) 4(5) Harvard Law Review 194.

(a) Sources of Privacy Protection

On a European level, there are two distinct but related systems to ensure the protection of fundamental and human rights – the European Convention on Human Rights,[19] and the Charter of Fundamental Rights of the European Union,[20] both of which have provisions on privacy. Article 8 of the ECHR and similarly,[21] Article 7 of the EU Charter provide that everyone has the right to 'respect for his or her private and family life, home, and communications'.[22] However, a potential restriction to the existence of this right exists within Article 52 of the ECHR, which allows for certain limitations to rights laid out in the convention, such as privacy.[23] Article 8 of the ECHR contains many broad, poorly defined concepts,[24] making it difficult to account for what it covers,[25] and its ambit has been likened to the phrase 'how long is a piece of string?'.[26] The European Court of Human Rights has consistently refused to provide a clear definition of the meaning of the term 'private life' within Article 8. In *Reklos v Greece*, it stated that:

> …according to its case-law "private life" is a broad concept not susceptible to exhaustive definition. The notion encompasses the right to identity … and the right to personal development, whether in terms of personality … or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees.[27]

However, Article 8 has proven to be adaptable and has successfully been interpreted to recognise a wide variety of matters as privacy violations since its establishment.[28] The EU Charter, entered into force by the 2009 Lisbon Treaty, strongly reaffirmed the existing rights recognised first within the ECHR.[29] It ensured that these rights could be enforced by the Court of Justice of the European Union against Member States. The landmark case of *Kruslin v*

[19] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[20] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, (EU Charter).
[21] ECHR (n 19), Article 8.
[22] EU Charter (n 20), Article 7.
[23] ibid, Article 52.
[24] *Wright v Secretary of State for Health* [2006] EWHC 2886. This case highlighted that Article 8 was quite "unruly" given its quite vague definitions.
[25] *EB v France* [2008] ECHR 509.
[26] Ameer Ismail, 'How Long is a Piece of String? The "Ambit" of The Right to Family Life Under Article 8 ECHR' (Cloisters Blog, 2022) <How Long is a Piece of String? The "ambit" of The Right to Family Life under Article 8 ECHR — Cloisters> accessed 26 February 2024.
[27] *Reklos and Davourlis v Greece*, [2009] ECHR, Application No 1234/05.
[28] *Halford v UK* [1997] ECHR. Monitoring of telephone and internet use was held to be a violation under private life and correspondence.
[29] ECHR (n 19).

France is one example of the court's interpretation of Article 8, which established the principle that any interference by public authorities in the private lives of individuals must be in accordance with the law and necessary in a democratic society.[30] This case concerned police finding evidence that Kruslin was responsible for a crime that they were not currently investigating through evidence that had been obtained through the tapping of the individuals telephone lines.[31] The ECtHR ruled that this amounted to a violation of the individual's right to privacy under Article 8, the case also led changes in French law, with the introduction of new legislation in 1991 to regulate the use of wiretapping by public authorities.[32]

Specifically in the context of Ireland, in addition to European protection systems, there is also an 'unenumerated right' to privacy in the Constitution under Article 40.[33] While the Constitution does not expressly state within its text that a general right to privacy exists, the courts recognise that the personal rights in the Constitution imply the right to privacy. However, this right may be limited or restricted by legislation in the interests of the common good, public order and morality. This was ascertained from the significant case of *Norris v Attorney General*,[34] in which David Norris challenged the criminalisation of homosexuality under sections 61 and 62 of the Offences Against the Person Act 1861.[35] He won his case on appeal to the European Court of Human Rights and, in turn, this seminal case led to homosexual activity being decriminalised within the Criminal Law (Sexual Offences) Act 1993.[36] The existence of this unenumerated right as well as other implicit references to privacy in the Constitution and the European protection framework highlights that in Ireland privacy is ‘an amalgam of several’ rights.[37]

As the framework for privacy protection expanded over time both on a European level and in Ireland, it became evident that there was a need for another dimension of robust protection, specifically for online privacy rights and personal data. These developments to the protective framework happened in parallel to digital advancements such as the rise in the use of automated technology, the expansion of the internet and more instances of platforms using data as a

[30] *Kruslin v France*, [1990] ECHR, Application No 11801/85 (Strasbourg, 24 April 1990).
[31] ibid.
[32] *Kruslin* (n 30).
[33] 1937 Constitution of Ireland, Article 40.3.1°.
[34] *Norris v Attorney General* [1983] IR 36 (SC).
[35] Offences Against the Person Act 1861, Sections 61 and 62.
[36] Criminal Law (Sexual Offences) Act 1993.
[37] Denis Kelleher, *Privacy and Data Protection Law in Ireland* (Bloomsbury Professional 2015).

method of gaining a competitive edge within their specific market. This expansive array of protective measures that came to the fore placed an emphasis on greater online privacy and knowledge of how one's personal data is being processed.

II The Concept of Data Protection

Referring back to Aristotle's distinction between the *private* and the *public*,[38] there is an evidently blurred separation line between the two when it comes to individual data. It could be posited that this is one of the greatest differences between 'real world' privacy and 'online' privacy.[39] With regards to online privacy, huge volumes of data can be collected, accessed, and combined in ways never before practical, which poses increasingly higher threats of breaches and changes to the meaning of 'public information'. [40] Personal data is often referred to as 'the new oil of the internet' or 'the new currency of the digital world',[41] as such, online violations of privacy are becoming far more likely to occur than ever before. Those who value data could gain a competitive or monetary advantage from accessing it. Although violations of online privacy could be said to be unlikely to occur since data is so ubiquitous, in theory a dominant firm could abuse its dominance by lowering the level of privacy and data protection it offers to consumers.[42] For example, Stucke argues that a dominant business '…depends on harvesting and exploiting personal data, has the incentive to reduce its privacy protection below competitive levels and collect personal data above competitive levels'.[43] Furthermore, there is potential for a business to engage in exclusionary abuse of dominant practices. In particular, a dominant firm could restrict a competitor's access to consumer data to foreclose competitor's or raise rivals' costs.[44]

These issues can be exacerbated by something known as 'the privacy paradox', which is a phrase used to describe the existence of discrepancies between user attitude and their actual

[38] Swanson (n 15).
[39] Ethiopis Tafara, 'The Importance of Protecting 'Privacy' in the Age of Digital Data' (Digital Development, 7 February 2020) <https://blogs.worldbank.org/digital-development/importance-protecting-privacy-age-digital-data> accessed 29 November 2023.
[40] Tafara (n 39).
[41] Chris Jay Hoofnagle, Bart Van der Sloot and Frederick Zuiderveen Borgesius, 'The European Union General Data Protection Regulation: What it is and What it Means' (2019) 28(1) Information and Communications Technology Law 65.
[42] Katharine Kemp, 'Concealed Data Practices and Competition Law: Why Privacy Matters' (2019) 53 University of New South Wales Law Research Series.
[43] Maurice E Stucke, 'The Relationship Between Privacy and Antitrust' (2022) Notre Dame Law Review.
[44] See for example OECD (2020), Consumer data rights and competition – Note by Canada <https://one.oecd.org/document/DAF/COMP/WD> accessed 19 March 2024.

behaviour in relation to their privacy.[45] More specifically; while users claim to be very concerned about their online privacy, they nevertheless undertake very little to protect their personal data, as revealed by recent research.[46] It is critical that effective safeguards exist to protect individual data as, while an intention to limit data disclosure exists, actual disclosure often significantly exceeds intention. Younger consumers – especially those in their 20s and 30s – are acting in greater numbers to protect their privacy, compared with older consumers, according to the Cisco 2023 Consumer Privacy Survey, which draws on anonymous responses from 2,600 adults in 12 countries.[47] Over 40% of consumers aged 18-34 have exercised their data subject access rights, enabling them to find out what personal data companies have about them.[48] Conversely, only 15% of consumers aged 55-64, and 6% of consumers aged 75 and older, have done so.[49] Individuals often share private information in exchange for retail value and personalised services. They also often trade the benefits of using superior or free services against the associated risks. Although there exists a level of hesitation when making these 'trades', this is not monumental enough to deter individuals from disclosing extensive amounts of personal information to reap the benefits of doing so, despite the potential underlying effects of this.[50] However, more positively, personal data continues to fuel the digital economy and it is essential to technological development.

(a) Sources of Data Protection

As well as the data protection rights which are extended to individuals by privacy provisions, there are also an abundance of rights which exist specifically relating to individual data. The aforementioned EU Charter makes provision for the protection of data as well as the protection of privacy.[51] Article 8 provides that everyone has the 'right to the protection of personal data concerning him or her'.[52] This provision also ensures that such data is fairly processed, for specified purposes and with the consent of the person concerned or some other legitimate basis.[53] There has been considerable attempts by the ECtHR to define 'personal data' as per

[45] Susanne Barth, 'The Privacy Paradox – Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behaviour – A Systematic Literature Review' (2017) 34(7) Telematics and Informatics.
[46] ibid.
[47] Cisco, 'Generation Privacy: Young Consumers Leading the Way' (2023) Cisco 2023 Consumer Privacy Survey <Cisco Consumer Privacy Survey - Cisco> accessed 19 March 2024.
[48] Cisco Survey (n 47).
[49] ibid.
[50] Sabrina Karwatzki and Others, 'Beyond the Personalization – Privacy Paradox: Privacy Valuation, Transparency Features, and Service Personalization (2017) 34(2) Journal of Management Information Systems.
[51] EU Charter (n 20).
[52] ibid, Article 8.
[53] EU Charter (n 20), Article 8.

Article 8 of the EU Charter and thus far it is has been interpreted broadly in various cases as including 'any information relating to an identified or identifiable individual',[54] forename and surname,[55] dynamic internet protocol (IP) address,[56] DNA samples,[57] internet usage and messaging history,[58] birth information,[59] and information relating to one's assets in divorce settlements.[60] Article 16 of the Treaty on the Functioning of the European Union ("the TFEU") obliges the EU to legislate for data protection and provide 'rules relating to the free movement of such data'.[61] In *Volker und Markus Schecke*,[62] it was contended that this fundamental right is closely connected with the right to respect of private life expressed in Article 7 of the Charter,[63] further highlighting why it is necessary to consider both when seeking to ascertain how effectively data protection objectives are being met in Ireland. This significant case also held that although data protection is an integral principle of the EU law, it is not an absolute right and must be considered in relation to its function in society.[64] The data protection rights of one individual have to be balanced with the privacy rights of others, a good example of this in practice are DSAR's, as third party personal data may not be released in a SAR. This highlights that the scope of what is included in a SAR can be subject to certain limiting factors, and as such it is important to assess if this can undermine the effective of the DSAR process.

In Ireland, basic data protection principles came about with the Data Protection Acts 1988 – 2003.[65] These acts created the independent body of the Data Protection Commission (DPC), which at the time had incredibly weak powers. However, with the introduction of the Data Protection Act 2018 (DPA 2018),[66] the powers of the DPC were expanded on rather significantly, and it is now the primary enforcer of the GDPR. The majority of the complaints and queries which the DPC receives relate to DSAR's.[67] The most significant legal protective

[54] *Amann v Switzerland* (2000) (App No 27798/95 ECtHR), para 65.
[55] *Guillot v France* (1996) (App No 22500/93 ECtHR), paras 21-22.
[56] *Benedik v Slovenia* (2018) (App No 62357/14 ECtHR), paras 108-109.
[57] *S & Marper v UK* (2008) (App No 30562/04 and 30566/04 ECtHR), paras 70-77.
[58] *Barbulescu v Romania* (2017) (App No 61496/08 ECtHR), paras 18, 74-81.
[59] *Gaskin v UK* (1989) 12 ECtHR 36, para 39.
[60] *Liebscher v Austria* (2021) (App No 5434/17 ECtHR), paras 31 and 68.
[61] Treaty on the Functioning of the European Union (TFEU), Article 16.
[62] Case C-92/09 *Volker und Markus Schecke* (9 November 2010).
[63] EU Charter (n 20) Article 7.
[64] *Volker* (n 62).
[65] The Data Protection (Amendment) Act, 2003 (DPA 2003).
[66] The Data Protection Act, 2018.
[67] Data Protection Commission, 'Data Subject Access Requests – FAQ' <Data Subject Access Requests - FAQ | Data Protection Commissioner> accessed 4 December 2023.

measures for individual data in Ireland came about with the GDPR,[68] which will apply by default to the majority of personal data processing.

C THE GENERAL DATA PROTECTION REGULATION

Upon the implementation of the GDPR in 2018 and *vis-à-vis* the DPA 2018 in an Irish context, personal data was provided with stronger armour and data subjects were afforded many more rights.[69] The implementation of this Regulation is considered the most notable and significant change in EU data privacy regulation in 20 years.[70] It applies to all member countries of the European Union. One of its key objectives is safeguarding the right of natural persons to the protection of personal data, by establishing new rules for the handling of personal data by organisations.[71] The effectiveness of this Regulation is reinforced by the fact that organisations must comply and there are substantial penalties for non-compliance. The key provisions of the GDPR set rules relating to the processing of personal data and the free movement of data to protect natural persons.[72] It also very succinctly defines personal data as relating to any information which can directly or indirectly identify an individual, such as an IP address, cookies, digital footprints and location data.[73] This definition is capable of a broad interpretation which is useful due to the ever-evolving nature of what kind of data can be used and processed. Under the GDPR, individuals have the right to access their data, request its deletion, and restrict its processing.[74] Organizations are required to obtain explicit consent for data processing, implement robust security measures, and notify individuals in the event of a data breach.[75]

The GDPR also introduced the concept of 'privacy by design', which requires organizations to consider data protection and privacy principles from the inception of any new project or system.[76] Essentially doing anything with personal data is considered processing, it can include

[68] The GDPR (n 4).
[69] ibid.
[70] Matt Davis, 'GDPR Compliance Regulations: The 12 Biggest Need-to-Knows' (21 July 2022) <https://www.osano.com/articles/gdpr-compliance-regulations> accessed 9 April 2024.
[71] Davis (n 70).
[72] ibid.
[73] ibid.
[74] Privacy Engine 'Exploring the History of Data Subject Rights Requests' (1 August 2023) <Exploring the History of Data Subject Rights Requests - PrivacyEngine> accessed 4 December 2023.
[75] ibid.
[76] Privacy Engine (n 74).

collection, recording, organisation, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.[77] Lawful, fair and transparent processing is the cornerstone principle governing personal data; with processing needing to be done for specified, explicit and legitimate purposes.[78] The data being processed must be limited to what is necessary for the purposes which it is being collected, data stored must be accurate and up-to-date, personal data must not be kept for longer than needed, and it must be kept safe and confidential.[79] The GDPR has encouraged development of innovative technologies and solutions to help organizations comply with its requirements, including anonymization techniques and encryption, as well as data protection impact assessments to identify and mitigate privacy risks.[80] The principle of accountability is the overarching principle of the GDPR and this need for compliance by organisations and the need to have reviewed and updated measures renders the GDPR hugely effective in achieving Westin's objective of 'privacy as information control'.[81]

A contemporary issue in this regard is the concept of 'pay-or-ok'.[82] This is because Meta began charging European users €9.99 if they refused tracking for personalised ads, relying on consent as a legal basis, despite such consent not being 'freely given', which raises questions around informed consent and a clear opt-out option.[83] Meta have since dropped the fee to €5.99, however there is growing concern that other platforms will adopt this framework, resulting in the right to data protection no longer being fundamental, but rather unaffordable.[84] Notably, the European Data Protection Board's Opinion and Guidelines on 'pay-or-ok' should be just around the corner,[85] which could lead to the Commission taking enforcement actions against companies found to be in violation of EU law, such as the GDPR. According to Tobias Judin, head of the international section at the Norwegian data protection authority 'This is a huge fork in the road. Is data protection a fundamental right for everyone, or is it a luxury reserved for

[77] The GDPR (n 4).
[78] ibid (n 4), Article 5(1)(a), Article 5(1)(b).
[79] ibid, Article 5(1)(c), Article 5(1)(d), Article 5(1)(e).
[80] Privacy Engine (n 74).
[81] Westin (n 14).
[82] IAPP, 'Implications of EDPB's Looming 'Pay or OK' Guidelines' (20 February 2024) < https://iapp.org/news/a/privacy-and-adtech-implications-surrounding-metas-pay-or-ok/#> accessed 25 March 2024.
[83] ibid.
[84] Rosie Evans, 'Pay-or-OK – An Update' (23 March 2024) < https://www.linkedin.com/pulse/pay-or-ok-update-rosie-evans-rpkwe/?trackingId=OuFxPrRaSyCGa0YgOV2NHA%3D%3D> accessed 25 March 2024.
[85] ibid.

the wealthy? The answer will shape the internet for years to come'.[86] It is contended that this limelight on issues within the data protection sphere further emphasises the importance of considering how well individual data protection rights are protected and how they could potentially be better protected. Moreover, the increased use of AI in relation to data protection, for example within the DSAR process, also highlights the significance of the scope of this article in examining the effectiveness of the current legislative framework.

D DATA SUBJECT ACCESS REQUESTS

Data subject rights refer to the legal rights individuals have over their personal data. These rights are designed to empower individuals and give them control over how their data is collected, used, and shared by organizations.[87] Furthermore, data subject rights help to rebalance the power dynamic between individuals and organizations.[88] By empowering data subjects with legal rights and remedies, they can address any misuse or mishandling of their personal data.[89] There have been several pivotal cases regarding data subject rights which have provided clarification on the scope and boundaries of these rights over the years as well as setting important legal precedents. One such case is the *Google Spain* case, which affirmed an individuals' 'right to be forgotten', by allowing them to request the removal of search results containing personal information that is inaccurate, outdated, or no longer relevant.[90] This case came about prior to the implementation of the GDPR, but provided interesting precedent on the stance of the CJEU when balancing the data subject's right against the interest of the general public to access his or her personal information.[91] This case highlighted the emphasis the court places on ensuring individual data rights are effectively protected, and since the GDPR became applicable in 2018 it is evident from the various DSAR cases that the protection of individual data remains a primary motive of the CJEU. Provision is made for DSAR's under Article 15 of the GDPR.[92] This gives individuals the right to confirmation as to whether or not personal data relating to them are being processed, certain prescribed information about the processing of

[86] Preisel & Co, 'EDPB Considering the 'Consent or Pay' Model' (29 January 2024) < https://www.preiskel.com/edpb-considering-the-consent-or-pay-model/> accessed 25 March 2024.
[87] Privacy Engine (n 74).
[88] ibid.
[89] Privacy Engine (n 74).
[90] Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (13 May 2014).
[91] ibid.
[92] The GDPR (n 4), Article 15.

their data, and a copy of their personal data.[93] Similarly to data protection rights in general, an individual's right of access is not absolute and is subject to certain statutory exemptions.

I Examining the Effectiveness of the Current System

(a) Time Limitations for Responding to a DSAR

Organisations generally take four key operational steps on receipt of an access request, including: assessing the validity of the access request, searching for personal data relating to the requester, considering whether any statutory exemptions apply, and responding to the request.[94] Controllers who receive a valid subject access request must respond to the request without undue delay and at the latest within one month of receiving the request. If an employer looks to extend the period for response by a further two months due to the 'complexity' of the request, the employee must be contacted within one month about the extension and why it is necessary.[95] An employer's data protection policy dealing with DSAR's should ideally address where a DSAR crosses a threshold from being routine to being 'excessive' or complex.[96] If the policy is applied consistently and fairly by an employer, it will most likely be taken into account by the DPC in determining whether a request by a data subject is in fact excessive. These time limitations can prove to be challenging and some organizations struggle to meet the strict deadlines outlined in the regulation due to the time-consuming nature of DSAR processes.[97]

Delays can impede individuals from promptly accessing and rectifying their data, diminishing the intended empowerment of data subjects. Whilst DSAR's are very effective at providing control to the data subject over their information to a certain extent, they could be further improved upon if more emphasis was placed on addressing delays. If primary causes for delay were identified, mechanisms could be implemented to minimise this delay and ensure DSAR processes get completed in a timely and efficient manner. Subsequently in part (c) of this section it shall be highlighted that AI integration into the DSAR process may be the solution to addressing these delays.

[93] The GDPR (n 4).
[94] Davinia Brennan, 'The New Guidelines on Access Requests – Is the Bar Now Too High?' (2022) 15(2) Data Protection Ireland 1.
[95] The GDPR (n 4), Article 12(3).
[96] Cormac Murphy, 'Dealing with Data Subject Access Requests' (Legal Island, 30 July 2019) <Dealing with Data Subject Access Requests (legal-island.ie)> accessed 4 December 2023.
[97] ibid.

(b) The Scope of Information Included in a DSAR

There are instances where organizations may deploy legal mechanisms to limit the information disclosed in response to a DSAR. For example, an employer can restrict data from the data subject's request, if necessary and proportionate to do so, because legal proceedings are contemplated or ongoing and/or it is in the public interest to restrict the data.[98] This raises questions about the practical realization of transparency and the extent to which individuals can truly comprehend the scope and nature of data processing activities involving their personal information.

Interestingly, a recent DPC decision held that this test of necessity and proportionality is also required when withholding data from the data subject on the basis of legal privilege, even though the test is not included in the wording of the DPA.[99] Although this position could be challenged in the future, as the law currently stands employers need to take extra consideration than explicitly provided for in the law when looking to withhold documents from an employee in a contentious investigation, disciplinary or appeals process on the basis of legal privilege. This emphasises the ongoing efforts to strike a balance between individual data protection rights and the legitimate interests of data controllers, and the aim to ensure the effectiveness of data subject access requests in protecting individual data protection rights. In this regard it is evident that the scope of information included in a DSAR is supportive towards effectively meeting the objective of enhanced protection of individual data protection rights.

If a data subject is not satisfied with how an organization handles a DSAR request which they submitted to them, the data subject can lodge a complaint with the DPC. If the DPC sees it as appropriate following an investigation, they may intervene or take enforcement action against the organization to resolve the matter. The DPC is concerned, in particular that there is a pattern of data controllers not performing adequate searches for personal data, not informing individuals that they are withholding data and the exemption that they are relying on for same, and not responding within the statutory timeframe.[100] In 2022 alone the DPC received 1,142

[98] The GDPR (n 4), Article 15.
[99] Data Protection Commission, 'Inquiry concerning the Department of Health – June 2023' (16 June 2023) <Inquiry concerning the Department of Health - June 2023 (PDF, 1.35mb)> accessed 4 December 2023.
[100] Davinia Brennan, 'Responding to Data Subject Access Requests – Legal Certainty Ahead?' (12 January 2023) <https://publications.matheson.com/data-protection-technology-and-cyber-security-bulletin-jan-2023/responding-to-data-subject-access-requests-legal-certainty-ahead > accessed 10 April 2024.

new access complaints and concluded 1,225.[101] This has proven to be a very effective system as the involvement of the DPC tends to incentivise organizations to comply and can lead to an amicable resolution. The DPC plays a crucial role in ensuring compliance with the GDPR and in assisting individuals in enforcing their data protection rights against controllers. In this regard the current system can be merited due to the evident success of the DPC in resolving access complaints.

(c) Potential Implications of AI on the DSAR Process

As was briefly noted earlier in this piece, AI and AI solutions are beginning to have increased use in the DSAR process. This can very effectively increase the efficiency of the process but there are also many compelling reasons for being cautious around using AI exclusively to complete DSARs.[102]

AI can be very useful in the automated retrieval of personal data relevant to a DSAR as it can offer exceptional functionalities such as easily eliminating duplicate entries, providing data version control and programmed data redaction where sensitive or confidential information in documents being provided in response to a DSAR are automatically removed or masked.[103] AI is also evidently very promising of benefits such as consistency and time efficiency, particularly where large numbers of DSARs are being received.[104] Automation of the data being processed will help the controller to fulfil the DSAR in record time. Adopting automation is part of privacy by default and design which the GDPR mandates.

On the contrary, it is important that it is recognised that AI may pose risks to the current DSAR process, and these risks will need to be mitigated through robust regulation, which recent developments such as the AI Act will play a key role in providing. One of the key issues with AI algorithms is that it is difficult for organisations to understand how decisions are being made and to explain those decisions to data subjects due to problems such as a general lack of transparency and interpretability.[105] Moreover, AI cannot take the place of human judgement,

[101] Data Protection Commission, 'The Data Protection Commission Annual Report 2022' (2022) <Data Protection Commission publishes 2022 Annual Report | 07/03/2023 | Data Protection Commission> accessed 5 December 2023.
[102] Urm Consulting (n 12).
[103] ibid.
[104] ibid.
[105] ibid.

as it lacks contextual understanding and nuanced decision-making.[106] Human judgment considers multiple factors, ethical considerations and reasoning which AI systems can struggle with.[107] On balance, it appears that the best way forward for organisations would be the adoption of a hybrid approach, which would combine automation and human resources in managing DSARs. This would effectively leverage the efficiency of AI while also having human judgment to ensure reliable and accurate DSAR responses for individuals seeking to assert their data access rights.

(d) The Relationship Between DSAR'S and Discovery

In the context of litigation, DSAR's are often used as a tool by litigants as an attempt to avail of information earlier than required by discovery disclosure, or in advance of any formal discovery orders. In the Irish case of *Dublin Bus v Data Protection Commissioner* it was held that the existence of legal proceedings between a data requester and a data controller does not preclude the requester from making a DSAR, nor does it justify the data controller refusing the request.[108] In *Kinsella v Wallace, Monaghan and Bank of Scotland Plc*, the Irish High Court noted that a party cannot claim, in response to a request for discovery, that his opponent does not require discovery of certain documents as that party has already obtained copies of these documents by way of a DSAR.[109] This position was reiterated in *Susquehanna International Group Limited v Daniel Needham*, in which the court held that there was no reason why information that can be obtained through a data access request cannot be the subject matter of a request for discovery.[110] This illustrates a court move towards prudence in the face of costly and time consuming discovery process. This highlights how DSAR's can be effective in helping the plaintiff access their data quicker in the context of a discovery, but this will have implications on the defendant in the legal proceedings as greater time constraints will be put in place with the DSAR request alongside the discovery.

[106]Ayaz Ahmed, 'Relevance of Human Judgement in the Age of AI' (5 October 2023) <https://www.linkedin.com/pulse/relevance-human-judgement-age-ai-ayaz-ahmed/ > accessed 25 March 2024.
[107] ibid.
[108] *Dublin Bus v Data Protection Commissioner* [2012] IEHC 339.
[109] *Kinsella v Wallace, Monaghan and Bank of Scotland Plc* [2013] IEHC 573.
[110] *Susquehanna International Group Limited v Daniel Needham* [2017] IEHC 706.

E CONCLUSION

Overall, it is concluded that the current system of DSAR's is evidently very useful at providing another dimension of protection to individuals over their data and giving them enhanced control over their data being processed. DSAR's give more power to individuals in the context of their dealings with organisations as they have the ability to file a complaint with the DPC to ensure that they get a satisfactory response to their DSAR. As mentioned, the key issue as it stands seems to be time limitations and the delays which can occur in the DSAR process which should be addressed going forward to ascertain if delays can be reduced. However, as noted, increased automation or the use of AI alongside human oversight could make things run more seamlessly and diminish these delays. Looking forward in the sphere of data protection; emerging technologies such as blockchain, quantum computing, and biometrics are poised to have a profound impact on data subject rights.[111] These technologies offer new opportunities for secure data sharing, enhanced privacy, and improved data accuracy.[112] However, they also introduce unique challenges, such as the need for robust encryption, protection against quantum threats, and safeguards against potential misuse of biometric data.[113] Data protection provisions will need to be adapted to account for these advancements and to continue to protect and strengthen data subject rights.

[111] Privacy Engine (n 74).
[112] ibid.
[113] ibid.

A COMPARATIVE ANALYSIS OF EU AND CANADIAN COMPETITION LAW: LESSONS TO BE LEARNED FOR REGULATORY REFORM

Liam Brunton*

A INTRODUCTION

Canada and the European Union (EU) are both well-regarded internationally for having robust competition law regimes. Canada, being the country with the oldest post-industrial competition law regime in the world[1], has had over a century to work on refining their framework. Whereas the EU, being a relatively 'newer' political union, has been able to look to regimes found around the world and within their very own Member States in constructing their more modern framework. Both systems have fleshed out substantive competition enforcement and regulatory regimes that were designed to meet their respective needs.

In Canada, the geography and size of the country, in addition to its wealth of natural resources, have assuredly impacted the evolution of its competition regime. Whereas the EU's fundamental goal of creating and protecting the single market has had a different, yet equally important impact on its regime. The differing aims and foundations of the Canadian and EU competition regimes have fostered particularities that do not exist in the other regime; and these particularities form the basis for a robust comparative analysis.

Through conducting this comparative analysis, this paper will seek to isolate key successes within one regime that could ultimately lead to effective regulatory reform in the other. To this effect, this paper will first provide a contextual analysis of the underlying frameworks of both regimes. The paper will then discuss specific shortcomings within both regimes, followed by a comparative analysis of success factors in either regime: most notably, their ability to adapt,

---

* Liam is a graduate of the Bachelor of Civil Law & Juris Doctor program at McGill University's Faculty of Law in Montréal, Canada. Upon the completion of his legal studies, Liam undertook a 5-month stage in the cabinet of a member of the Court of Justice of the European Union in Luxembourg. Prior to his legal studies, Liam completed a Bachelor of Commerce at the University of Ottawa and followed Masters' courses at KEDGE Business School in Bordeaux, France. Liam's research interests include competition law, tax law, administrative law, constitutional law, language rights, and the intersection of law and democracy. Liam's interest in competition law stems primarily from his four years working at the Competition Bureau of Canada. While at the Bureau, he worked in the International Affairs Directorate, the Cartels Directorate, and in the Policy and Advocacy units. The views expressed in this article, however, are those of the author alone.

[1] Edward Iacobucci, 'Chapter 3: Canada' in Eleanor M Fox and Michael J Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013) 109.

and their degrees of compliance. Finally, the paper will touch on areas where either regime could learn from the other, with brief recommendations for regulatory reform.

B THE UNDERLYING LEGISLATIVE FRAMEWORKS IN CANADA AND THE EU

Before assessing the relative strengths and weaknesses of either regime, it is important to understand the underlying legislative and constitutional frameworks that enable them. This section of the paper will look to the key legislative and constitutional authorities from which both regimes derive their power. Additionally, various historical and political issues rooted within these constitutional matrices will be discussed to provide a contextual analysis for the modern versions of both regimes that are in force today.

I The Foundation of the EU's Competition Law Framework

The EU's competition regime derives much of its regulatory and legislative authority from the *Treaty on the Functioning of Europe* (TFEU), and more specifically, from articles 101 through 109 of the TFEU.[2] Of course, there are additional Directives and Regulations which have been initiated by the European Commission Directorate General for Competition (the Commission) that further flesh out the Commission's ability to regulate mergers, cartels, abuse of dominance, and many other competition-related activities. Two such examples that deal with merger regulation are Directive 2005/56/EC on Cross-Border Mergers, and the Economic Concentration Regulation 139/2004.[3]

Article 105 TFEU empowers the Commission to investigate and enforce the competition-related provisions of the Treaty.[4] These provisions broadly cover anticompetitive effects related to the formation of cartels and collusion, abuse of dominance in a market, merger control, and remedies for market distortions brought about through state aid.[5] What is noteworthy here is that the Commission both performs an investigatory role, and is also subsequently responsible for sanctioning anticompetitive behaviours.[6] In this sense, the EU's competition regime is an administrative-centred enforcement system, whereby the Commission investigates and

[2] Ioannis Lianos, 'Chapter 9: The European Union' in Eleanor M Fox and Michael J Trebilcock(eds.), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013) 385-387.
[3] ibid 387.
[4] ibid 388.
[5] ibid.
[6] ibid 390.

enforces unilaterally. However, judicial review of the Commission's decisions may be sought at the European Court of Justice (ECJ) and the General Court.[7] According to *Les Verts v. European Parliament*, all actions taken by the Commission and the Member States when enacting EU law are subjectable to judicial review.[8]

Another particularity of the EU's system is its dual enforcement competencies. Here, enforcement is achieved both by the Commission, and by the Member States' national competition authorities. This remains the case despite the Lisbon Treaty shifting the field of competition law to an area of exclusive EU competence in 2009.[9] As such, the multilevel governance structure borne out of the EU's unique federalist model as it relates to competition can be confusing at times.

Additionally, due to the EU's unique political makeup, the EU's competition regime must prioritise the creation and protection of the single market, which may inherently result in market inefficiencies, on top of other aims, such as consumer welfare.[10] This need to prioritise the single market has led to criticisms that the EU's regime, in certain instances, may not be able to properly defend consumer welfare. As in the EU, the protection of the single market must be prioritised when pitted against any other issue.[11]

(a) Multilevel Governance and EU Competition Law

The federalist structure of competition law competence in the EU is muddled. Prior to the enactment of the Treaty of Lisbon, many believed that competition law was an area of shared legislative competence between the Member States and the EU.[12] However, since 2009 and the Treaty's enactment, it is widely accepted that competition law falls almost exclusively within the jurisdiction of the EU.[13] Yet, according to Türk, there is no 'coherent, developed doctrine on competence allocation "in the sense of a self-standing, systematically-ordered construct".'[14] This lack of a clear allocation of competence leaves room for significant confusion as to who is 'in charge' in some instances.

[7] ibid.
[8] ibid 399.
[9] Alex Türk and Chris Townley, 'The Constitutional Limits of EU Competition Law – United in Diversity' (2019) 64(2) Antitrust Bulletin 235, 241.
[10] Roger Van der Bergh, *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017), 87.
[11] ibid 110.
[12] Türk (n 10).
[13] ibid.
[14] ibid 242.

According to the Treaty on the European Union (TEU) Member States must confer competences onto the EU to achieve their common goals[15], and the EU can only act 'within the limits of the competences conferred upon it by the Member States in the Treaties.'[16] Article 3(1)(b) of the TFEU grants exclusive competence to the EU to regulate 'the establishing of the competition rules necessary for the functioning of the internal market.'[17] In areas of exclusive competence, it is only the EU that can legislate and adopt legally binding acts.[18] As such, *prima facie*, it would seem that any competition-related legislation adopted by the Member States would not be legally binding. Yet, this does not align with the current practice whereby Member States also play an active role in competition legislation and enforcement. Indeed, to resolve this discord one must look no further than the wording of Article 3(1)(b), 'establishing of the competition rules *necessary for the functioning of the internal market*'. Where competition laws and rules are enacted by Member States that do not directly impact the functioning of the internal market, the Member States have a legislative and regulatory right of way.

Moreover, Article 105 of the TFEU provides that Member States can and should assist the Commission with competition enforcement.[19] Because of this joint-enforcement mandate, Member States must be able to create procedural rules and laws that help them enforce competition. Enter Article 103(2)(e) TFEU, which essentially allows the Commission to 'determine the relationship between national laws' and the [competition provisions of the TFEU]' acting as a pseudo-loophole to the EU's exclusive competence.[20] Through Article 103(2)(e), so long as the EU has not put forth legislation, or pre-empted a Member State from doing so, the Member States are free to pass national laws pertaining to competition.[21] However, if at any point the Commission did pass a law related to their competition competence that clashed with a Member State's national laws, the Commission's legislation would prevail.[22] As such, national competition authorities do play an important legislative role in competition law within the EU—but when necessary, they are required to take a back seat to the Commission.

[15] *Treaty on European Union* [2010] OJ, C 83/01, art 1. (TEU).
[16] ibid art 5(2).
[17] *Treaty on the Functioning of the European Union* [2016] OJ, C 202/150, art 3(1)(b).
[18] Türk (n 10) ,247.
[19] ibid 342.
[20] ibid 337.
[21] ibid.
[22] ibid.

Where things can get more complicated is when one assesses the shared competence of multileveled enforcement. There are two types of competition enforcement under Articles 101 and 102 of the TFEU: 1) enforcement that is led by the Commission (with support from the national competition authorities); and, 2) enforcement that is led by the Member States where the national competition authority is acting in their own right.[23] In the first case, multilevel enforcement is rather simple, as the Commission has initiated proceedings and will therefore take the lead, with the support of Member States when required. Multilevel enforcement becomes more complicated in the second scenario, as we must remember, it is the Commission that has exclusive competence over competition rules in the internal market.

Article 11 of Regulation 1/2003 provides a framework for enforcement cooperation between the Commission and the Member States in such an instance.[24] According to Article 11(6), as soon as the Commission initiates competition proceedings, the Member States are relieved of their competence in the file at hand.[25] Furthermore, it goes on to say that if the Member State is already acting in a case, then 'the Commission shall only initiate proceedings after consulting with that national competition authority.'[26] In such a case, the Commission can still choose to initiate proceedings—essentially overriding the Member State's case—but only if they deem this is the best course of action, and after liaising with the Member State. This sort of 'backstop' is the EU's way of resolving conflicts that might arise from multilevel enforcement. That is not to say that conflict does not still arise.

The ECJ and the General Court have been called on in various files to determine the ambit of Article 11(6). For example, in *Toshiba Corporation*, Advocate-General Kokott stated that in regards to Article 11(6), once the Commission has finished acting, national competition authorities can act as well, allowing them a mode of recourse should they be dissatisfied with the Commission's findings.[27] Furthermore, in *France Télécom*, the CJE stated that as long as the Commission acts in line with Regulation 1/2003, then they are not infringing the Member States' rights or breaching the subsidiarity principle.[28]

[23] ibid 338.
[24] ibid.
[25] ibid.
[26] ibid.
[27] *Case C-17/10 Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže* [2011] ECLI:EU:C:2011:552.
[28] *Case T-339/04 France Télécom SA v. Commission* [2007] ECR II-521, 79.

Essentially, through an analysis of the Treaties and the rulings of the CJE, it is clear that the Commission has the 'right of way' when it comes to initiating competition proceedings and legislation. However, the Member States play a role in legislating and enforcement as well. The Commission, like any regulator, has its limits, whether they be budgetary or otherwise. As such, they will inevitably have to be selective in which cases they pursue. It is helpful to have support from national competition authorities who can fill in the gaps—both by initiating their own proceedings and in supporting the ongoing files of the Commission'. Furthermore, not all anticompetitive conduct within the Union will fall within the broad scope of the Commission's mandate of 'protecting the internal market'. In these cases, a more localised approach may be preferable—and here, the national competition authorities can play a more important role.

(b) The Relationship Between EU Competition Law and the Single Market

One of the ultimate goals of the EU is the integration and protection of the single market across Member States, and this goal is intrinsically linked with the EU's competition regime.[29] This link is highlighted in Protocol No. 27 of the EU, which states that 'the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted.'[30]

Van der Bergh explains that while EU competition law may not have a unifying economic goal, the uniting principle of EU competition law can be found in its political aim of achieving and protecting the single market, as per Article 3(3) of the TFEU.[31] Furthermore, he explains that the relationship between EU competition law and the single market has been evolutive insofar as EU competition law is no longer seen simply as an *instrument* within the Union, rather as an *objective means of accomplishing* the internal market.[32]

To this effect, when the Commission is enforcing and assessing EU competition law, it is understood that there is an important overarching goal of breaking down barriers between Member States and the Union. As such, EU competition law not only attempts to protect competition, but must inherently also seek to remove economic barriers between the economies

[29] Lianos (n 2) 406.
[30] ibid.
[31] Van der Bergh (n 10) 105.
[32] ibid 106.

of Member States such that 'neither Member States nor private enterprises may engage in practices that are in conflict with or undermine the unification of the European market.'[33]

This position has been further integrated into EU law through the CJE's interpretation of competition law cases. For example, in the *Grundig* decision, the CJE found that business activities, just as much as regulation, can have the potential to partition markets and that these types of private barriers are fundamentally contrary to the establishment of the single market.[34] It is therefore because of the link between competition law and the single market that such activities must be expressly prohibited.

While such a goal is laudable, the link between competition law and the single market can also be viewed as problematic insofar as through the prioritisation of the single market, the EU's competition law regime may have to allow for certain market inefficiencies. Indeed, a hierarchy whereby the needs of market integration supplant other competition law aims, such as the consumer welfare aim of competition law, may be the root cause for certain market inefficiencies. Van der Bergh highlights two such examples: 1) the banning of absolute territorial protection; and, 2) the hesitation to allow price discrimination between Member States.[35] In the context of the latter example, it is easy to see how across the expanse of the Union, price uniformity will be beneficial for some and disadvantageous for others. Due to this disparity, the absence of price discrimination which would be a goal of the single market, can have harmful effects on consumer equity and the overall efficiency of the market; both of which are traditionally intended to be protected by competition law regimes.[36]

Consequently, while in many situations the goals of the single market and the goals of the EU's competition framework can be harmonious, there are scenarios where this link can become problematic, to the detriment of consumer welfare and market efficiency. This is because when the aim of market integration is pitted against consumer welfare aims of competition law, the former must necessarily supersede the latter.

[33] ibid 109.
[34] ibid 110.
[35] ibid.
[36] ibid.

II The Foundation of the Canadian Competition Law Framework

Canada's competition regime has evolved significantly since its first iteration, and with this evolution, its enforcement capabilities have improved drastically. Canada's first piece of competition legislation, which dates back to 1889—only included criminal provisions and lacked any form of enforcement agency, essentially relying entirely on individual complaints.[37] In the most recent iterations of the Canadian competition law regime, significant portions of previous Acts that had historically prompted criminal sanctions are now dealt with civilly.

The modern Canadian competition law regime derives its authority from the Competition Act, which is administered and enforced by the Competition Bureau. The Competition Act broadly covers enforcement areas related to cartels, deceptive marketing practices, monopolistic practices, and merger review.[38] The adjudication of competition law matters in Canada is then executed through a 'two-track', or bifurcated, system whereby matters imposing criminal sanctions are referred to the Attorney General to be enforced in conjunction with the Bureau in ordinary courts, and matters imposing civil sanctions are adjudicated by the Bureau at the Competition Tribunal.[39] Under the current Competition Act, the main area of anticompetitive practices dealt with through criminal law are hardcore cartel-related activities, such as various forms of collusion, and bid-rigging. Additionally, some forms of deceptive marketing practices entail criminal sanctions. Whereas the other areas dealt with by the Act, such as monopolistic practices and merger review are now more appropriately dealt with civilly.

This shift towards civil enforcement has had a significantly positive effect on the effectiveness of the enforcement of competition law in Canada. Under the prior criminal-law focused regime, when prosecuting various aspects of the Act, the burden placed upon the enforcement agency was incredibly high. Furthermore, the Supreme Court of Canada and Federal Court of Appeal adopted very narrow interpretations of competition provisions in decisions such as *Atlantic Sugar Refineries,*[40] *KC Irving Ltd,*[41] and *Superior Propane.*[42] The combination of the high burden of proof in criminal matters and the narrow interpretation of competition law provisions

[37] Thomas W Ross, 'The Evolution of Competition Law in Canada' (1998) 13(1) Review of Industrial Organization 1, 3-4.
[38] Iacoubucci (n 2) 116.
[39] ibid 112.
[40] *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 SCR 644 (A*tlantic Sugar Refineries*).
[41] *R. v. K.C. Irving, Ltd. et al.*, [1978] 1 SCR 408 (*KC Irving Ltd*).
[42] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2003] FCA 53 at 73 (*Superior Propane*).

by the Supreme Court made enforcement incredibly difficult. By switching the enforceability of many offences under the Act from criminal to civil, not only did enforcement become more efficient and predictable, but in specific cases like merger reviews, the process was made 'more appropriate to the evaluation of complex situations over which reasonable people (even experts) could disagree'.[43] This shift streamlined many of the enforcement processes at the Bureau. However, there are still some issues within the Act that remain contentiously restrictive due to the narrow interpretations they have been given by the Supreme Court.

(a) Canadian Federalism: An Historical Barrier to Effective Competition Enforcement

The European Union is not the only jurisdiction which has experienced complications regarding its competition law regime that stem from its federalist structure. Canada's federalist design has also historically hampered its competition enforcement capabilities. In the case of Canada, this struggle first manifested shortly after the First World War. Indeed, in 1919, the federal government recognised how practically restrictive their criminal law approach to competition enforcement was in the wake of a rapid rise in the post-war cost of living in Canada.[44] Consequently, the government introduced the Board of Commerce Act and the Combines and Fair Prices Act. These two pieces of legislation introduced a more regulatory and administrative approach to competition enforcement which included civil remedies to streamline the enforcement of competition.[45] However, the Acts were found to be beyond the competences of the federal government competence in the *Reference on the Board of Commerce Act and Combines and Fair Prices Act of 1919* after being appealed to the Privy Council from a split 3-3 judgment at the Supreme Court of Canada. It was determined by the Privy Council that the Acts infringed on the provinces' exclusive competence over matters concerning property and civil rights stemming from s 92(13) of the Constitution Act.[46] As a consequence of the *Reference*, Canada's competition law regime could only derive authority from the federal government's criminal powers.

In 1935 the federal government once again saw the Privy Council's decision in the *Reference* reinforced when the Supreme Court struck down the Dominion Trade and Industry Commission Act.[47] This Act attempted to create a preliminary iteration of the Competition

[43] ibid 15.
[44] Iacobucci (n 2) 110.
[45] ibid.
[46] *Re Board of Commerce Act and Combines and Fair Prices Act of 1919* [1920] 60 SCR 456. (*Reference).*.
[47] Iacobucci (n 2) 110.

Bureau and once again expand the scope of competition enforcement. Here too the modernisation attempt was found to have exceeded the legislative authority of the federal government by encroaching on the jurisdiction of the provinces.[48] For the following decades competition enforcement in Canada stagnated and saw very few successful enforcement decisions. A handful of price-fixing cases would be successful, but barely any mergers or monopolistic practices cases would be brought forward—and almost all of those that were brought forward failed.[49]

Finally, in 1976 and 1986 a series of amendments would dawn a new age in Canadian competition policy. In 1976 the government would create new regimes for some criminal offences, such as bid rigging and private rights of action to criminal provisions of the Act.[50] The amendments also brought forward a slew of civilly reviewable anticompetitive practices, such as refusals to deal and exclusive dealing.[51] Of course, these amendments would not go without judicial review as well. The amendments were challenged in the *General Motors Canada v. City National Leasing* case at the Supreme Court, where the Court ruled that the amendments did not impugn the province's rights under s 92(13) of the Constitution Act.[52] Rather, the Court found that the amendments fell within the ambit of the federal government's competence under s 91(2) of the Constitution Act, which grants them legislative authority over trade and commerce.[53]

Consequently, the federal government finally overcame the federalist issues surrounding its inability to enforce competition law civilly. This led to an even more important overhaul of the Canadian competition regime in 1986 which would create the Competition Act and the Competition Tribunal, both of which remain in force today.[54] While various amendments have occurred over the years, the basic structure of the Competition Act has remained the same since 1986.[55]

[48] ibid.
[49] ibid.
[50] ibid 111.
[51] ibid.
[52] *General Motors of Canada Ltd. c. City National Leasing* [1989] 1 SCR 641.
[53] ibid.
[54] Iacobucci (n 2) 112.
[55] ibid.

(b) The Bifurcated Model and the Independence of the Competition Tribunal

A major distinction between the Canadian regime and the European regime relates to its bifurcated model of competition enforcement. In Canada, while the Competition Bureau investigates and enforces the Competition Act, it is the Competition Tribunal and the normal criminal courts which are responsible for the adjudication of competition law matters. The creation of the Competition Tribunal, which accompanied the revamped Competition Act in 1986, was an additional byproduct of the enhanced civil jurisdiction of Canada's competition regime which has led to further efficiencies in competition enforcement. The Tribunal acts as an adjudicative body for the enforcement of civilly reviewable competition law matters on application from the Commissioner of Competition.[56] To this effect, it is within the Tribunal's purview to allow, disallow or modify mergers, as well as enact prohibition orders against various anticompetitive activities.[57] Furthermore, the Tribunal maintains the power to administer remedial orders, such as administrative monetary penalties (AMPs) as a form of civil remedy (distinct from a criminal fine) in order to promote compliance with the Act regarding various anticompetitive effects, such as abuse of dominance.[58] These AMPs can reach maximum penalties of up to 10 or 15 million dollars, depending on the specifics of the case.[59] Of course, as stated before, matters that are criminally reviewable are referred to the Attorney General to prosecute in cooperation with the Bureau at the provincial superior courts. Therefore, the Canadian regime is bifurcated in two distinct ways: 1) in its bifurcation of how it treats criminally and civilly reviewable matters; and 2) in its bifurcation of the role that agencies play, whereby the Competition Bureau investigates and enforces, while the Competition Tribunal and provincial courts adjudicate.

The Competition Tribunal is comprised of judicial officers, who are also judges of the Federal Court, as well as expert lay members, who are often economists or business practitioners with a strong knowledge of competition issues.[60] Cases at the Tribunal are heard by panels of judges, which will be composed of both judicial and lay members. In this formulation, the judicial

[56] Ross (n 38) 12-13.
[57] ibid.
[58] Competition Act, RSC 1985, c C-34, s 79(3.3) (Competition Act).
[59] ibid, 79(3.1).
[60] Thomas Colin, 'Interview with Denis Gascon, Chairperson of the Canadian Competition Tribunal' (*The Antitrust Source June* 2017), <https://www.ct-tc.gc.ca/en/tribunal/documents/jun17_gascon_intrvwC.pdf>, accessed 1 April 2024.

members of the Tribunal will determine matters of law, and the lay members will assist the judicial members in determining matters of fact or mixed matters of law and fact.[61]

According to Justice Gascon, the Chairperson of the Competition Tribunal, one of the key features of the Canadian competition regime that distinguishes it from most other enforcement authorities around the world is the independence of its adjudicative branch (the Tribunal) from its enforcement agency (the Bureau).[62] Gascon goes on to state that the Tribunal is 'truly at arm's length from the Competition Bureau', and because of this unique formulation, can be seen as veritably independent.[63] This type of bifurcation and independence can more properly ensure that enforcement decisions are impartial. This also contrasts the European model, where the investigation, enforcement and adjudication of competition matters is done entirely by the Commission—at which point if a party is dissatisfied, they may seek judicial review. Of course, decisions from the Competition Tribunal in Canada can also be subject to judicial review, and in such an instance would be appealed directly to the Federal Court of Appeal.[64] When these appeals take place, the Court of Appeal will be deferential to the Tribunal in their findings of fact due to the subject-matter expertise of the Tribunal.[65] However, appeals are still reviewed on the merits and the Court of Appeal may intervene in some cases where there are issues of law, or mixed issues of fact and law, that are raised.[66]

C SHORTCOMINGS OF THE CANADIAN REGIME

As has been highlighted, the Canadian competition regime is quite a robust regime. That is not to say that it is not without its shortcomings. In recent years, the Canadian regime has been criticised for its relatively low maximum penalties. Some have gone so far as to suggest that the Canadian regime lacks teeth when it comes to enforcement.[67] This is particularly true when one compares the maximum penalties available under the Canadian regime with those available in other jurisdictions. Furthermore, this perceived 'lack of teeth' is not helped by a history of the Supreme Court undermining competition enforcement through restrictive interpretations of how competition law ought to be applied in the country. The ability of the Competition Bureau

[61] ibid.
[62] ibid.
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] House of Commons, Standing Committee on Industry, Science and Technology, *Briefing on the Office of the Competition Bureau of Canada*, 43-2, No 9 (3 December 2020) at 12:58:25 (Erskine-Smith).

to properly enforce competition is fundamental in promoting the efficiency and adaptability of the Canadian economy, and to properly protect consumers, which are all core purposes of the Competition Act as outlined in s 1.1.[68] If the Canadian framework is not properly equipped to accomplish these objectives sufficiently, then this should be cause for concern—at which point legislative reform ought to be in order.

I Maximum Penalties

(a) Maximum Penalties Available Within the Act

Under the current regime there are a variety of maximum penalties available for the various forms of anticompetitive conduct found within the Act.

When the criminal provisions of the Act are engaged, the court may assign a maximum sentence of 14 years imprisonment to an individual.[69] Additionally, for hard-core cartel-related offences, a maximum fine of $25 million may be imposed,[70] and for bid-rigging offences, a fine may be imposed at the discretion of the court.[71] To date, the highest fine imposed in such a case was $30 million.[72] For criminally reviewable deceptive marketing offences, in addition to a prison sentence, a maximum fine of $750,000 (for first time offences) and $1,000,000 (for subsequent offences) may be imposed on an individual; or a fine of $10,000,000 (for first time offences) and $15,000,000 (for subsequent offences) may be imposed on a corporation.[73] It is also possible for the Bureau to seek 'fines in excess of the statutory limits by charging a party with multiple counts of an offence or under other provisions of the Act.'[74] Furthermore, as per the federal government's Integrity Framework, persons who are found guilty of cartel conduct or bid-rigging are prohibited from entering into contracts with the government for up to 10 years.[75] In some cases, this 'debarment' from contracting with the government can be more economically damaging than the maximum fines found within the Act.[76]

---

[68] Competition Act (n 59) s 1.1.
[69] Osler, 'InfoPAK Canadian Competition Law' (*Association of Corporate Counsel* February 2018), <https://www.acc.com/sites/default/files/resources/vl/membersonly/InfoPAK/1479421_1.pdf,> 15 (Osler) accessed 1 April 2024.
[70] ibid.
[71] ibid 14.
[72] ibid.
[73] ibid 55.
[74] ibid 15.
[75] ibid.
[76] ibid.

When a firm violates the civilly reviewable provisions of the Act related to monopolistic practices or deceptive marketing, it can face a variety of prohibitive or prescriptive orders. For example, under subsection 79(2), the Competition Tribunal may issue an order that requires the firm to take any reasonable or necessary action to overcome their anticompetitive effects, which includes the divestiture of assets or shares.[77] Furthermore, pursuant to subsection 79(3.1), the Tribunal may order an AMP of up to 10 million dollars for a first-time infraction, and up to 15 million dollars for any subsequent infractions.[78]

Finally, concerning merger enforcement, the Act provides the Tribunal with remedial powers to issue an interim injunction to prohibit parties from completing transactions.[79] Where a transaction is already completed, the Tribunal may dissolve the merger, force the divestiture of assets, impose AMPs up to $10,000 for every day of non-compliance, or grant any other relief considered appropriate.[80]

(b) Are These Penalties Sufficient?

At the Parliamentary Standing Committee on Industry, Science and Technology on November 5th 2020, Member of Parliament Nathaniel Erskine-Smith noted that the Bureau's maximum fines and penalties for anticompetitive behaviours are low when contrasted to the fines other jurisdictions are able to impose.[81] Specifically, MP Erskine-Smith pointed to the fine of $9 million that the Competition Bureau imposed on Facebook for making false or misleading claims about the privacy of its Canadian users. He then contrasted the Canadian fine to the American fine of $5 billion, stating that even after adjusting for the difference in population between the two countries, the American fine is more than sixty times that of Canada's.[82] This demonstrates that the Competition Bureau's capacity to levy fines, insofar as the maximum penalties prescribed under certain sections of the Act are concerned, is far less than that of its international counterparts.

[77] Competition Bureau Canada, 'Abuse of Dominance Enforcement Guidelines' (*Government of Canada* 7 March 2019), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html> , accessed 1 April 2024.
[78] ibid.
[79] Osler (n 69) 34.
[80] ibid.
[81] Erskine-Smith (n 67).
[82] ibid.

Because the maximum penalties for many infractions prescribed under the Act are relatively low when contrasted with the maximum penalties found in other jurisdictions, it could be argued that the deterring capabilities of some of the penalties found within the Competition Act are deficient. This is further emphasised when one considers the large profits being realised by many Canadian firms. Illustratively, if a firm is making a profit of $1 billion a year, a maximum fine of $10 million for violating a provision of the Act might simply be considered part of the 'cost of doing business'.

According to Matthew Boswell, the Commissioner for Competition, '[the Bureau] cannot afford complacency, particularly as our international partners work quickly to strengthen their own tools to promote and protect competition in their jurisdictions'.[83] In order for Canada's competition enforcement regime to remain effective and internationally relevant, important changes need to be made to the maximum penalties that may be prescribed by the Act. If the maximum penalty is a drop in the bucket for major firms, the deterring effect is negligible.

Contrariwise, the EU is well-known for their ability to levy massive fines on those companies that contravene EU competition legislation. As opposed to having a variety of fines for various forms of anticompetitive conduct, the Commission uses a formula[84] to determine appropriate fines in specific circumstances. Ultimately, according to the Commission, their fining policy considers 'that some breaches cause more harm to the economy than others, that breaches affecting a high value of sales cause more harm than infringements affecting a low value of sales, and that long-running breaches cause more harm than short ones.'[85] As such, the Commission adjusts their fine to account for various contextual factors, such as the severity and length of the infringement.

Under the EU model, the only maximum threshold the Commission is bound by is that a fine cannot exceed 10% of the annual turnover of the previous business year of the corporation found in violation of the provisions (per infringement).[86] It is also worth noting that the

[83] Matthew Boswell, 'Canada Needs More Competition'(Address Delivered at the CBA Competition Law Fall Conference, 20 October 2021) (Boswell). < https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html> accessed 1 April 2024.
[84] *See* Annex A for a chart outlining the Commission's fining policy.
[85] European Commission, 'Fines for breaking EU Competition Law' (*EC Europa* November 2011), <https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf>, accessed 1 April 2024.
[86] Marion Provost, 'At a glance: sanctions for cartel activity in European Union' (*Dechert LLP* 26 November 2021) <https://www.lexology.com/library/detail.aspx?g=3c895cdc-a217-48d2-99cc-4669cfad34f3> accessed 1 April 2024.

maximum penalty applies to the 'undertaking's group turnover and not only to the entity that participated in the infringement.'[87] Because the fine is based on the annual turnover of the firm, the punishment can be proportionate, rather than being capped by arbitrary maximum thresholds. As such, the European fine can truly achieve deterrence, as it will not be seen as a 'drop in the bucket', but a significant proportion of the firm's revenue. For example, one of the largest fines imposed in a single case by the Commission was for €3.807 billion in the *Trucks* decision.[88] That is over 150 times greater than the $25 million dollar maximum fine available under the Canadian cartel regime. There has also been a clear increase in fines by the Commission over the past few years, with some notable decisions making international headlines, such as the Commission's €2.42 billion fine against Google in 2021, and their €5 billion fine against Google in 2018.[89]

I Enforcement Capabilities

(a) The Competition Bureau's Budget and Record of Levying Fines

The Competition Bureau's annual budget for the 2020-2021 fiscal year was $52.1 million.[90] This, however, has been rising recently as the federal government pays increasingly more attention to the country's competition regime. In 2021, the federal government committed to increasing the Bureau's budget by $96 million over five years, and then by $27.5 million ongoing thereafter so that they could improve their enforcement capacity.[91] This is an important step in ensuring that Canada will be able to properly enforce competition. The influx of budget will allow the Bureau to create a new enforcement branch that is responsible for digital enforcement and intelligence, in addition to supporting the federal government with a review and update of the *Competition Act*.[92]

Despite this increase, the Bureau's budget is still a far cry away from the resources that are available in the EU. In 2019 (the most recent reporting year on record), the Commission

[87] ibid.
[88] ibid.
[89] ibid.
[90] Competition Bureau Canada, 'Championing competition in uncertain times' (*Government of Canada* 7 December 2021), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04601.html>. accessed 1 April 2024.
[91] Competition Bureau Canada, '2022-2023 Annual Plan: Competition, recovery and growth' (*Government of Canada* 4 April 2022), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04663.html>. accessed 1 April 2024.
[92] ibid.

managed an annual budget of €18.2 million (which is approximately $25 million Canadian.)[93] However, it is important to remember that the EU also relies on national competition authorities to handle cases, all of whom have their own budgets in addition to the Commission's budget. According to a study conducted by the OECD in 2020, the average annual budget amongst European competition authorities was approximately €19 million.[94] When one considers there are 27 Member States in the Union with national competition authorities, it is quite simple to see that the EU's budget eclipses Canada's.

It is also worth noting that the Commission has a significantly stronger record than the Competition Bureau at levying and collecting fines. In 2020-2021, the Bureau collected $2.2 million in settlements[95], and $9 million in AMPs[96], totaling $11.2 million in fines. Conversely, the Commission adopted €4.1 billion worth of fines in 2019 and had €14.6 billion worth of fines pending appeal at the CJE and General Court.[97] When totaled at €18.7 billion, the revenue raised by the Bureau in fines would account for 0.045% of the revenue raised in fines by the Commission.

Of course, this massive disparity in the levying of fines between both regimes is also reflective of the issues raised above related to the relatively low maximum penalties available in the Canadian regime.

(b) The Role of the Supreme Court in Undermining Competition Enforcement

The Supreme Court has historically chosen to adopt an incredibly narrow interpretation of competition law. This narrowed approach has had an undermining effect on competition enforcement in Canada. Prior to the enactment of the modern *Competition Act*, there are many examples of the Supreme Court placing incredibly high thresholds on competition enforcement. In several instances, these thresholds made it virtually impossible to enforce competition.

---

[93] DG Competition, '2019 Annual Activity Report' (*EC Europa 30* March 2020), <https://ec.europa.eu/info/sites/default/files/comp_aar_2019_en.pdf>,55 (DG Comp), accessed 1 April 2024.
[94] OECD, 'OECD Competition Trends 2020' (*OECD* 2020), <https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>,21.
[95] Competition Bureau Canada, 'Competition Bureau Performance Measurement & Statistics Report 2020-21' (*Government of Canada,* 2022), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04567.html>.
[96] ibid.
[97] DG Comp (n 93).

Leading up to the modernisation of the Competition Act and the incorporation of civil remedies into Canada's competition regime, the Supreme Court laid down a series of judgments that made it extremely difficult for the government to defeat anticompetitive mergers and monopolies or prosecute cartels 'unless the end result was a complete elimination of competition.'[98]

In the *KC Irving* decision in 1976, the Supreme Court decided that even in a situation where a single firm controls 100% of an industry through the acquisition of its competitors, that such a merger was not unlawful since the government also had to prove that the merger was detrimental to the public.[99] The Court then defined 'detriment to the public' as the virtual elimination of competition.[100] So, the Court built in requirements for the government to not only prove the lessening of competition, but also to prove that the lessening was detrimental to the public (i.e. that competition was virtually extinct.)

This restrictive approach was not only employed in merger cases. The Court applied its narrow interpretation across multiple areas of competition enforcement. In 1980 in the *Atlantic Sugar* case, the Supreme Court took a restrictive approach to cartel enforcement as well. In *Atlantic Sugar*, there was a proven market-sharing agreement between three firms representing 90% of the market, yet, the Supreme Court required a 'demonstration of a virtual extinction of competition before it would find competition lessened "unduly."'[101]

The government could no longer win important competition cases, and this was a major reason for the reforms that were brought about in 1976 and 1986.[102] When the civil enforcement mechanisms were adopted, the incredibly high thresholds required by previous jurisprudence from the Supreme Court were done away with for the most part, leading to increased enforcement efforts and greater outcomes that more properly protected competition.

However, this narrowed interpretation of competition enforcement did not end with the adoption of the new Act. The Supreme Court has continued to take a restrictive interpretation to modern provisions of the Act that have rendered these sections unduly narrow and allowed

[98] Ross (n 37) 7.
[99] ibid.
[100] ibid.
[101] ibid.
[102] ibid 8.

for anticompetitive mergers to proceed. For example, the recent jurisprudence from the Supreme Court in regard to the efficiencies defence has had a particularly adverse effect on competition enforcement.

The efficiencies defence is prescribed under Section 96 of the Act. Essentially, the efficiencies defence allows for an analysis of the trade-off between efficiencies and the anticompetitive effects that may result from a transaction.[103] Where it is determined that efficiencies derived from a merger can offset the anticompetitive effects of a merger, the Tribunal may allow a non-pro-competitive merger.

In the *Superior Propane* decision, the efficiencies defence was successfully used to justify a merger that created a local monopoly in many markets and significantly reduced competition elsewhere. Justice Létourneau in his dissenting opinion in the *Superior Propane* judgment at the Federal Court of Appeal demonstrates the problem with such an interpretation when he stated:

> 'I remain convinced that the creation of monopolies is the ultimate adverse, anti-competitive effect which defeats the very purpose of the Act as expressed in s.1.1. In the name of economic efficiency the Act allows for a substantial lessening of competition, but it does not authorise its elimination altogether… [which] Parliament intended and the Act reflects that intent'.[104]

In recent jurisprudence, the efficiencies defence has undergone further judicial scrutiny that has spurred calls to abolish the defence due to the overly narrow interpretation the courts have used when applying it. This is specifically apparent when one looks at the recent *Tervita*[105] merger case. Here, the Competition Tribunal and the Federal Court of Appeal both found that the merger would substantially lessen competition in the market, while also finding that the efficiencies to be gained from the merger would not offset the anticompetitive effects.[106]

Yet, the Supreme Court of Canada overturned both judgments. The Tribunal and the Court of Appeal concluded that the quantitative anti-competitive effects of the merger which were not quantified by the Commissioner should be afforded an 'undetermined' weight, as opposed to a

[103] Competition Act (n 59) s 96.
[104] *Superior Propane* (n 43) 73.
[105] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (*Tervita*).
[106] ibid 10.

weight of zero.[107] However, the Supreme Court, in its first merger ruling in almost 20 years, disallowed the Commissioner's submissions and gave them a weight of zero, finding that the anticompetitive effects did not outweigh the efficiencies.[108] As such, the Court allowed the merger on the grounds that the Commissioner did not meet its burden regarding the quantification of anticompetitive effects.[109]

The logic of the Supreme Court in *Tervita* is flawed. As is pointed out by Justice Karakatsanis in her dissent,

> 'the statutory language of the Act does not distinguish between quantitative and qualitative efficiencies, and many of the wide-ranging purposes of the Act set out in s.1.1 may not be quantifiable. Indeed, many important anti-competitive effects of a merger may be qualitative in nature, and in some cases, those qualitative effects may be determinative in the s.96 analysis… the failure to quantify quantifiable anti-competitive effects does not invalidate the evidence that established there was a known anti-competitive effect of undetermined extent'.[110]

Here, Justice Karakatsanis raises the important point that while the Commissioner could not properly quantify the anticompetitive effects of the merger, that should not invalidate the finding that the merger will ultimately result in a significant harm to competition. Indeed, the anticompetitive effects were known, just undetermined. Thus, the majority decision of the Supreme Court in *Tervita* fundamentally erred in interpreting the Competition Act by narrowing its scope and reading in a requirement that all anticompetitive effects in an efficiency analysis must be absolutely quantifiable.

The *Superior Propane* and *Tervita* cases demonstrate perfectly how the efficiencies defence has been misinterpreted by the courts in such a way that the defence is contrary to the very purpose of the Competition Act. In so doing, the Supreme Court and Federal Court of Appeal have essentially created a statutory loophole to allow the formation of monopolies that would otherwise be deemed anticompetitive. The continued adoption of narrow interpretations to competition matters by the Supreme Court can only have harmful effects on competition enforcement in Canada.

[107] ibid 31.
[108] ibid.
[109] ibid.
[110] ibid 184-192.

D SHORTCOMINGS OF THE EU REGIME

As evidenced, the EU also possesses a highly robust competition regime. This similarly does not mean it is a system without weaknesses. The EU's regime has been criticised for a potential perceived lack of impartiality and for its limited scope of remedies. This section of the paper will address these shortcomings.

I The European Commission: Police, Prosecutor, and Judge?

The role that the Commission plays in every step of a competition case, from investigating to imposing fines, has led some to raise impartiality and procedural fairness concerns. To this effect, it has been argued that the conflation of competences of the Commission does not respect basic standards of fairness, as decision-making cannot be fair when the 'decision-maker is the same body that heard the evidence against the investigated parties.'[111] These critics state that this lack of procedural fairness becomes an even more important consideration when one notes that the level of fines levied by the Commission have increased significantly over the past years.[112]

Indeed, the Commission is not a court of law or tribunal. As such, the benefits and rights one would derive from such a context do not exist in the European competition framework at this step. A party does not have the right to cross-examine witnesses, nor do they have an opportunity to be heard in determining the amount of the fine that will be imposed on them.[113] It is only if they wish to judicially review a decision made by the Commission that a party will have a right to be heard on these aspects. Furthermore, some critics argue that the right of appeal for decisions taken by the Commission is insufficient.[114] According to these critics, 'the Court has limited power of review, especially in respect to the complex economic evaluations carried out by the Commission.'[115] Additionally, the fact that the legal effects of a decision taken by the Commission are not suspended when one seeks judicial review is contrary to other administrative law systems[116], such as Canada's system. In the EU competition framework, filing for a review to the General Court does not suspend the Commission's decision; as such,

[111] Lianos (n 2) 412.
[112] ibid.
[113] ibid 413.
[114] ibid.
[115] ibid.
[116] ibid 414.

fines are payable as soon as the Commission's decision is published.[117] This can also be cause for alarm from a procedural fairness perspective. Fortunately, there is a safeguard built-in whereby one can file for the suspension of the decision, but only if the party can prove that the suspension is necessary to 'avoid serious and irreparable harm.'[118]

Having a bifurcated system, like the system in Canada, does away with most of these procedural fairness and impartiality concerns. When the adjudicative branch remains separate from the investigatory branch, concerns of fairness would be assuaged. Furthermore, when a party is properly able to present their own conclusions and engage with the evidence presented against them in the adjudicative process, they are afforded significantly more procedural fairness. As such, a process like that of the Competition Tribunal *prima facie* affords parties a more procedurally fair decision-making framework when juxtaposed with the Commission's model.

II Scope of Remedies Available

In contrast to the Canadian regime which contains both criminal and civil sanctions, only civil sanctions can be levied in the EU's regime. Article 23(5) of Regulation No 1/2003 states that fines imposed by the Commission 'shall not be of a criminal law nature.'[119] Because of this provision, the Commission lacks a 'tool' in its deterrence toolbox that is available to many other competition enforcement agencies around the world: criminal sanctions.

Despite a perceived underutilisation of the criminal provisions of the Competition Act in Canada, their continued existence has proven useful to the Competition Bureau. The existence of criminal provisions in the Act has bolstered the Canadian leniency program—as individuals are more likely to come forward as a whistleblower when their liberty is on the line as opposed to when they are simply facing a fine.[120] According to the Bureau, the leniency program has been an incredibly powerful tool in detecting criminal activities, so much so that the Bureau has stated that the program's 'continued appeal as an incentive for those who would otherwise remain undercover to disclose their criminal behaviour is *pivotal* to the Bureau's enforcement

[117] ibid.
[118] ibid.
[119] Wouter J. Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28(2) World Competition, 1 (Wils).
[120] Competition Bureau Canada, 'Immunity and Leniency Programs under the *Competition Act*' (*Government of Canada* 15 March 2019), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>.

efforts.'[121] The lack of criminal sanctions in the Commission's arsenal may not allow its leniency program to have the same motivational effect as Canada's program.

According to Wils, effective deterrence with only fines requires impossibly high fines.[122] Based on his findings, the minimum level of fines required to completely deter price cartels is 150% of annual turnover[123]—which is a far cry from the Commission's 10% maximum. As such, alternatives, such as criminal sanctions can provide appropriate additional disincentives to engaging in cartel-related activities. Wils then highlights four additional arguments that support criminal sanctions in competition law contexts: 1) fines on companies do not always guarantee adequate incentives for responsible individuals within the firm, 2) criminal sanctions increase the effectiveness of leniency and whistle blowing programs, 3) imprisonment is a very effective deterrent, and, 4) imprisonment carries a uniquely strong moral message.[124] The absence of criminal sanctions in the EU may be preventing the EU from achieving some of its deterrence goals to their fullest potential.

That being said, with the fines in Europe being much higher than in Canada, their leniency program may be sufficient enough without the added motivation of criminal sanctions. Furthermore, the Member States can provide for criminal fines or imprisonment within their national competition law regimes.[125] Indeed, some Member States, such as Ireland and Estonia, have incorporated criminal fines and imprisonment within their national frameworks.[126] As such, the lack of criminal remedies available to the Commission isn't as detrimental a factor as it might have been but-for some Member States filling in the gap. However, as is warned by Wils, having criminal sanctions in some Member States and not in others (nor at the EU level) might result in the Member States with criminal provisions having to take on a disproportionate share of the enforcement burden.[127] Wils then likens this to the disproportionate role the US has taken in recent years in the deterrence and punishment of global cartels due to its robust criminal powers.[128]

[121] Wils (n 120) 10.
[122] ibid 11.
[123] ibid.
[124] ibid 13-15.
[125] ibid 7.
[126] ibid 10.
[127] ibid 20.
[128] ibid.

E A COMPARATIVE ANALYSIS OF RISK FACTORS

I Susceptibility to Adapt

(a) Modern Market Forces and the Issue of Big Tech

In March of 2022, the EU unveiled the provisional text of its long-awaited Digital Markets Act (DMA). One of the key objectives of the DMA is to facilitate the entry of small-and-medium-sized tech companies into a market that is dominated by Big Tech giants.[129] The DMA provides a suite of new legal remedies that the Commission will be able to utilise when dealing with tech giants. For example, for Big Tech companies who infringe the Act and do not comply with orders, the maximum fine available has jumped significantly to 20% of *worldwide* revenue.[130] Furthermore, the DMA empowers the Commission to block any and all acquisitions attempted by a repeat infringer of the Act, regardless of what their infringements were.[131] These new and ground-breaking tools have arisen in response to multiple Big Tech companies being so cash-rich that they refuse to comply with orders from the Commission and simply opt for fines associated with non-compliance. These powerful new tools reflect the Commission's 'determination to bring cash-rich offenders to heel.'[132]

In a similar attempt to start tackling the issue of Big Tech in competition, the Competition Bureau created the new Digital Enforcement and Intelligence Branch in 2021.[133] The Bureau is therefore taking steps in the right direction, but in order to properly enforce big tech, the *Competition Act* will need to be updated to account for the unique market dominance big tech companies have enjoyed relatively unchecked since the advent of modern online marketing. Indeed, the Bureau has recognised that big data regulation will require 'specialised and less familiar tools and methods.'[134] While the Competition Bureau has begun sounding the alarm, there is a lack of Parliamentary action to this effect. Hopefully, as Parliament begins the process

[129] Alina Blankertz, 'The EU's experimental approach in overhauling competition rules' (*Teach Stream,* April 14, 2022), <https://www.brookings.edu/techstream/the-eus-experimental-approach-in-overhauling-competition-rules-digital-markets-act-dma/>, accessed 1 April 2024.
[130] ibid.
[131] ibid.
[132] ibid.
[133] Boswell, (n 83).
[134] Competition Bureau Canada, *Big data and innovation: key themes for competition policy in Canada* (Competition Bureau, 2018), 14.

of reviewing Canada's competition regime this year, the question of modernising the Act to deal with Big Tech will be at the forefront of discussions.

(b) Willingness to Regulate

The EU and its Member States have demonstrated a significantly greater willingness to regulate and make competition law a priority than Canada has. The EU has long been a champion of strengthening competition laws and staunchly enforcing existing ones. Canadian Commissioner of Competition Matthew Boswell said himself that Canada will need to look to the European example and start doing the same if it hopes to 'better protect consumers and ensure a healthy and competitive marketplace.'[135] According to Anu Bradford of Columbia Law School, EU regulators also typically take a 'more aggressive stance' than their North American counterparts when reviewing the same conduct under their regimes.[136]

As has been evidenced throughout this paper, there have been significant competition amendments in Canada every 10 or so years since the Act was modernised in 1976. Updates every 10 years will no longer be sufficient to keep the Act relevant with increasingly rapid shifts in markets and the rise of dominant firms. The Competition Bureau has been calling for amendments to its regime for the past decade, yet no substantive changes have been enacted since 2009.[137] Only in the past months has the federal government manifested any interest in reviewing the current framework. On February 7th 2022, a legislative review of the Act was announced and is expected to include 'discrete changes that would have an immediate and tangible impact for consumers and businesses in Canada' in the coming months, as well as a 'comprehensive modernisation' of the Act to occur over a longer timeframe.'[138] This step is incredibly positive. However, if Canada hopes to continue to keep up with its international counterparts, it will have to continue its willingness to provide recurrent updates to its framework.

[135] Boswell, (n 83).
[136] Anu Bradford and others. 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16(1) Journal of Empirical Legal Studies 731, 732.
[137] Shuli Rodal and others., 'Significant amendments to the Competition Act on the horizon – key areas to watch' (Osler 15 February 2022), <https://www.osler.com/en/resources/regulations/2022/significant-amendments-to-the-competition-act-on-the-horizon-key-areas-to-watch>., accessed 1 April 2024.
[138] ibid.

II Compliance

(a) The Brussels Effect

The Brussels effect is generally understood as the phenomenon whereby when the EU regulates on a particular matter, those regulatory standards commonly become the global standards through market forces.[139] This is because many companies operating internationally will voluntarily extend the European framework to their global operations (due in part to them often being the most stringent standards) to streamline costs associated with complying to numerous standards.[140]

Only large economies can hope to be sources of global standards. However, the EU has achieved this effect, not simply for the size of its market, rather for its 'institutional architecture that has converted its market size into a tangible regulatory influence.'[141] In this way, the EU can truly transform global markets through the setting of standards in a variety of regulatory areas, such as competition, that will inevitably be extended to companies' regulatory compliance elsewhere.[142]

(b) The Smaller Size of the Canadian Market

Contrary to the EU, which is a large jurisdiction that covers a market base of some 450 million people, Canada is a smaller jurisdiction with a population of around 38 million people. As such, its international influence is inherently not as strong as that of the EU. Despite this, the Competition Bureau has instituted a rather successful compliance regime. Where the EU can often rely on firms knowing their rules, and the 'exportation' of their rules abroad through the Brussels effect, Canada has had to rely on an educative approach to compliance of teaching companies operating within its jurisdiction about its regime. To this effect, the Bureau has created a Bulletin that outlines how companies operating within Canada can create effective compliance programs.[143] The Bureau has additionally invested significant time and resources into disseminating this information to various stakeholders across the country.[144]

---

[139] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019) (Bradford).
[140] ibid.
[141] ibid.
[142] ibid.
[143] Competition Bureau Canada, 'Corporate Compliance Programs'(*Government of Canada* 3 June 2015), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>, accessed 1 April 2024.
[144] ibid.

F LESSONS FOR REGULATORY REFORM

I What can Canada Learn from the EU?

The most obvious shortcoming of the Canadian regime is in relation to the maximum penalties prescribed by the Act. The biggest lesson Canada might learn from the EU is that it should create a regime where it can impose fines based on annual turnover. As such, it could levy fines that are proportionate to large firms, rather than a simple drop in the bucket—like the Commission can. Furthermore, Canada should take inspiration from the EU's record of levying fines and take an equally aggressive approach to enforcement. As Bradford noted, the EU is often willing to take a more aggressive stance to enforcement than other jurisdictions, citing the €2.3 billion fine against Google for manipulating the market in 2018.[145] In the exact same situation, Canada and the US did not levy a fine.[146] Taking a more aggressive stance would allow Canada to show that competition law is indeed a priority; not to mention, a more aggressive stance would force parties to take the country's regime more seriously, which might enhance deterrence and compliance. If other jurisdictions are able to levy fines over 150 times greater than your own, that should be cause for concern that your system is outdated and in serious need of reform.

Additionally, the EU routinely reviews its competition framework to ensure it is 'up to snuff'—demonstrating a strong willingness to regulate. Canada ought to consider more frequent parliamentary reviews of its Act to ensure that it remains relevant as well. These types of review would also ensure that the framework is being interpreted in a way that is compatible with Parliament's intent—and not being unduly restricted by the courts' interpretations. Furthermore, by looking to ground-breaking regulatory reforms taking place in Europe, such as the DMA, Canada might benefit from the Brussels effect and consider adopting similar provisions to keep its regime up-to-date with market forces and new international norms.

II What can the EU Learn from Canada?

The concern that the Commission's decisions are to a certain extent procedurally unfair is significant. In the EU model, it can be said that the Commission acts as the 'police, prosecutor, and judge.' The EU could inspire itself from Canada's regime if it were looking to improve the

[145] Bradford (n 140).
[146] ibid.

procedural fairness of its competition framework. Creating a separate, impartial entity to handle the adjudicative aspect of competition enforcement, like the Competition Tribunal, would assuage many concerns of unfairness, provide parties with greater procedural fairness so they might engage with the evidence presented against them before a fine is levied, and ultimately result in a more transparent decision-making process. By taking inspiration from the Canadian Competition Tribunal, the Commission could construct their own adjudicative body with procedural rules that best fit their needs.

Furthermore, to avoid forcing some Member States to take on a disproportionately higher enforcement role, it might be worthwhile for the EU to consider adopting EU-wide criminal sanctions for some forms of anticompetitive conduct, as is the case in Canada. According to Wils, based on the current European Treaties, the addition of criminal sanctions into the EU's competition regime would be legally possible in some particular circumstances; for example, insofar as harmonisation is concerned, and strictly in relation to national law in the Member States.[147] However, the addition of criminal sanctions at the EU-level would indeed require amendments to the Treaties. In such an eventuality, criminal provisions might also help the Commission improve its leniency program and better deter anticompetitive conduct.

Consequently, by looking to the bifurcated model of the Canadian regime, the EU might inspire itself twofold from Canada. First, from the enhanced procedural fairness the Canadian regime has crafted through the separation of the enforcement and adjudicative branches; and second, from the bifurcation of criminally and civilly reviewable matters.

[147] Wils (n 120) 21.

LE DROIT À UN ENVIRONNEMENT SAIN EN RÉPUBLIQUE D'IRLANDE : NÉCESSITÉ D'UNE RÉFORME CONSTITUTIONNELLE OU DE 'REVERDIR' LES DROITS FONDAMENTAUX APRÈS COYNE & ANOR V AN BORD PLEANÁLA & ORS ?

Julián Suárez*

A INTRODUCTION

Le débat en Irlande sur la reconnaissance d'un droit à un environnement sain non expressément reconnu par la Constitution semble être achevé. D'après cet arrêt récent du Tribunal de Grande Instance, livré par le juge Holland,[1] il n'est pas possible de tirer un tel droit de la clause constitutionnelle des droits personnels en utilisant la doctrine dite des 'droits innommés' développée par la Cour Suprême irlandaise au fil des années 1960s.[2] Vu l'étendue limitée de la Convention européenne des droits de l'homme (CEDH) dans la juridiction interne, tenant compte de la nature dualiste de l'État irlandais et des articles 3 et 4 de l'European Convention on Human Rights (ECHR) Act 2003, les juges ne sauraient non plus dégager aucun droit à l'environnement sain s'appuyant sur les droits personnels garantis par la Convention.

Quel serait-il, donc, l'avenir en Irlande de la protection environnementale basée sur une approche depuis les droits fondamentaux ? Deux arrêts précédents, étudiés par la décision commentée ci-dessous, auraient acheminé la position des Cours et tribunaux du pays vers l'impossibilité de fournir une protection de l'environnement consonante avec la dignité humaine sans qu'il ne se configure une de deux conditions : soit un amendement constitutionnel pour inclure expressément le droit à un environnement sain dans l'ordre juridique interne, soit le requérant dans un cas particulier fonde sa réclamation faisant appel au 'reverdissement' des droits fondamentaux. A l'heure actuelle, l'arrêt *Coyne* viserait à consolider cette position de la Cour Suprême irlandaise par l'application du principe de *stare decisis*, même si le Tribunal de

* Julián Suárez (LLB, Pontificia Universidad Javeriana; LLM, Universidad Nacional de Colombia) est avocat au barreau de Bogotá depuis 2009. Passionné par le droit administratif, qu'il pratique durant sept ans, il quitte la Colombie afin de poursuivre des études en français (LLM, Université catholique de Louvain). Auparavant stagiaire auprès de la section francophone du Conseil contentieux des étrangers de Belgique, stagiaire chez An Taisce-National Trust for Ireland et chargé des cours à la Technological University of the Shannon, Julián est depuis 2022 candidat au doctorat en droit pour l'University College Cork. Il y travaille sous la direction du Prof Owen McIntyre. Il développe son projet de recherche autour des droits de la nature et de leurs implications juridiques substantielles et procédurales.

[1] *Coyne & Amor v An Bord Pleanála & Ors* [2023] IEHC 412.

[2] *Ryan v AG* [1965] IR 294 ; *Murtagh Properties v Cleary* [1972] IR 330 ; *McGee v AG* [1974] IR 284 ; *State (M) v AG* [1974] IR 73 ; *Kennedy v Ireland* [1987] IR 587 ; *YY v Minister for Justice* [2017] IEHC 166.

Grande Instance aurait pu s'éloigner de celle-ci en avançant des arguments plus raisonnables pour parvenir à la reconnaissance dudit droit.

Après la présentation d'une vue d'ensemble des faits, des moyens de la requête et des principaux arguments de décision consignés dans l'arrêt *Coyne*, cette étude propose de revenir sur les implications de la décision par rapport à la protection juridique offerte aux droits environnementaux en Irlande.

B LES FAITS

Les litiges relatifs à la contestation des décisions d'urbanisme et de l'environnement en Irlande relèvent d'une haute complexité technique, d'une lourdeur documentaire et de l'application minutieuse du droit européen de l'environnement. Ainsi l'a reconnu récemment le juge Humphreys au Tribunal de Grande Instance.[3] C'est pourquoi le Ministère irlandais de la Justice et ce Tribunal ont convenu la mise en place d'une nouvelle chambre d'urbanisme et de l'environnement en décembre 2023.[4] En outre, le contrôle juridictionnel de ces décisions subit dans certains cas une morosité inédite. Le Tribunal de Grande Instance, en tant que destinataire de toutes les requêtes en annulation contre ces actes administratifs en première instance, a évoqué l'affaire fictive de *Jarndyce v Jarndyce* dans le roman 'Bleak House' de Dickens, d'une durée de 54 ans. Le Tribunal voulait attirer l'attention sur des affaires d'urbanisme et de l'environnement en cours de très longue date, comme celle de l'arrêt *Wicklow County Council v EPA & Anor*, entraînant une durée de 44 ans.[5]

L'affaire en cause ne s'en échappe pas. Il s'agit d'une requête en annulation contre la licence environnementale et de développement d'un centre de données concédé en 2021 par les autorités d'urbanisme (le conseil du comté et An Bord Pleanála) à l'entreprise EngineNode. Le développement, à être situé en comté de Meath, devait inclure la construction d'une sous-station électrique de 220 kV dûment ralliée au réseau électrique national. Les requérants (les Coynes, père et fille) habitaient dans une propriété adjacente au développement proposée, et y faisaient de l'élevage équine. Conséquemment, ils cherchaient la compensation d'une perte

[3] Courts Service, 'New Planning and Environment Court division of the High Court formally launched today' (*General News*, 11 December 2023) <https://www.courts.ie/news/new-planning-and-environment-court-division-high-court-formally-launched-today> accédé 10 février 2024.
[4] High Court Practice Direction HC 124, s 1.
[5] *Brownfield Restoration (Ireland) Ltd v Wicklow County Council* [2023] IEHC 712 [2].

d'aménité résidentielle et de privacité familiale, des nuisances sonores et visuelles et d'une perturbation sérieuse de leur activité commerciale. Ils se sont portés partie de la procédure administrative devant le conseil du comté de Meath afin de présenter leurs objections au projet de centre de données.

Pendant la procédure administrative, un rapport d'étude d'impact environnemental (EIE) et l'EIE correspondant ont été produits. Une fois la licence a été octroyée, les requérants ont recouru contre la décision devant An Bord Pleanála. Pour faire face au recours administratif, EngineNode a pourtant modifié les spécifications techniques liées à sa méthode d'approvisionnement d'énergie. Au lieu de la générer *in situ*, l'entreprise allait l'obtenir du réseau énergétique national. En plus, EngineNode a présenté un complément au rapport d'EIE et un nouveau rapport d'EIE pour la connexion au réseau énergétique national, sans qu'aucune répercussion négative importante sur l'environnement ait été repérée. Cela a déclenché la prise de décisions différentes au sein d'An Bord Pleanála : l'une, par rapport au centre de données ; l'autre, en relation avec la connexion au réseau énergétique national. En dépit des requérants, l'autorité administrative en voie d'appel a décidé de confirmer l'octroi du permis de développement et environnementale à EngineNode.

C LA REQUÊTE EN ANNULATION ET SON MOYEN § 6

Dans l'essentiel, les Coynes ont plaidé l'existence des effets nocifs dûs au changement climatique causés par les émissions indirectes de gaz à effet de serre (GES) produites par le centre de données à développer par la société défenderesse. Cette société, on le rappelle, a proposé aussi de construire une sous-station de génération d'électricité à 220 kV pour fournir son opération. Pour ce faire, les requérants ont fondé leur demande sur de plusieurs griefs de violation aux lois environnementales. Ces violations peuvent être condensées en trois groupes.

D'abord, les requérants ont allégué que les décisions contestées allaient à l'encontre des objectifs nationaux de transition et de réduction des émissions de GES établis par le 2015 Climate Act. Ils avancent que les décisions n'ont pas eu aucun regard à cette loi, dans le sens de l'article 15 *in fine*. Également, à leur avis, les rapports d'EIE et les EIE mêmes montraient que le développement proposé allait monter les émissions de GES de presque 1%, dans un contexte d'urgence climatique. Et ensuite, les requérants ont plaidé la violation de l'article 94 et de l'annexe 6 des Planning and Development Regulations 2001-2022, de l'article 171A du

Planning and Development Act 2000, et de l'Annexe IV de la Directive EIE.[6] Ces dispositions obligent les autorités administratives d'identifier, décrire et évaluer l'impact environnemental des GES produits par le développement proposé, et de tenir compte, de façon cumulative, des impacts d'autres centres de données déjà approuvés.

Néanmoins, le grief le plus intéressant de la requête soulève que les décisions contestées portaient atteinte aux droits à la vie, à l'intégrité physique et à un environnement sain consonant avec la dignité humaine. Ces droits, garantis par l'Article 40.3 de la Constitution irlandaise et les articles 2 et 8 de la CEDH, devaient être respectés par les décisions attaquées dans les conditions de la section 3 de l'ECHR Act 2003. Les Coynes font valoir que vus les risques posés par le changement climatique dû aux émissions de GES à la vie et à la santé des requérants, An Bord Pleanála devait donc s'abstenir de permettre le développement proposé. Ceci contribuerait significativement à une crise climatique qui exposerait les Coynes à des dommages actuels et futurs de leurs intérêts juridiquement protégés.

Bien évidemment, les arguments des requérants sont bien plus sophistiqués que cela. En tant que précédents judiciaires, ils citent la décision de la Cour Suprême irlandaise dans l'affaire *Friends of the Irish Environment CLG v Ireland* (*Climate Case Ireland*).[7] Ils reconnaissent dans cette décision l'existence d'un consensus scientifique et même judiciaire sur les effets présents et prévus du changement climatique. Ils se sont appuyés aussi sur les arrêts néerlandais *Urgenda*[8] et *Milieudefensie*[9] pour constater que les effets sévères du changement climatique restent incontestés et qu'il demeure également pacifique que ces effets ont et auront un impact significatif sur les droits fondamentaux.

Les requérants ont ensuite cité de nombreux arrêts des Cours et tribunaux irlandais afin de soutenir l'affectation des droits fondamentaux invoqués causée par la contribution au changement climatique du centre de données proposé par la partie requise. Par rapport au droit

[6] Directive 2011/92/EU du Parlement Européen et du Conseil du 13 décembre 2011 concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement (texte codifié) [2011] JO L 26/3.
[7] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49.
[8] Rechtbank Den Haag 24 juin 2015, ECLI:NL:RBDHA:2015:7145, *AB* 2015/336 ; Hoge Raad 13 janvier 2020, ECLI:NL:HR:2019:2007, n. 19/00135.
[9] Rechtbank Den Haag 26 mai 2021, ECLI:NL:RBDHA:2021:5339, *JONDR* 2022/712.

à la vie, les Coynes ont évoqué l'autorité des arrêts *East Donegal Co-op*[10] et *A Ward of Court*[11] pour justifier une obligation de moyens de la part de An Bord Pleanála de prendre toutes les mesures adéquates pour préserver le droit à la vie des requérants étant menacé par les émissions des GES du développement proposé. En ce qui concerne le droit à l'intégrité physique, les requérants ont plaidé la règle arrêtée dans les affaires *Ryan v AG*[12] et *State (C) v Frawley.*[13] Ces deux arrêts imposent au pouvoir exécutif une autre obligation de moyens ; cette fois-ci en relation avec le devoir de prévenir toute action ou omission administrative entraînant une exposition injustifiée à des risques ou dangers pour la santé.

La partie requérante a voulu mettre en relief les arrêts *Merriman v Fingal County Council*[14] et *Simpson v Governor of Mountjoy Prison*[15] pour dériver un droit personnel et fondamental à un environnement sain en consonance avec la dignité humaine. Les requérants ont aussi soulevé que la position du président de la Cour Suprême Clarke par rapport au caractère 'vague de manière inadmissible' de ce droit, dans l'arrêt *Climate Case Ireland,*[16] devrait être tenue pour *obiter dicta.*

Finalement, les Coynes ont fondé leur requête sur l'article 3(1) de l'ECHR Act 2003 pour dégager le devoir d'An Bord Pleanála de se comporter de manière compatible avec les obligations de l'État irlandais face à la CEDH. Ils proposent ensuite une interprétation extensive des articles 2 et 8 de cette Convention, de l'arrêt *Urgenda* et de la jurisprudence de la Cour européenne des droits de l'homme (Cour EDH). A leur avis, selon ces dispositions, le devoir de rendre pratiques et effectifs les droits consacrés par la CEDH dans le droit interne s'étend jusqu'à imposer aux autorités d'urbanisme et environnementales l'obligation de moyens de prendre des mesures adéquates contre la menace du changement climatique.

D UNE ANALYSE CRITIQUE DE LA DÉCISION DU JUGE HOLLAND

Dans une décision de 165 pages, le juge Holland a rejeté tous les moyens de droit de la requête en annulation présentée par les Coynes.

---

[10] *East Donegal Co-operative Livestock Mart Ltd v AG* [1970] IR 317.
[11] *A Ward of Court (withholding medical treatment) (No. 2)* [1995] 2 IR 79.
[12] *Ryan v AG* [1965] IR 294.
[13] *State (C) v Frawley* [1976] IR 365.
[14] *Merriman v Fingal County Council* [2017] IEHC 695.
[15] *Simpson v Governor of Mountjoy Prison* [2019] IEHC 81.
[16] *Climat*e *Case Ireland* (n 7) 8.11.

Les fondements de l'arrêt peuvent être condensés en quatre prémisses, dont (i) L'importance cardinale de la preuve des conditions de la violation des droits revendiqués, (ii) L'étendue raisonnable de la protection octroyée par la jurisprudence irlandaise et celle de la Cour EDH aux droits fondamentaux contre les atteintes portées par des risques environnementaux, (iii) Le rejet d'une 'interprétation extensive' de la CEDH pour en tirer un droit à un environnement sain, et finalement (iv) L'impossibilité de retenir un droit à un environnement sain dérivé de la Constitution irlandaise.

Ce serait excessif d'étendre cette étude à l'analyse de la totalité des moyens de la requête.[17] En revanche, celle-ci ne s'attardera que sur les aspects relatifs à l'existence d'un droit fondamental, personnel et dérivé à un environnement sain comme paramètre de contrôle juridictionnel des actes administratifs d'urbanisme et environnementaux irlandais. En effet, tel qu'il est proposé ci-dessous, la contribution de l'arrêt *Coyne* est de cristalliser le rejet des Cours et tribunaux irlandais de reconnaître par voie de création judiciaire l'existence d'un droit subjectif à un environnement sain. Cependant, cette détermination n'est pas à l'abri des critiques.

I L'importance cardinale de la preuve des conditions de la violation des droits revendiqués

Tout d'abord, le juge Holland a considéré que les requérants n'ont pas démontré un risque actuel et imminent de préjudice contre leurs droits fondamentaux du fait de l'opération du centre de données proposé par EngineNode. En droit irlandais, la charge de la preuve du dommage personnel incombe à celui qui allègue une violation d'un droit fondamental.[18] Le juge Holland a regretté le déficit probatoire de la requête. Son jugement a vivement critiqué que les requérants auraient prétendu faire valoir le consensus scientifique et judiciaire sur les effets du changement climatique au-delà de ce constat pour tenter d'échapper l'*onus probandi* de démontrer les faits de l'espèce. Il n'était pas permis aux Coynes, dit le juge, de '[f]aire glisser des faits prouvés dans des affaires comme celles citées des Cours et tribunaux néerlandais ou basés sur des documents n'ayant pas été mis comme preuve devant moi'. Il ne leur était pas permis non plus d'extrapoler ces faits relevant du consensus scientifique et judiciaire sur les effets du changement climatique en général, soit pour les placer en amont

[17] *Coyne* (n 1) 151-216.

[18] *Pig Marketing Board v Donnelly* [1939] IR 413 ; *Article 26 and the Offences against the State (Amendment) Bill* [1940] IR 470 ; *Curtin v Dáil Eireann* [2006] IESC 14 ; *Fleming v Ireland & Ors* [2013] IESC 19 [92]-[95].

comme cause entre ces effets et les actes ou omissions du centre de données, soit pour les placer en aval comme des effets particuliers sur leur propre situation juridique.[19]

Ensuite, l'arrêt a entrepris l'étude des moyens relatifs à la violation des droits à la vie et à l'intégrité physique des requérants avec la génération d'électricité du projet. Selon l'opinion du juge Holland, le moyen était mal fondé. Il n'était pas possible de faire sortir un manquement de la loi d'un prétendu devoir de refus de la licence au développement proposé afin de revendiquer les droits subjectifs des requérants. Ceci exigeait des requérants de proposer un standard selon lequel une demande de permis d'urbanisme ou environnementale pour un projet de génération d'électricité devrait être refusée pour dépasser un certain seuil d'émissions de GES ; un sujet qui n'est abordé nulle part dans la requête. À son avis, ce raisonnement mélange deux questions distinctes : d'un côté, les faits et les effets généraux du changement climatique ; de l'autre côté, la question sur la probabilité que le centre de données proposé pourrait causer la violation de leurs droits subjectifs. Nonobstant, soutenir ce principe emmenait à l'inadmissible conclusion de permettre les requérants d'enjoindre toute action judiciaire conduisant à la fermeture des développements existants en raison de leurs émissions directes et indirectes, sans avoir égard à leur intensité. Et ce, car ils pourraient menacer leurs droits fondamentaux.[20]

De surcroît, le juge Holland a fait ressortir l'absence de preuve dans la requête de la cause du dommage aux droits personnels des requérants. Au dire du jugement, les Coynes n'ont pas fourni des arguments tentants à expliquer les complexes liens de causalité entre les émissions de GES directes et indirectes du développement proposé, d'un côté, et le dommage subi par chacun d'entre eux avec lesdites émissions, de l'autre côté. Ils ont tout juste affirmé que le développement proposé, étant donné ces émissions de GES et une implication nécessaire dans leur montant, posait un risque justiciable contre leur santé. Le juge Holland a soulevé que cette absence s'expliquait du fait qu'une analyse plus élaborée de la causalité à cet égard est impossible. Tel que la Cour EDH l'avait soutenu dans l'arrêt *Pavlov c Russie,*[21] il est impossible d'estimer le quantum de la pollution industrielle dans des cas particuliers, vu les difficultés de distinguer les effets de cette pollution de l'influence d'autres facteurs pertinents.[22]

[19] *Coyne* (n 1) 9.
[20] ibid 234 -235.
[21] *Pavlov et autres c Russie* Requête no 31612/09 (CtEDH, 13 novembre 2023).
[22] ibid 61.

Un tel résultat, lorsque le requérant ne parvient pas à démontrer les conditions de la responsabilité de l'État pour la violation des droits fondamentaux, ne surprend personne. Or, bien qu'il serait déraisonnable d'exclure l'exigence de preuve de la causalité dans n'importe quel régime de responsabilité pécuniaire, les particularités des effets nocifs des émissions des GES sur les droits fondamentaux exigent des nouvelles formes d'aborder cette question. D'autres juridictions se sont interrogées sur la possibilité d'étudier les liens entre les émissions de GES et les dommages causés.[23] Elles ont ainsi utilisé l'approche de la science de l'attribution,[24] au-delà des théories classiques de la causalité. Il faudrait se demander, dans le cadre de la discussion autour du 'degré de causalité' et des 'multiples et complexes liens de causalité' entre les émissions de GES en question et le dommage subi par les requérants, si le juge Holland serait prêt à entretenir de pareils arguments.

II Est le juge irlandais tenu de revendiquer les droits fondamentaux face à l'action administrative à des répercussions environnementales ?

Sans vouloir contester le consensus scientifique et juridique autour des effets dévastateurs du changement climatique, l'arrêt a souligné qu'aux fins d'annuler le permis octroyé à EngineNode, il n'en était pas de décontextualiser des règles de droit établies pour des faits et des points de droit invoqués. Spécialement, lorsque ces arrêts comme *A Ward of Court* ou celui de *Ryan v AG* portent sur des faits et des principes complètement différents de ceux animant la requête. Au contraire, selon la décision en cause, la requête a failli comprendre deux choses. La première : malgré l'absence de reconnaissance du droit à l'environnement sain, les Cours et tribunaux ont reconnu l'existence des dangers posés à la santé humaine par le changement climatique. Et la deuxième : bien que la Cour de Strasbourg ait revendiqué le volet environnemental des articles 2 et 8 CEDH, elle a refusé de concéder la réparation du préjudice écologique objectif, même si cela pose un risque pour la santé publique, et a toujours exigé des

[23] *Luciano Lliuya v RWE AG* Affaire No. 2-O-285/15 (5. Zivilsenat des Oberlandesgerichts Hamm, 1er juillet 2021).

[24] Rupert Stuart-Smith and others, 'Liability for Climate Change Impacts: The Role of Climate Attribution Science', in Elbert R De Jong et al (eds.) ; *Corporate Responsibility and Liability in Relation to Climate Change* (1edn, Intersentia 2022) ; Isabella Kaminski, 'How scientists are helping sue over climate change' (2022) 6(5) The Lancet Planetary Health E386 ; Rupert Stuart-Smith et al, *Attribution science and litigation: facilitating effective legal arguments and strategies to manage climate change damages* (Summary report for FILE Foundation 2021) 1 <https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/attribution-science-and-litigation.pdf> accédé le 18 mars 2024.

requérants la preuve d'une affectation personnelle, actuelle et sévère de leurs droits fondamentaux.[25]

Le jugement du juge Holland s'aligne donc avec la large marge d'appréciation concédée par le pouvoir judiciaire au gouvernement et au législateur irlandais en matière environnementale. En reprenant les arrêts d'instance et en appel dans l'affaire *An Taisce v An Bord Pleanála & Kilkenny Cheese,*[26] le jugement a rappelé que, s'agissant du changement climatique, il n'y a pas de solutions simples mais seulement des compromis. En plus, il '[r]evient aux pouvoirs exécutif et législatif de décider quelle serait l'étendue de ces compromis et comment serait-il traité le problème du changement climatique'. Également, le juge Hogan à la Cour Suprême, dans cette même affaire, a établi que l'EIE a pour but aussi d'évaluer les impacts environnementaux significatifs, directs et indirects, d'un projet, y compris ses effets sur changement climatique. En ce sens, la portée de l'EIE ne peut pas être allongée au-delà de ces limites, ni être incluse dans la politique générale de lutte contre le changement climatique afin de se substituer aux autres mesures législatives pertinentes –telles que le Climate Act 2021.[27]

À cet argumentaire s'ajoutent les raisonnements des Cours et tribunaux sur l'étendue même du contrôle juridictionnel des licences d'urbanismes et environnementales. La position pacifique du Tribunal de Grande Instance irlandais –ainsi l'explique le juge Holland– est celle de se prononcer exclusivement sur la légalité des décisions contestées ; jamais sur la correction ou l'incorrection du fond. En somme, l'annulation de ces actes n'est pas une instance d'appel dans laquelle les juges peuvent revenir sur la décision sur base de ce que d'autres ou le tribunal même auraient pu décider différemment.[28]

Mais cet argument de la large marge d'appréciation en matière environnementale ne saurait être raisonnablement justifié. Déjà la jurisprudence irlandaise oblige les Cours et tribunaux à contrôler la compatibilité de l'action administrative avec les droits fondamentaux pouvant être impactés via cette action.[29] Lors de la décision dans *Climate Case Ireland,* certains

[25] *Coyne* (n 1) 236-237.
[26] *An Taisce v An Bord Pleanála & Kilkenny Cheese* [2022] IESC 8.
[27] *Coyne* (n 1) 238 ; *An Taisce* (n 26).
[28] *Kemper v An Bord Pleanála & Ors* [2020] IEHC 601 [8]-[9] ; *M28 Steering Group v An Bord Pleanála & Anor* [2019] IEHC 929 [122] ; *Holohan & Ors v An Bord Pleanála* [2017] IEHC 268 [101]-[103].
[29] *Efe & Ors v Minister for Justice, Equality and Law Reform & Ors* (No. 2) [2011] IEHC 214 [34]-[35], [55] ; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 [68].

commentateurs se questionnaient sur la possibilité des juges irlandais de se soustraire à une telle analyse. Bien évidemment, la réponse doit être négative : dans les systèmes de common law, il y a une tendance des Cours et tribunaux à se livrer au contrôle juridictionnel *contextuel* de l'action administrative. Cette approche implique la variation de l'intensité de l'examen là où le contexte le requiert, et impose d'étendre la portée du contrôle lorsque des droits fondamentaux seront touchés.[30] Vu l'impact inédit du changement climatique sur les droits fondamentaux et l'échec des autorités administratives dans l'accomplissement des objectifs de réduction des émissions de GES, cette perspective adoptée par le Tribunal de Grande Instance dans l'arrêt *Coyne* manquerait de justification.

Ensuite, le juge Holland a expliqué que selon la doctrine et la jurisprudence de la Cour EDH – en particulier, d'après l'arrêt *Kyrtatos*,[31] il n'est pas possible de dégager aucun droit à un environnement de la CEDH. Pour plaider l'existence d'une atteinte au droit à la vie privée à cause des dommages environnementaux, les Coynes devaient remplir les exigences retenues par la jurisprudence de Strasbourg. La décision a donc évoqué les conditions établies dans les arrêts *Powell et Rayner c Royaume-Uni*,[32] *Hatton c Royaume-Uni*,[33] et *Hardy et Maile c Royaume-Uni*,[34] s'agissant des revendications du volet substantive de l'article 8 de la Convention.[35] Il a aussi été fait référence aux conditions consignées dans l'arrêt *Taskin c Turquie* pour que les requérants puissent accéder au système international de droits de l'homme dans le cas d'une méconnaissance de leurs droits environnementaux procéduraux.[36]

---

[30] Philip Alston, Victoria Adelmant and Matthey Blaney 'Litigating climate change in Ireland' (2020) 20-19 NYU School of Law Public and Policy and Legal Theory Paper Series 1.

[31] '... Ni l'article 8 ni aucune autre disposition de la Convention ne garantit spécifiquement une protection générale de l'environnement en tant que tel ; d'autres instruments internationaux et législations internes sont plus adaptés lorsqu'il s'agit de traiter cet aspect particulier.' *Kyrtatos c Grèce* Requête no 41666/98 (CtEDH, 22 août 2003) 52.

[32] *Powell et Rayner c Royaume-Un*i [1990] ECHR 2, (1990) 12 EHRR 355.

[33] *Hatton c Royaume-Uni* ECHR 2003-VIII 195.

[34] *Hardy et Maile c Royaume-Uni* Requête no 31965/07 (CtEDH, 14 février 2012).

[35] Ces conditions sont (i) l'affectation négative suffisante par la dégradation environnementale des droits du requérant, (ii) avoir atteint un certain seuil minimum de pollution dans les circonstances, et (iii) arriver à incliner la balance des intérêts en jeu, en faveur de l'individu et de la communauté et en dépit de la large marge d'appréciation des États membres dans l'adoption de mesures pour rendre efficace la CEDH. *Pavlov* (n 21) 61.

[36] Ces conditions comprennent le devoir des requérants d'épuiser leur participation dans la réalisation des EIE, l'accès public à l'information environnementale et l'accès à la justice environnementale lorsque les administrations publiques en leur confèrent raisonnablement l'opportunité. *Taskin c Turquie* Requête no 46117/99 (Cour EDH, 30 mars 2005) 119.

Ces analyses ont permis au juge Holland d'écarter l'argument selon lequel le juge de l'annulation devait interpréter la Constitution irlandaise dans la mesure du possible en consonance avec la CEDH, afin de retenir la violation de leurs droits à la vie et à l'intégrité physique à cause de l'activité du développement proposé. D'abord, la décision a refusé d'appliquer les principes de l'affaire *Pavlov c Russie,* et même ceux des arrêts *Kotov c Russie*[37] et *Fadeyeva c Russie*.[38] Ce refus s'est produit en raison de l'absence de preuve de l'impact que le centre de données proposé allait avoir dans leurs droits fondamentaux, et de l'insuffisance à cet égard des affirmations générales en relation avec les impacts qui peuvent survenir du changement climatique. En outre, les Coynes n'ont pas constaté durant la procédure aucun préjudice –au moins non négligeable– spécial et anormal par rapport au contexte environnemental général prévalent lors de l'occurrence dudit préjudice.

Ces considérations du juge Holland, par rapport aux conditions pour plaider la violation de l'article 8 CEDH due à des affectations environnementales, ont été récemment ratifiées par la Cour EDH. Dans l'arrêt *Locascia et autres c Italie*, la Cour a retenu que les requérants sont obligés de prouver que les effets adverses de la pollution environnementale ont atteint 'un certain seuil minimum' pour rentrer dans le champ d'application de cette disposition, tenant compte des toutes circonstances du cas d'espèce.[39] Sans aucun doute, les appréciations de l'arrêt à cet égard sont alignées avec celles de la Cour de Strasbourg.

S'appuyant sur la doctrine du droit européen de l'environnement, le juge Holland a relevé qu'il n'est pas permis de tirer un droit à un environnement sain de la Charte des Droits Fondamentaux de l'UE, ou bien du haut niveau de protection environnementale à assurer via son article 37. Il n'a reconnu que la possibilité pour les requérantes d'opposer les droits environnementaux procéduraux consacrés par la Convention d'Aarhus. Pour en finir, il a rappelé les difficultés subies pour incorporer un tel droit dans de plusieurs Constitutions européennes et même dans le droit primaire de l'Union, et même pour les droits internes de définir les contours dudit droit.

[37] *Kotov et autres c Russie* Requête no 6142/18 (CtEDH, 11 janvier 2023).
[38] *Fadeyeva c Russie* Requête no 55723/00 (CtEDH, 30 novembre 2005).
[39] *Locascia et autres c Italie* Application no 35648/10 (ECLI:CE:ECHR:2023:1019JUD003564810), [121]-[122], [130]-[133].

Toutefois, cette Charte prévoit aussi, dans son article 1er, l'inviolabilité de la dignité humaine et le devoir des États Membres de la respecter et la protéger. Cette disposition a aussi retenu l'attention des Cours et tribunaux irlandais. La jurisprudence irlandaise a développé la reconnaissance des droits dits non énumérés se basant sur la dignité humaine,[40] en tout cas consacrée en tant que valeur dans le préambule de la Constitution. Certains arrêts y ont vu le fondement, *verbi gratia,* d'un droit à gagner sa vie,[41] ou même d'un droit aux conditions matérielles de réception –logement, nourriture et vêtements– sur base du droit européen et interne d'un adolescent chercheur d'asile.[42] Pourquoi un tel droit n'a-t-il pas pu être identifié sur base de la dignité humaine reconnue par le droit européen si un environnement sain est le présupposé essentiel pour l'exercice efficace de l'ensemble des autres droits ?[43]

III Une 'interprétation extensive' de la CEDH pour en tirer un droit à un environnement sain ne saurait (pour l'instant) être justifiée

(a) Le droit n'existe pas encore dans le contexte de la CEDH

Le juge Holland a étudié aussi l'opinion en partie concordante du juge Serghides dans *Pavlov c Russie.*[44] Cette opinion a été avancée par les requérants pour remarquer que l'article 8 CEDH méritait une interprétation dite 'évolutive' où la Cour EDH viendrait reconnaître *de facto* un droit à un environnement sain dans ce contexte.[45] Cependant, l'opinion du juge Serghides soutient la nécessité d'incorporer expressément le droit à un environnement sain dans la Convention, via un Protocole additionnel. Ainsi, la reconnaissance du droit dans le système du Conseil de l'Europe n'a pas été encore atteinte car un instrument international est requis à cet effet, dont la rédaction a été refusée par le Comité de Ministres.

En tout cas, le juge Holland n'a pas voulu faire droit aux plaidoiries des Coynes sur une tendance dans la jurisprudence se basant exclusivement sur l'arrêt *Pavlov c Russie*, pour en finir par reconnaître le droit à un environnement sain. Il exprime littéralement qu'une

[40] *McGee v AG* [1974] IR 284 ; *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

[41] *NHV v Minister for Justice and Equality & Ors* [2017] IESC 35. Dans ce cas, la Cour Suprême a fait appel à l'article 15 de la Charte, mais a retenu la dignité humaine en tant qu'essence du droit à gagner sa vie d'après un commentaire du Comité des Nations Unies des droits économiques, sociaux et culturels.

[42] *SY v Minister for Children, Equality, Disability, Integration and Youth* [2023] IEHC 187 [51] ; *IKA v Minister for Children, Equality, Disability, Integration and Youth* [2023] IEHC 283 [6].

[43] Philip Alston, Victoria Adelmant and Matthey Blaney (n 30) 18-20.

[44] *Pavlov* (n 21) opinion concurrente Serghides.

[45] ibid, opinion concurrente Serghides 9-17.

hirondelle ne fait pas le printemps : ladite tendance arguée par la partie requérante n'apparaît que dans une seule décision de la Cour EDH, et dans une opinion en partie concordante que la majorité n'a pas accompagnée. Il y a en outre l'absence d'un tel droit expressément prévu dans la Convention avouée par le juge Serghides lui-même.[46]

Ces considérations du juge Holland gardent cohérence avec le développement dudit droit dans le droit international régional. Tout récemment le Conseil de l'Europe, dans la Déclaration de Reykjavik, a voulu reconnaître que 'les droits de l'homme et l'environnement sont intimement liés et qu'un environnement propre, sain et durable est essentiel au plein exercice des droits de l'homme des générations actuelles et futures'. Cela reflète timidement une sorte de rôle plus actif que le Conseil de l'Europe irait assumer dans la protection de l'environnement en tant que défi actuel et futur de la région.[47] Certains y ont vu le début d'une initiative visant l'introduction d'un protocole additionnel dans la CEDH pour incorporer expressément le droit à un environnement sain dans cet instrument,[48] même si ce genre d'initiative n'est pas inédit.[49] Ce nouvel élan du Conseil de l'Europe vient après sa décision non-contraignante de recommander aux États membres de 'réfléchir à la nature, contenu et implications du droit à un environnement propre, sain et durable' et de sérieusement envisager son incorporation en droit interne en tant que droit de l'homme 'important pour la jouissance des droits de l'homme'.[50] Au moment de clôturer de la présente édition, le Groupe de Rédaction sur les Droits Humains et l'Environnement du Conseil de l'Europe (CDD-ENV) présentait un projet de rapport sur la nécessité et la faisabilité des instruments additionnels sur les droits humains et l'environnement.[51]

[46] *Coyne* (n 1) 269.

[47] Conseil de l'Europe '4e sommet des chefs d'État et de Gouvernement du Conseil de l'Europe' Rec Conseil des Ministres CM(2023)57-final (16-17 mai 2023).

[48] Assemblée Parlementaire Conseil de l'Europe #EnRoutePourReykjavik : Vers un sommet ambitieux en matière de protection de l'environnement' (*Conseil de l'Europe,* 26 avril 2023) <https://pace.coe.int/fr/news/9066/-roadtoreykjavik-towards-an-ambitious-summit-for-protecting-the-environment> accédé le 18 mars 2024.

[49] Conseil de l'Europe 'Ancrer le droit à un environnement sain: le besoin d'une action renforcée par le Conseil de l'Europe' Rec Assemblée parlementaire 2396 (29 septembre 2021).

[50] Conseil de l'Europe 'Recommandation aux États Membres sur les droits de l'homme et la protection de l'environnement' Rec Conseil des Ministres CM/Rec(2022)20 (27 septembre 2022).

[51] Conseil de l'Europe, Groupe de Rédaction sur les Droits Humains et l'Environnement, 'Rapport 10ème réunion' (21 mars 2024) CDDH-ENV(2024)R10.

Il n'y a alors d'autre choix pour les futurs requérants que rester attentifs aux développements du Conseil de l'Europe a cet égard et continuer à plaider le 'reverdissement' de droits de l'homme conformément à la jurisprudence de la Cour EDH.

(b) Pas d'anticipation à la jurisprudence de Strasbourg, ni d'un devoir de prévenir ou de mitiger le dérèglement climatique sur base de la CEDH

En outre, le juge Holland a mis en valeur la portée limitée de la CEDH en droit irlandais, qui lui empêche aussi d'arriver à la conclusion plaidée par les requérants. Pour ce faire, il cite les articles 2 et 4 de l'ECHR Act 2003 et l'autorité de l'arrêt du juge Fennelly de la Cour Suprême dans l'affaire *McD v L.*[52] À son avis, il est interdit aux Cours et tribunaux irlandais d'anticiper des développements extensifs des interprétations de la Convention par la Cour EDH dans des directions pas encore envisagées par la Cour EDH même, lorsque ces Cours et tribunaux tiennent compte de la Convention et de la jurisprudence de Strasbourg pour appliquer la loi nationale.[53] Cette approche a été aussi suivie par le Tribunal de Grande Instance dans l'arrêt *BPSG Limited t/a Stubbs Gazette v The Courts Service*,[54] et par la Cour Suprême dans l'arrêt *Fox v Minister for Justice and Equality.*[55]

Le juge Holland est ensuite revenu sur l'analyse de la jurisprudence de la Cour EDH relative aux droits consacrés dans les articles 2 et 8 de la Convention. Outre les arrêts évoqués ci-dessous, le juge a étudié particulièrement les arrêts *Brincat et al c Malte*,[56] *Osman c Royaume-Uni*,[57] *Guerra c Italie*,[58] et *Budayeva c Russie.*[59] Il n'y avait donc pas droit à dégager de la CEDH un devoir pour l'État irlandais d'adopter des mesures positives pour faire face aux émissions de GES causées par la génération d'électricité du projet. L'État aurait une large marge d'appréciation sur le choix de traiter lesdites émissions. Les autorités administratives pouvaient donc validement élire l'emploi du système d'échange de quotas d'émissions de l'UE (EU-ETS) et d'entamer la transition à la génération électrique renouvelable, au lieu de

[52] *McD v L & Anor* [2007] IESC 81 [82]-[88].

[53] La citation appartient à l'arrêt britannique rendu par Lord Bingham dans l'affaire *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

[54] *BPSG Limited t/a Stubbs Gazette v The Courts Service et al* [2017] IEHC 209.

[55] *Fox v Minister for Justice and Equality & Ors* [2021] IESC 67.

[56] *Brincat et autres c Malte* Requête no 60908/11, 62110/11, 62129/11, 62312/11 et 62338/11 (Cour EDH, 24 octobre 2014).

[57] *Osman c Royaume-Uni* 1998-VIII 3124.

[58] *Guerra et autres c Italie* 1998-I 1.

[59] *Budayeva et autres c Russie* Requête no 15339/02, 21166/02, 20058/02, 11673/02 et 15343/02 (CtEDH, 29 septembre 2008).

restreindre la demande d'électricité via EIE et processus de consentement aux projets. Elles pouvaient aussi tenter de concilier ces réponses avec la croissance économique (en général) et en favorisant les centres de données (spécifiquement).[60]

En outre, vu que la requête n'a pas prouvé que le changement climatique était une affaire nécessitant des mesures d'urgence, la décision a trouvé que la marge d'appréciation de l'État quant aux mesures à être prises demeurait tout de même large.[61]

L'Irlande rejoint ainsi d'autres juridictions européennes pour lesquelles le pouvoir législatif dispose d'une large marge d'appréciation pour prendre des mesures contre le changement climatique. Par exemple, dans l'affaire *Neubauer,* la Cour constitutionnelle fédérale allemande a accepté l'ample pouvoir d'appréciation du législateur pour assurer le respect des droits fondamentaux lors de la lutte contre les effets des émissions de GES. La Cour a retenu qu'il n'y avait pas besoin d'approfondir sur la question du droit à un environnement sain en Allemagne car les autorités publiques ne sauraient le violer, vu qu'elles ont ratifié l'Accord de Paris et qu'elles ont adopté des lois spécifiques pour faire face au réchauffement planétaire.[62] En France, *verbi gratia,* le Conseil constitutionnel a estimé, s'agissant de l'article 1er de la Charte de l'environnement sur le droit à un environnement sain, 'qu'il incombe au législateur et, dans le cadre défini par la loi, aux autorités administratives de déterminer, dans le respect des principes ainsi énoncés par cet article, les modalités de la mise en œuvre de ces dispositions'.[63]

Ces considérations ont permis aussi au jugement d'écarter les raisonnements avancés dans les arrêts *Urgenda* et *Milieudefensie* aux Pays-Bas. Il s'est d'abord référé à la décision prise dans *Urgenda*. Le juge Holland a soulevé que les décisions des tribunaux néerlandais ne peuvent pas être appliquées en droit irlandais du fait que l'État néerlandais est moniste et envisage une application directe de la CEDH par ses Cours et tribunaux.[64] Par contre, en Irlande, les juges

[60] *Coyne* (n 1) 276-288.
[61] ibid.
[62] *Neubauer et al v Germany* Affaire No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (BverfG, 24 mars 2021), § 113.
[63] C const., n° 2012-282 QPC du 23 novembre 2012, Assoc France Nature et autre, § 7.
[64] C'est pourquoi, par exemple, que la Cour de cassation des Pays-Bas a retenu que les articles 2 et 8 CEDH imposent à l'État néerlandais l'obligation de prendre des mesures appropriées afin de conjurer les dangers imminents posés à l'environnement, et que cela couvre ces dangers qui menacent des larges groupes de la

ne peuvent pas appliquer directement les articles 2 et 8 CEDH pour en sortir des devoirs de mitigation du changement en charge de l'État vu le principe établi par l'arrêt *McD v Pl.* C'est-à-dire, il est interdit aux juges irlandais d'anticiper la jurisprudence de Strasbourg – contrairement aux arrêts des Cours et tribunaux néerlandais, parus avant l'arrêt *Pavlov c Russie*– si celle-ci ne s'est pas encore prononcée sur l'impact du changement climatique. Ensuite, le jugement a expliqué que dans *Milieudefensie*,[65] les citoyens co-requérants se sont vu refuser de l'intérêt pour agir, outre les intérêts déjà desservis par les class actions en cours, car ils n'avaient pas démontré 'un impact clair et négatif… d'une manière réelle et concrète'[66] à leurs intérêts individuels.[67]

Les considérations du juge Holland sur le caractère dualiste de l'État irlandais, prévus par l'article 29.4 de la Constitution, permettent d'expliquer l'absence d'effet direct en droit interne des droits fondamentaux consacrés par la CEDH. Or, ces explications refusent d'adresser – même via des arguments *obiter*– pourquoi son jugement a rejeté de traiter les contentieux liés au climat éloignés du débat sur les politiques publics sur celui-ci comme des réclamations relatives aux droits fondamentaux. Dans *Urgenda* et *Milieudefensie*, les Cours et tribunaux des Pays-Bas ont fait le choix exprès d'employer une approche basée sur les droits à la vie et à la vie privée et familiale des articles 2 et 8 CEDH. Sous cette approche, ces droits ont un effet direct vertical et permettent de dégager des obligations en charge des États membres et des entreprises pour prévenir et mitiger les effets nocifs du dérèglement climatique.[68]

Ce que le respect des droits fondamentaux veut soulever dans ce type d'affaires, c'est le devoir général d'agir de façon responsable. Ce devoir s'étend au-delà du respect des régulations environnementales : il implique une 'obligation non écrite de prudence sociale' où la responsabilité patrimoniale extra-contractuelle des États et entreprises peut être engagée du fait des atteintes aux droits fondamentaux causés par leurs actions ou omissions ayant un impact

population, même si les dangers n'ont à se concrétiser que dans le long terme. Hoge Raad 13 janvier 2020 (n 8) 5.2.1-5.5.3.

[65] Rechtbank Den Haag 26 mai 2021 (n 9) 4.2.1-4.2.4.

[66] Holland J a extrapolé ici la formule de l'intérêt pour agir employée dans l'arrêt *O'Doherty & Water v Minister for Health* [2022] IESC 32.

[67] *Coyne* (n 1) 270-275.

[68] Otto Spijkers, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell' (2021) 5(2) Chinese Journal of Environmental Law 237 ; Jasper Krommendijk, 'Beyond *Urgenda*: The role of the ECHR and judgments of the ECtHR in Dutch environmental and climate litigation' (2022) 31 Review of European, Comparative & International Environmental Law 60.

négatif sur l'environnement.[69] S'il y a un effet limité de la CEDH en droit irlandais, selon l'article 2(1) ECHR 2003 Act il est néanmoins possible d'interpréter les règles de common law d'une façon compatible avec les obligations de l'État irlandais sous la CEDH.

L'arrêt proféré dans l'affaire *Coyne* a bien soulevé que les requérants n'ont pas fondé leur moyen sur ces droits prévus par la Constitution et la jurisprudence des Cours et tribunaux. Mais le devoir d'interprétation conforme à la CEDH exigeait du jugement d'établir, au moins via des *dicta*, la possibilité de faire la balance entre les arguments relatifs à la large marge d'appréciation de l'État et ceux concernant les droits fondamentaux. Cette interprétation, loin d'anticiper la jurisprudence de la Cour EDH, ne fait que développer la vision fortement anthropocentrique de ce Tribunal sur la protection de l'environnement. Celle-ci impose la protection –quoique indirecte et utilitariste– de l'environnement, dans la mesure où celle-ci garantit des conditions nécessaires pour la vie, l'intégrité physique ou le bien-être des titulaires de droits protégés par la Convention.[70] Il a été déjà soulevé au-dessous l'obligation en common law pour les juges de se livrer à un contrôle juridictionnel *contextuel* de l'action administrative.

Il conviendrait en tout cas de rappeler que la Cour suprême, dans l'affaire *Climate Case Ireland,* a considéré que malgré le respect dû par les Cours et tribunaux au principe de séparation des pouvoirs, les juges doivent faire valoir les droits constitutionnels, peu importe si cela amène le juge à une étude de matières complexes relatives aux politiques publiques.[71]

Par ailleurs, au moment où l'arrêt *Climate Case Ireland* a été livré, certains commentateurs s'en doutaient déjà que la jurisprudence irlandaise serait prête à découvrir des nouveaux droits dans la Constitution que la Cour EDH pourrait dériver de l'article 8 CEDH dans des litiges environnementaux. Ils soulevaient aussi le fait que la Cour suprême ne s'était pas prononcée sur la prohibition pour les Cours et tribunaux d'aller plus loin que les développements de la jurisprudence de Strasbourg le permettent en matière de droits reconnus par la Convention. Ils ont également rappelé une tendance dans la jurisprudence du Royaume-Uni à s'écarter de cette

[69] ibid.
[70] Natalia Kobylarz, 'Balancing its Way out of Strong Anthropocentrism: Integration of 'Ecological Minimum Standards' in the European Court of Human Rights 'Fair Balance' Review' (2022) 13(0) Journal of Human Rights and the Environment 16.
[71] *Climate Case Ireland* (n 7) 8.16.

position, dont le suivi en droit irlandais n'était pas certain.[72] Vu ce qui a été retenu par l'arrêt *Coyne*, il est constaté qu'ils n'en ont pas eu tort.

IV Est-il impossible de retenir un droit à un environnement sain dérivé de la Constitution irlandaise?

Pour la dernière partie de sa décision, le juge Holland s'est penché sur les jugements du Tribunal de Grande Instance dans l'affaire *Merriman,* et sur ceux de la Cour Suprême dans les affaires *Simpson v Governor of Mountjoy Prison* et *Climate Case Ireland*. Les requérants ont fait valoir que la première de ces décisions aurait déclaré l'existence du droit à un environnement sain. La deuxième d'entre elles, par contre, aurait proposé l'article 40.3 de la Constitution irlandaise comme la source des droits fondamentaux dits 'dérivés' et 'énumérés', et que ces droits auraient tous pour fondement la dignité humaine. Et la troisième des décisions citées mettrait en exergue l'absence, dans le cas d'espèce, d'un dossier convaincant monté en faveur d'un droit dérivé à un environnement sain.

(a) Le droit à un environnement sain (plus ou moins) retenu dans *Merriman* mais rejeté par *Climate Case Ireland*

Par rapport au jugement dans l'affaire *Merriman*, le juge Holland a considéré que la reconnaissance dudit droit constituait un argument *obiter.* Bien que le droit a été considéré protégé par la clause des droits personnels de la Constitution, consonant avec la dignité humaine et le bien-être des citoyens *latu sensu,* et indispensable pour l'exercice des tous autres droits fondamentaux, le jugement a souligné les réserves du juge Barrett au Tribunal de Grande Instance concernant cette reconnaissance. D'abord, le droit ainsi reconnu n'a pas été pourvu de contenu spécifique par l'arrêt : le juge Barrett a préféré de laisser la concrétisation des devoirs et obligations spécifiques émanant du droit à un environnement sain à l'évolution de la jurisprudence. Ce juge en tout cas n'a octroyé aucune réparation aux requérants sur base du droit à un environnement sain, et a établi que la partie requérante n'a pas réussi à prouver une méconnaissance de ce droit ni d'aucun autre droit reconnu par la CEDH.[73]

L'argument le plus solide contre l'existence du droit à un environnement sain en droit irlandais, dans l'opinion du juge Holland, a été offert par le président de la Cour Suprême Clarke dans

[72] Rónán Kennedy and others, 'When is a Plan Not a Plan? The Supreme Court Decision in "Climate Case Ireland"' (2020) 2 Irish Planning and Environmental Law Journal 60.
[73] *Coyne* (n 1) 289-290.

son arrêt *Climate Case Ireland*. Un des cas représentatifs des litiges climatiques dans les juridictions européennes internes, à côté d'*Urgenda*, cette affaire a toutefois impliqué une victoire douce-amère pour les requérants. Bien que la décision a annulé le National Mitigation Plan car il ne s'avérait pas au Climate Act 2015, le président Clarke a considéré comme non nécessaire de se prononcer sur l'affectation du droit reconnu dans l'arrêt *Merriman* dont l'ONG requérante se montrait titulaire.[74] Cependant, dans des arguments constituant *obiter dicta,* mais avancés sous le consensus de la Cour Suprême, le président Clarke a considéré qu'il n'y avait pas de raisons suffisantes pour identifier un droit dérivé à un environnement sain de la clause des droits personnels de la Constitution.[75]

L'arrêt du juge Holland présente un raisonnement assez classique pour refuser de déclarer l'existence du droit à un environnement sain en droit irlandais. Il retient le caractère d'*obiter dicta* des arguments consignés à cet égard dans les arrêts *Merriman* et *Climate Case Ireland*, alors qu'il estime que la Cour Suprême avait en tout cas tranché sur la question au moyen d'une opinion unanime faisant autorité. En défaut d'une meilleure explication, avec autant d'autorité, dit le juge Holland, il n'y a que le choix d'accepter que le droit à un environnement sain ne peut pas être dérivé de la Constitution irlandaise.

La Constitution irlandaise, dans les attributions visées par l'article 34.5, ne confère aucune compétence à la Cour Suprême pour émettre des opinions à titre consultatif sur des points de droit. Pourtant, la doctrine du *stare decisis* demande au juge du common law d'appliquer strictement le précédent, sauf si le précédent a été mis en vigueur par ignorance ou oubli d'une règle écrite constitutionnelle ou légale. En outre, il se peut qu'il y ait une méconnaissance du précédent, lorsque des 'raisons impérieuses' l'imposent car la décision est évidemment erroné.[76] Toutefois, le juge doit aussi faire preuve d'équilibrisme : dans l'application du précédent, il doit balancer flexibilité et sécurité juridique, afin d' atteindre opportunément les changements sociaux mais d'une façon qui ne rende pas imprévisible le résultat des litiges.[77]

[74] Owen McIntyre, 'The Irish Supreme Court Judgment in Climate Case Ireland: "One Step Forward and Two Steps Back"' (*IUCN News and Events*, 27 août 2020) <https://www.iucn.org/news/world-commission-environmental-law/202008/irish-supreme-court-judgment-climate-case-ireland-one-step-forward-and-two-steps-back> accédé le 11 juillet 2023.

[75] *Coyne* (n 1) 293-294.

[76] *AG v Ryan's Car Hire Ltd* [1965] IR 642.

[77] Séamus Henchy, 'Precedent in the Irish Supreme Court' (1962) 25(5) MLR 544; Ian Walsh, 'Precedent in former Irish Superior Courts' (2005) 40 Irish Jurist 160.

Cette doctrine ne s'applique qu'à la *ratio decidendi* des arrêts, non pas aux *obiter dicta*. Mais les *obiter dicta* gardent, en tout cas, une certaine force persuasive lorsqu'il s'agit d'interpréter des questions de droit faisant partie de l'examen du fond dans des décisions futures.[78]

Dans le cas d'espèce, le juge Holland a été persuadé par la force des arguments d'*obiter* présentés par le président Clarke dans l'arrêt *Climate Case Ireland*. Cet argumentaire lui a permis d'arriver, finalement, à appliquer ces arguments dans un litige où l'existence du droit en question faisait partie de l'examen du fond. Or, derrière l'acceptation du principe établi par le président Clarke dans *Coyne* sur la base du *stare decisis* se cachent également d'autres principes touchant à des valeurs constitutionnelles très enracinées dans la pensée juridique irlandaise. La revendication de ces principes montre une application stricte de la séparation de pouvoirs en dépit d'une protection environnementale axée sur les droits de l'homme.

D'abord, on constate que le jugement a refusé de retenir l'existence d'un droit à un environnement sain en absence d'une disposition expresse, soit dans la CEDH, soit dans la Constitution irlandaise. Dans le contexte de la CEDH, c'est une position pacifique dans la Cour EDH depuis l'affaire *Kyrtatos*. En outre, en raison de la portée limitée de la CEDH en droit irlandais, on voit bien pourquoi les juges ne sauraient interpréter la Constitution en fonction d'un droit dont les contours en droit international demeurent flous.[79] Cependant, dans le contexte constitutionnel irlandais, on pourrait avancer plusieurs arguments contre l'exigence d'une base juridique expresse pour dériver des droits fondamentaux non explicitement reconnus par la Constitution.

(b) Une critique à l'acceptation sans controverse par l'arrêt *Coyne* de la doctrine dite des droits fondamentaux 'dérivés'

[78] Ian McLeod, *Legal method* (1st edn, Macmillan Law Masters 1999) 143.

[79] Si le système onusien a reconnu le droit à un environnement sain dans deux occasions, cette reconnaissance a toutefois été faite par voie d'instruments sans aucune valeur obligatoire. La reconnaissance du droit est plafonnée à l'aspect subjectif du droit à l'environnement ; c'est-à-dire, à la protection indirecte de l'environnement via les droits de l'homme et les droits socio-économiques et au rapport entre l'environnement et la survivance culturelle et physique des communautés via les droits bio-culturels. UNHRC Res 48/13 (2021) A/HRC/48/L.23/Rev.1 ; UNGA Res 76/300 (2022) A/76/L.75. Il demeure contesté le fait que le droit à un environnement sain dans les systèmes internationaux des droits de l'homme puisse garantir la protection de l'environnement en tant que tel. Il y a néanmoins du progrès en la matière, lorsque la Cour IDH a accepté d'inclure dans le droit prévu par les articles 26 CADH et 11 du Protocole de San Salvador la protection des intérêts légaux de la nature étant donné sa valeur intrinsèque. Kobylarz (n 68) ; *The Environment and Human Rights,* Advisory Opinion OC-23, Inter-American Court of Human Rights (15 novembre 2017).

Dans l'arrêt *Climate Case Ireland*, le président Clarke revient sur la doctrine dite des droits fondamentaux 'énumérés'. Il considère qu'il est de meilleur droit de parler des droits fondamentaux 'dérivés', lorsque l'on fait référence aux droits non explicitement reconnus par la Constitution. Afin de réduire la haute subjectivité propre à la tâche dite 'd'énumérer' des droits fondamentaux, et de ne pas empiéter les attributions des autres pouvoirs publics, il fallait dériver ces prérogatives d'une base juridique propre à d'autres droits, obligations, valeurs – comme la dignité humaine– ou structures –comme la nature démocratique de l'État irlandais– dans la Constitution.

Toutefois, cet argument ne tient raisonnablement pas. Si la rupture avec la doctrine des droits énumérés se justifie dans l'abandon des fondements de droit naturel qui la supportent auparavant,[80] il n'en est moins que la doctrine des droits dérivés voudrait que la reconnaissance de droits non expressément prévus par la Constitutions soit faite sur des bases juridiques expresses mais floues par défaut. L'existence d'une base juridique expresse, formée par des mots souvent non clairs et ambigus, n'exonère pas les juges d'un exercice interprétatif plus ou moins créatif pour arriver à préciser leur contenu. Le fait que la Cour Suprême ait retenu des méthodes d'interprétation au-delà de l'interprétation littérale ou textualiste de la Constitution,[81] ou qu'elle ait développé une doctrine qui conçoit la Constitution comme 'un document vivant',[82] en témoigne.

En outre, tout récemment la Cour Suprême a fait preuve d'une créativité que le président Clarke lui-même songerait à critiquer : elle a incorporé une doctrine pour revendiquer la souveraineté nationale vis-à-vis les traités internationaux n'ayant aucune base juridique expresse dans la Constitution. On fait référence à l'arrêt *Costello v Government of Ireland & Ors*.[83] Les commentateurs mettent en exergue que la base juridique expresse de 'l'identité constitutionnelle', doctrine avancée pour s'opposer à la ratification du CETA, est le mot 'démocratique' dans l'Article 5 de la Constitution comme trait essentiel de l'État irlandais. Pourtant, cette doctrine est inédite dans le droit constitutionnel irlandais, car elle n'a aucune

[80] Même si les mentions référant au droit naturel sont partout dans le texte constitutionnel ; notamment, comme fondement des droits de la famille et de la protection spéciale dont ceci jouit (Article 40.1), des droits des enfants (Article 42A) et du droit de propriété (Article 43).
[81] *Senator Ivana Bacik v An Taoiseach* [2020] IEHC 313 [80] (Irvine P) ; *Curtin v Dáil Éireann* [2006] 2 IR 556.
[82] *McGee v AG* [1974] IR 284 (Walsh J) ; *State (Healy) v Donoghue* [1976] IR 325 ; *Sinnott v Minister for Education* [2001] IESC 63 ; *Zappone v Revenue Commissioners* [2006] 2 IR 417.
[83] *Costello v Government of Ireland* [2022] IESC 44.

mention dans la Constitution ni dans la jurisprudence, et l'exercice argumentatif d'en tirer cette identité constitutionnelle de cette expression nettement floue se révèle assez hasardeux. La nouvelle doctrine, du coup, viendrait aussi menacer ainsi la séparation des pouvoirs publics, compte tenu de la restriction qu'elle porte à l'action du pouvoir exécutif dans les affaires étrangères.[84]

La méthode de la dérivation des droits fondamentaux non expressément prévus par la Constitution s'avère dans la pratique d'une nature très restrictive. Il y en a quelques exemples. Le juge Hogan, en tant que commentateur et en tant que magistrat,[85] avait proposé que le 'droit de la personne' de l'Article 40.3.2° de la Constitution aurait pu aisément servir de base juridique aux droits fondamentaux non énumérés. On pourrait soutenir que l'Article 40.3.2 de la Constitution constitue un fondement suffisant pour un droit dont l'efficacité rend les autres droits fondamentaux personnels eux-mêmes efficaces : sans un environnement sain, les autres droits fondamentaux personnels deviendraient irréalisables. Cependant, dans l'arrêt *Fleming v Ireland*,[86] la Cour Suprême a refusé catégoriquement d'étendre l'application de cette clause constitutionnelle à la protection de l'autonomie personnelle, afin d'y voir un droit non énuméré à une fin de vie assistée. Une acceptation de l'existence d'un tel droit a été jugée trop extensive.[87] Il serait donc extrêmement difficile, voire impossible, d'en tirer un droit à un environnement sain en utilisant la méthode de dérivation vis-à-vis de la clause des droits personnels. Ceci, en raison de la portée très étendue de la protection offerte par la disposition en question et le contenu de la base juridique 'droit de la personne'. C'est pourquoi une base juridique fondée dudit droit sur la dignité humaine, qui apparaît dans la Constitution même et dans de plusieurs textes internationaux et régionaux contraignants pour l'Irlande, tel qu'il a été soulevé au-dessous, s'avère plus raisonnable.

De surcroît, l'argument du juge Holland et du président Clarke sur l'extrême difficulté pour conférer du contenu au droit à un environnement sain mérite aussi quelques lignes. Cet argument dénonce l'absence de contenu spécifique de ce droit, qui l'empêcherait d'être

---

[84] Gavin Barrett, 'Constitutional Identity, Ireland and the EU' (Verfassungsblog, 22 mars 2023) <https://verfassungsblog.de/constitutional-identity-ireland-and-the-eu/> accédé le 12 février 2024.

[85] David Kenny, 'Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights' (2013) 36 Dublin University Law Journal 322; Gerard Hogan, 'Unenumerated Personal Rights: The Legacy of Ryan v Attorney General', in Laura Cahillane and others, *Judges, politics and the Irish Constitution* (1st edn, Manchester University Press 2017) 49.

[86] *Fleming v Ireland* [2013] IESC 19.

[87] ibid 99-108.

distingué des droits à la vie ou à l'intégrité physique. En réalité, cet argument met l'accent sur la vétusté du texte constitutionnel irlandais qui laisse les juges les mains liées pour introduire des droits environnementaux dans le droit interne. Il n'y a dans la Constitution aucune expression relative à l'environnement, la nature ou sa protection de laquelle tirer ce contenu spécifique.[88] Par conséquent, tant qu'il n'y ait pas de disposition expresse assortie d'expressions visant sur les aspects subjectifs ou objectifs du droit en question, via une interprétation judiciaire extensive des droits –le cas du système interaméricain des droits de l'homme–, au moyen d'un protocole additionnel à la CEDH –comme, par exemple, dans le système africain des droits de l'homme–,[89] ou même par voie d'une modification des instruments pertinents en droit européen, il n'y aura lieu à aucune reconnaissance de ce droit pourvu d'un contenu spécifique par voie de la méthode 'dérivée'.

(c) Vers le 'reverdissement' des droits fondamentaux ou l'amendement constitutionnel pour l'environnement en droit irlandais ?

L'arrêt *Climate Case Ireland* a établi qu'il peut y avoir des cas relatifs à l'environnement où des droits constitutionnels peuvent être impliqués, et les Cours et tribunaux devraient considérer les circonstances dans lesquelles les mesures –ou l'absence des mesures– contre le changement climatique affectent le droit à la vie ou à l'intégrité physique. De plus, le président Clarke n'a pas écarté la possibilité que le rapport entre certaines valeurs constitutionnelles et droits fondamentaux –telles que la propriété de l'État des ressources naturelles, le droit de propriété et la protection spécial du foyer-, puisse imposer des devoirs spécifiques en tête de l'État irlandais dans des circonstances particulières dûment prouvées.[90] Cela évoque, d'ailleurs, l'appréciation du président Clarke du droit à un environnement sain soit comme une addition non nécessaire (si sa portée ne va pas au-delà des droits à la vie ou à l'intégrité physique), soit d'une imprécision inadmissible (si sa portée, par contre, en y va). Vu sa définition gazeuse, le droit à un environnement sain était superflu et vague, et dans aucun cas pourrait-il être dérivé de la Constitution.[91]

---

[88] Certes, on trouve dans le texte de 1937 des dispositions relatives au droit de propriété (articles 40.3.2 et 32) et à la propriété de l'État sur les ressources naturelles (Article 10). Mais les juges ne sauraient tirer de ces références aucun devoir de protection de l'environnement de la façon qu'il est compris dès nos jours. Par exemple, d'autres constitutions ont subi des amendements pour inclure le droit à un environnement sain, la protection environnementale ou des objectifs relatifs à sa protection. Tel est le cas de la Belgique (articles 7bis sur l'objectif du développement soutenable et 23 sur le droit à un environnement sain, introduits en 1994) et de la France (Charte de l'environnement, intégrée en 2005), dont les Constitutions datent de 1831 et 1958 respectivement.

[89] Charte africaine des droits de l'homme et des peuples, article 24.

[90] *Climate Case Ireland* (n 7) 8.17.

[91] ibid.

Conséquemment, à l'instar de la Cour EDH, à l'heure actuelle les cours et tribunaux irlandais ne reconnaissent que les affectations aux droits fondamentaux à la vie ou à l'intégrité physique que peuvent causer les décisions environnementales ou des faits constitutifs de dégradation environnementale. Cette 'écologisation' de droits fondamentaux, selon l'arrêt *Coyne*, impose au requérant de fournir une preuve d'un risque personnel, sérieux et actuel de préjudice aux droits fondamentaux des requérants. Il l'oblige aussi à établir la causalité entre le fait générateur de violation de ces droits –et partant, de dégradation environnementale– et ce risque. Cependant, les critiques contre cette 'écologisation' des droits fondamentaux demeurent pertinentes.

La première critique vient du juge Barrett lui-même, dans l'affaire *Merriman*. Il soutient que ce 'reverdissement' des droits fondamentaux n'assure qu'une protection environnementale précaire. A son avis, le volet environnemental des autres droits fondamentaux était tout simplement un creuset des différentes manifestations du droit à un environnement sain, qui constamment informait ces protections individuelles, même au point de se voir obscurci par celles-ci.[92] Pour certains académiciens, la protection indirecte et conditionnelle offerte par les droits fondamentaux 'écologisés' à l'environnement est fort limitée. Conséquemment, étant fondé sur des droits individuels, le chemin du 'reverdissement' sous-estime les aspects collectifs des dommages environnementaux et les droits des communautés affectées par ces impacts. Ce caractère très individuel de cette écologisation soulève aussi la difficulté de surmonter l'examen de causalité sous la *condition sine qua non* ('but for' test) dans le contentieux de la responsabilité environnementale. Finalement, il s'agit d'une doctrine d'application territoriale restreinte, qui n'admet que le dommage environnemental dans l'ordre juridique interne, en dépit du dommage transfrontalier.[93]

En outre, la protection environnementale offerte via le 'reverdissement' des droits fondamentaux n'est pas dépourvue d'obstacles dans les systèmes internationaux de protection où elle est souvent appliquée. Certains commentateurs soulèvent que pour obtenir cette protection, il faut démontrer trois conditions: (i) L'absence de conformité de l'État avec ses propres règles de protection environnementale en violation de son État de droit dans la matière,

[92] *Merriman* (n 14) 263.

[93] Azadeh Chalabi, 'A New Theoretical Model of the Right to Environment and its Practical Advantages' (2023) 23(4) Human Rights Law Review 1.

(ii) Une affectation aux droits fondamentaux suffisamment sérieuse –et pas seulement non-négligeable–, et (iii) L'erreur de l'État dans la balance à faire entre les besoins de la communauté dans son ensemble et les effets au groupement de personnes affecté par la mesure en question, compte tenu des circonstances du cas d'espèce.[94] D'autres commentateurs y ajoutent que les tribunaux internationaux –notamment la Cour EDH– vivent une sorte de dichotomie entre, d'un côté, une jurisprudence progressive et fondée sur des principes, et une prépondérance croissante de la doctrine de la marge d'appréciation des États, de l'autre côté.[95] Ces contingences rendraient extrêmement difficile une protection environnementale par voie de l'écologisation des droits fondamentaux si celles-ci sont extrapolées dans le droit irlandais.

La seule voie raisonnable ouverte pour insérer ce droit dans la Constitution n'est donc autre que celle de son amendement par voie d'un référendum plébiscitaire. Cela explique que l'Assemblée des citoyens sur la perte de la biodiversité et le Comité conjoint du Parlement irlandais aient recommandé dans leurs rapports respectifs qu'un tel processus soit déclenché 'pendant la vie utile de cette législature'.[96] Mais certains commentateurs ont durement critiqué cette suggestion du président Clarke dans *Climate Case Ireland.* Il a été mis en exergue, notamment, que le fait qu'il peut être plus légitime d'adopter ce droit au moyen d'un amendement constitutionnel –car il serait plus démocratique– ne rend pas illégitime qu'un tel droit soit reconnu par la jurisprudence des Cours et tribunaux si une base juridique utile constitutionnelle pour celui-ci peut être avancée.[97] Cette remarque s'avère tout à fait raisonnable vu le caractère désuet des provisions constitutionnelles irlandaises par rapport à la protection environnementale, et la valeur juridique de la dignité humaine en tant que fondement du droit à un environnement sain tiré de la Constitution irlandaise.

---

[94] Dina Shelton, 'Human Rights and the Environment: Substantive Rights' in Malgosia Fitzmaurice et al, *Research Handbook on International Environmental Law* (Edward Elgar 2011) 265.

[95] Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Cambridge University Press 2018) 86.

[96] Citizens' Assembly on Biodiversity Loss, *Report of the Citizens' Assembly on Biodiversity Loss* (2023) 16 <https://citizensassembly.ie/wp-content/uploads/Report-on-Biodiversity-Loss_mid-res.pdf> accédé le 7 juillet 2023; Orla Kelleher, 'The Supreme Court of Ireland's decision in Friends of the Irish Environment v Government of Ireland ("Climate Case Ireland")' (*EJIL:Talk!*, 9 septembre 2020) < https://www.ejiltalk.org/the-supreme-court-of-irelands-decision-in-friends-of-the-irish-environment-v-government-of-ireland-climate-case-ireland/ > accédé le 19 mars 2024.

[97] Jamie McLoughlin, 'Whither Constitutional Environmental (Rights) Protection in Ireland after "Climate Case Ireland?"' (2021) 5(2) Irish Judicial Studies Journal 26.

La question sera dès lors de proposer un contenu spécifique pour le droit à un environnement sain. Des publications récentes ont déjà tenté de formuler quelques principes généraux pour guider les travaux préparatoires du projet de loi du référendum –tels que la justice intergénérationnelle, le principe de *standstill*, ou bien l'effet horizontal direct du droit sans être lié à aucune restriction budgétaire.[98] Ces publications ont également proposé la nécessité de consacrer un vrai droit subjectif avec des devoirs clairs, inconditionnels, non-ambigus et d'application automatique. Parmi ces devoirs se trouve le devoir de l'État de garantir l'adoption et la mise en œuvre des mesures pour appliquer le droit environnemental en vigueur, ou même la responsabilité objective des personnes de droit privé et de droit public pour le préjudice écologique pur.[99]

(d) L'impossibilité de reconvertir la réclamation des Coynes en un litige de responsabilité civile

S'agissant de l'arrêt proféré dans l'affaire *Simpson*, le juge Holland a accepté la proposition des Coynes sur l'étendue de cette décision en relation avec les droits fondamentaux dans la Constitution ; pourtant, à son avis, cela n'avait pas d'incidence sur le moyen proposé par ceux-ci dans la requête. Néanmoins, il a de toute façon retenu que *Simpson v Governor of Mountjoy Prison* est saillant pour avoir ratifié la règle selon laquelle les recours constitutionnels n'ont lieu que dans des conditions strictement nécessaires, et qu'ils ne peuvent pas être conçus comme des jokers pour contourner l'application du droit de la responsabilité civile.[100]

Le juge Holland s'est également posé la question sur si, dans les faits de l'espèce et tenant compte du matériel probatoire devant soi, était-il possible de reconvertir la requête en une demande de responsabilité civile. Ceci, l'explique-t-il, afin de restreindre par injonction le

[98] Julián Suárez, 'A Symbolic Step and an Enormous Leap of Faith: The Recommendations of the Citizens' Assembly on Biodiversity Loss Regarding Constitutional Reform to Incorporate Environmental Human Rights and Rights of Nature in Ireland' (2023) 23 University College Dublin Law Review 31.

[99] ibid.

[100] Plus récemment, la décision prise dans 'McGee' a établi que les recours en revendication des droits fondamentaux –les recours nommés 'constitutionnels purs' ou 'type Meskell' –constituent des actions en responsabilité civile et se soumettent au délai de prescription de 6 ans établi dans l'article 11(2)(a) du Statute of Limitations 1957. *McGee v Governor of Portlaoise Prison* [2023] IESC 14 [76]-[79]. La règle concernant les recours constitutionnels purs en est restée la même : ces recours à nature résiduelle peuvent être présentés exclusivement là où la violation des droits fondamentaux ne peut pas être remédiée par des régimes de responsabilité civile prévus par les lois, le common law ou l'equity. Voir aussi *Simpson v Governor of Mountjoy Prison* [2019] IESC 81 ; *Blehein v Minister for Health and Children* [2018] IESC 40 ; *Savickis v Governor of Castlerea Prison & Ors (No. 2)* [2016] IECA 372 ; *Hanrahan & Ors v Merck Sharp & Dohme (Ireland) Ltd* [1988] ILRM 629 ; *Meskell v CIE* [1973] IR 121.

développement du centre de données proposé sur base d'un risque supposément causé par les émissions de CO2 de la génération d'électricité nécessitée pour son fonctionnement. Il y répond nonobstant négativement : l'absence de preuve d'un préjudice actuel et probable et du lien de causalité de ce préjudice avec les émissions de GES spécifiques du centre de données lui empêchaient de prendre une telle mesure.[101]

Il faut rappeler que l'action en justice pour revendiquer la violation des droits fondamentaux en droit irlandais n'a qu'un caractère subsidiaire. La responsabilité de l'État pour la violation des droits fondamentaux est seulement engagée en défaut des systèmes de responsabilité civile du *common law* (*torts*), statutaires ou fondés sur l'*equity*. Cependant, il est difficile de penser à des cas factuels dans lesquels une affectation d'un de ces droits causé par des préjudices environnementaux pourrait contourner la protection offerte par les régimes de responsabilité civile des nuisances (*nuisance*), d'ingérence injustifiée dans la jouissance des droits (*trespass*), de la faute personnelle (*duty of care*) ou du fait d'autrui (*vicarious liability*).

Vu les développements récents du Tribunal de Grande Instance irlandais dans l'affaire *Webster v Meenacloghspar*, il conviendrait de se demander s'il serait plus convenable aux requérants qui, comme les Coynes, estiment leurs droits fondamentaux violés par des opérations permises au moyen des licences environnementales, de plaider des nuisances. C'est-à-dire, de prouver une immixtion substantielle et fréquente avec l'usage ordinaire, jouissance et confort de leur propriété, selon une personne raisonnable et en tenant compte de la localité en question.[102]

D CONCLUSION

Après l'arrêt *Coyne*, il est suffisamment clair (i) Qu'il n'y a aucun droit à un environnement sain qui pourrait être tiré de la CEDH ou de la Constitution irlandaise, (ii) Qu'il n'y a aucune obligation positive pour l'État irlandais, en vertu de la CEDH ou d'un droit personnel à un environnement sain, de traiter le changement climatique, et que (iii) Même si cette obligation existait, l'État irlandais aurait une large marge d'appréciation sur le choix des mesures pour l'accomplir. Ceci, sans préjudice du fait qu'il existe à l'heure actuelle des raisons pour

[101] *Coyne* (n 1) 291-292.
[102] *Webster & Ors v Meenacloghspar (Wind) Limited* [2024] IEHC 136 [28]-[47], [346].

considérer que l'approche de l'État pour lutter contre les émissions se situe bel et bien dans cette marge.

La consolidation de la jurisprudence sur l'impossibilité de dériver un droit à un environnement sain depuis la Constitution irlandaise permet de faire trois constats sur la protection garantie aux droits environnementaux en Irlande :

1° Les cours et tribunaux irlandais, avec la théorie dite de la 'dérivation' des droits fondamentaux, ont adopté une position strictement respectueuse de la séparation des pouvoirs. Cette position leur a permis, d'après une perspective moult limitative, de refuser de déclarer l'existence du droit à un environnement sain, là où la Constitution ne prévoit aucune base juridique utile à cet égard.

2° La voie correcte pour demander la revendication d'un préjudice personnel subi à cause de la dégradation environnementale provoquée par l'homme ou tolérée par les administrations publiques est toujours l'écologisation des droits fondamentaux personnels prévus par la Constitution. Mais cette voie 'purement constitutionnelle', déjà hasardeuse pour les requérants, n'est ouverte que si l'étendue de la responsabilité civile ne couvre pas d'une manière efficace la réparation. Il ne serait pas toujours clair si les réparations concédées aux requérants tiendraient compte des biens socio-économiques collectifs souvent affectés dans ces circonstances –comme la qualité de l'air ou de l'eau, ou les environnements non-toxiques dans lesquels habiter, jouer, travailler, étudier et jouer–, vu l'empiètement de la séparation des pouvoirs publics que des décisions touchant à la justice distributive pourraient entraîner.

3° Il existe en droit de l'environnement irlandais un déficit de protection constitutionnelle des citoyens contre la dégradation environnementale, et spécifiquement, contre le préjudice écologique pur.[103] Cette brèche serait sans doute due au manque d'intérêt du pouvoir législatif de rendre effectifs les droits environnementaux. Bien que la décision des Cours et tribunaux de ne pas combler la lacune législative est un refus d'assumer le rôle d'interpréter de façon évolutive la Constitution en matière environnementale, la décision apparaît raisonnablement justifiée par des considérations démocratiques et de sécurité juridique. Cependant, cette justification ne rend pas illégitime une éventuelle reconnaissance du droit par le pouvoir

[103] McIntyre (n 74).

judiciaire. En outre, d'autres arrêts récents de la Cour Suprême révèlent que l'absence des bases juridiques claires n'est point un obstacle pour introduire d'une manière créative des nouvelles doctrines en droit constitutionnel, aussi aux bases juridiques floues.

Il ne peut pas être écarté, quand-même, qu'un nouveau cas d'espèce, avec d'autres faits de dégradation environnementale plus pressants et mieux établis que ceux discutés sur *Coyne*, justifierait dans l'avenir un changement d'avis au sein des Cours et tribunaux irlandais.

INCREMENTALISM AT THE EUROPEAN COURT OF HUMAN RIGHTS: A NEW VERSION OF THE LIVING INSTRUMENT DOCTRINE?

Saoirse Flattery[*]

A INTRODUCTION

The European Court of Human Rights' ('ECtHR') 'living instrument' doctrine has been a tool of great evolutive power in the decades since its creation. When the Court first elaborated this flexible approach to interpretation in 1978, it ensured the European Convention on Human Rights' ('ECHR') longevity by allowing for the creative reinterpretation of existing rights in response to the ever-changing nature of human society.[1] In the years since, a legitimacy crisis and an ever-increasing caseload have led to a decline in the power of the 'living instrument' doctrine at the ECtHR, but the need for such dynamic evolution remains.[2] Hence, the reason for a stronger turn toward incrementalism, a strategic approach that the ECtHR uses to advance human rights in small steps through techniques such as analogous reasoning and particularisation.

In this essay, I will suggest that incrementalism at the ECtHR is a new version of the 'living instrument' doctrine in the sense that it aims to fulfil the same need for evolution of Convention rights, albeit at a more gradual pace and with greater predictability. In doing so, I will discuss the function and decline of the 'living instrument' doctrine (Section B), before demonstrating the relative benefits of incrementalism in an age of growing suspicion toward interventionism at the ECtHR (Section C). Yet, I also acknowledge the limits of incrementalism, in terms of addressing uncertainty and achieving rights protection under time-pressure (Section D). Ultimately, I conclude that while incrementalism can somewhat fulfil the role of the 'living instrument' doctrine, there is a need for both of these judicial techniques at the ECtHR.

---

[*] The author is a masters student studying the BCL at Oxford University, with a particular focus on international human rights law. She holds a degree in Law and French from Trinity College Dublin. She has also completed a five-month policy internship at the UK Mission to the EU in Brussels and a 10-month diploma in European Law and Policy from Toulouse Capitole University. The views expressed in the article are those of the author alone. The author sincerely thanks the COLR team for their work in reviewing this piece.

[1] *Tyrer v United Kingdom*, App No 5856/72 (ECtHR, 25 April 1978); *Tyrer v UK* (1978) 2 EHRR 1; George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in A Føllesdal and others (eds) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 141.

[2] Stefan Theil, 'Is the 'Living Instrument" Approach of the European Court of Human Rights Compatible with the ECHR and International Law?' (2017) 23(3) European Public Law 587, 590.

B EVOLUTION AT THE ECtHR THROUGH THE LIVING INSTRUMENT DOCTRINE

In order to understand how incrementalism can be seen as a 'new version' of the 'living instrument' doctrine, it is necessary to understand the function of the 'living instrument' doctrine and what led to its decline. The early ECtHR developed several general principles to allow for the dynamic evolution of Convention rights, including the 'living instrument' doctrine, which underlines that the Convention must be interpreted in accordance with 'present-day conditions'.[3] From the late 1970s to the early 2000s, this doctrine was powerful in ensuring the continued relevance of the Convention to contemporary society, particularly when it came to the Court's interpretation of Article 8.[4]

In order to identify 'present-day conditions' to justify the use of the 'living instrument' doctrine, the ECtHR originally tried to identify common standards in the laws and practices of Convention States. Yet, Letsas notes that many early 'living instrument' cases display an activist streak, wherein the ECtHR ruled against prevailing attitudes on morally sensitive issues in the respondent state, often with a level of unpredictability and without significant evidence of a European consensus.[5] Sometimes, they relied solely on an 'emerging international trend' as evidence of these 'present-day conditions'.[6] However, in order to respect its subsidiary role and restrain intervention in particularly sensitive issues, the Court gradually began to apply the margin of appreciation doctrine, albeit in a somewhat uneven and unprincipled fashion.[7]

The heyday of the 'living instrument' doctrine was, however, constrained due to a number of factors. From the mid-2000s, politicians, political parties, and judges across Europe began to criticize the ECtHR, claiming that states agreed to uphold the rights as stated in the original text and did not sanction future developments implemented by an activist court.[8] The expansion in Convention membership meant that it was increasingly hard to find a 'European consensus' on matters relating to human rights. Moreover, Gerards cites significant resistance to the implementation of ECtHR decisions in national law, particularly in Russia and the UK.[9] Helfer

[3] *Tyrer* (n 1).
[4] Letsas (n 1) 143-145.
[5] Letsas (n 1) 145.
[6] *Goodwin v United Kingdom*, Application No 17488/90 (27 March 1996).
[7] Janneke Gerards, 'Margin of Appreciation, Incrementalism and the European Court of Human Rights' (2018) 18(3) Human Rights Law Review 495–515.
[8] Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) The European Journal of International Law 797, 798.
[9] Janneke Gerards, 'The Prism of Fundamental Rights' (2012) 8(2) European Constitutional Law Review 175.

and Voeten note that this brewing dissatisfaction culminated in the 2012 Brighton Declaration and later declarations and amendments to the Convention wherein states 'collectively signalled that the ECtHR should give them greater deference'.[10] Since then, with the growth of the far-right, the political and social consensus in Europe has been moving in a regressive direction on many human rights issues.[11] At the same time, an ever-increasing caseload has harmed the viability of the 'living instrument' doctrine, with the most consequential cases less likely to see a resolution and growing pressure on judicial resources.[12]

Moreover, the 'living instrument' doctrine has been criticised for its legal legitimacy and adherence to the rule of law. Even pro-ECHR judges have urged the ECtHR to restrain its use. For instance, Baroness Hale suggested that the living instrument doctrine should not be seen as 'an unstoppable beanstalk grown from a magic bean'.[13] She criticised the doctrine for its unpredictability, suggesting that evolutive developments should be consistent with the established principles of Convention jurisprudence.[14] Moreover, Letsas has suggested that the normative justification provided by the ECtHR for invocation of the 'living instrument' doctrine was weak, with virtually no explanation being provided when it originated in *Tyrer* or since.[15] Such critiques are not without merit. Many authors have argued convincingly for the legal legitimacy of the living instrument doctrine, for example, because it can claim democratic endorsement through States or by reference to the wording of the preamble.[16] Yet, the Court's reluctance to elaborate upon the doctrinal justification for such a divisive doctrine renders it vulnerable to significant criticism from an ever-growing far-right and legal scholars who doubt its legitimacy.

C EVOLUTION AT THE ECtHR THROUGH INCREMENTALISM

Hence, the need for a shift toward incrementalism, which can be seen as a more gradual and predictable version of the 'living instrument' doctrine in the sense that it fulfils a similar evolutive function. Having conducted quantitative research on ECtHR decisions, Gerards

[10] Helfer (n 8) 798.
[11] Helfer (n 8) 798.
[12] Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21(1) Penn State International Law Review 101, 104.
[13] Baroness Hale, 'Beanstalk or Living Instrument? How Tall Can the European Convention on Human Rights Grow?' Gray's Inn Reading 2011, 1. Accessed <https://www.gresham.ac.uk/watch-now/beanstalk-or-living-instrument-how-tall-can-european-convention-on-human> (19 December 2023).
[14] ibid 8.
[15] Letsas (n 1) 143.
[16] See Theil (n 2); Letsas (n 1) for example.

points to a shift in the approach of the ECtHR in recent years – nowadays, rather than pushing evolution by interpreting Convention rights expansively and then restraining their political and legal effects by granting wide margins of appreciation, the ECtHR has been pushing evolution primarily through incrementalism.[17] She writes that '[i]f the Court has to address a relatively new and potentially sensitive and divisive subject matter… it acts in a very cautious, incremental and circumscribed manner'.[18] To do so, it adopts restrained tactics such as analogous reasoning and particularisation (where judges accentuate the distinctive features of the facts before them to confine principles to the case at hand), while leaving the door open to future expansion. In this sense, the large, diverse caseload of the ECtHR actually serves incrementalism well as it can slowly build principles, case-by-case.[19] Finally, the ECtHR can make use of its incremental progress, by distilling 'general principles' from a series of cases. Gerards notes this approach, for instance, in relation to abortion rights decisions, where the Court initially only found a violation on procedural grounds in *Tysia*.[20] Then after building on this decision case-by-case, it eventually accepted that a prohibition of abortion sought for health reasons may violate Article 8 in *ABC*.[21] Here, the Court expressly noted that it was not pursuing the 'living instrument' approach, stating that 'this is not a case of the use of consensus for interpretation of the Convention.'[22]

There are several reasons to praise this increasing use of incrementalism in the current context, particularly in comparison to the 'living instrument' doctrine. Koskenniemi posits that international human rights law is often caught between an apology for following the wishes of states and a tendency to prescribe utopic versions of what the law ought to be, detached from actual state practice.[23] Yet, I would argue that incrementalism could be seen as a healthy compromise between the two – neither overly deferential to states nor overly idealistic in prescribing a remedy that states will likely refuse to respect. Moreover, Koskenniemi explains that, in the international human rights sphere, methodological reasoning is often strategic and compliance is frequently achieved through various forms of persuasion.[24] Explicitly stating that the Court is evolving rights through the 'living instrument' doctrine is more likely to catch the

[17] Gerards (n 7) 497.
[18] ibid 507.
[19] ibid 513.
[20] *Tysiąc v Poland*, App No 5410/03 (20 March 2007).
[21] *A, B and C v Ireland*, App No 25579/05 (ECHR, 16 December 2010).
[22] ibid para 7.
[23] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd ed, Cambridge University Press 2009) 9-15.
[24] Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 299.

attention of the political right who may discourage compliance and question the legitimacy of the Court. On the other hand, as Helfer and Voeten suggest, the increase in vague ECtHR decisions which tacitly overturn prior principles in a pro-applicant direction has been strategic; 'the majority in such cases may have become more circumspect in justifying progressive rulings as a way to shield themselves from criticism by states that oppose a more expansionist Court.'[25]

Furthermore, it is arguable that incrementalism does not suffer from the same unpredictability which Baroness Hale found so worrying in the 'living instrument' doctrine. In contrast to the heavy-handed blows of the 'living instrument' doctrine, 'incrementalism… allows for a process of slow socialisation into the Strasbourg conception of rights… it only demands limited changes at any given moment and also reacts to the evolution of domestic law.'[26] Thus, incrementalism tends to formulate practically-workable principles in a reactive, but restrained manner. By doing so, it attracts fewer complaints regarding its impact on the rule of law and predictability. Moreover, it does not suffer from the same normative justification critiques as the 'living instrument' doctrine since rather than invoking a specific doctrine, which would require justification, the ECtHR simply extends Convention rights tacitly by case-based reasoning. Moving Convention rights forward case-by-case also avoids the need for the constant invocation of the margin of appreciation doctrine, which suffers from coherence problems of its own.[27]

In an ECtHR which is dealing with the tail end of a legitimacy crisis, the strategic benefits and increased coherence associated with incrementalism are deeply valuable. Incrementalism can thus be seen as somewhat of a coping mechanism to continue evolving Convention rights in the face of an environment which is increasingly hostile to the 'living instrument' doctrine.

D THE LIMITS OF INCREMENTALISM

Yet, it seems that while incrementalism can be perceived as a new version of the 'living instrument' doctrine in some senses, it is a poor replacement in others. Firstly, the small, tacit steps of incrementalism can fail to ensure the development of clear and unambiguous obligations in areas of significant uncertainty. Thus, King argues that incrementalism may be

[25] Helfer (n 8) 826.
[26] Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71(2) The Modern Law Review 183, 214.
[27] Gerards (n 7) 498-506.

inappropriate when there is a great need for clarity as to the meaning of vague legal obligations.[28] He argues that in such a case, uncertainty simply promotes 'chaos and unfairness for those citizens who require a clear statement of their rights.'[29] This is particularly well illustrated by the ECtHR's incremental approach to the development of socio-economic rights, which has failed to elaborate the scope of the applicable rights and duties in a coherent or structured manner.[30] When it comes to socio-economic rights, the ECtHR often circumvents a discussion of whether a Convention right is at stake by 'assuming' the interest at stake is covered under the Convention, and usually finding no violation on a factual basis or on proportionality analysis.[31] When it does develop positive socio-economic obligations, they are usually only 'to give effective protection to the rights of the complainant *in the circumstances of the case'* or the Court relies artificially on extension of the explicit Convention rights, such as the right to a fair trial.[32] Moreover, since it tends not to engage substantively with the question of the positive scope of Convention obligations, Palmer has suggested that the jurisprudence of the ECtHR still reflects a conceptually outdated view of the positive–negative dichotomy of rights.[33]

This unprincipled development is harmful, particularly in terms of rights protection at a domestic level. For instance, in Ireland, judges are required to take account of ECtHR jurisprudence in their interpretation of Convention rights.[34] In Irish cases on housing rights, there has been significant uncertainty as to the level of positive protection afforded by Article 8, with the result that there has been a 'chilling effect on high court judges' who are reluctant to engage which the possibility of socio-economic rights in the ECHR.[35] Thus, I would argue that recourse to the 'living instrument' approach is warranted to increase certainty and underline the indivisibility of rights. Through this approach, the Court could explicitly acknowledge the fact that international legal scholarship has widely discredited the positive–negative dichotomy of rights and develop a coherent, principled, and explicit theory of the scope of socio-economic obligations in the ECtHR. While an incrementalist approach tends to

[28] Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 294.
[29] ibid 294.
[30] Ellie Palmer, 'Beyond Arbitrary Interference: the Right to a Home? Developing Socio-Economic Duties in the European Convention on Human Rights' (2010) 61(3) Northern Ireland Legal Quarterly 225.
[31] See for example, *Sentges v The Netherlands,* App no 27677/02 (ECHR, 8 July 2003).
[32] Palmer (n 30) 227.
[33] ibid 227.
[34] European Convention on Human Rights Act 2003, s 4.
[35] Dáire McCormack-George and Conor Casey, 'An Analysis of the Right to Shelter in Irish Law for Children and Adults' [2015] 54 Irish Jurist 131, 151.

attract less criticism, I would suggest that there is occasionally a need to 'call a spade a spade' in order to provide clear and unambiguous rights protections.

Moreover, an over-reliance on incrementalism could be gravely inadequate when dealing with a pressing crisis, such as climate change. King has explained that '[t]ime-sensitivity can override the allure of incrementalism. The best way to evaluate how to evacuate a ship will depend on whether it is sinking.'[36] As regards the state of our environment, our metaphorical ship is indeed 'sinking' in such a way that the fundamental rights of children and young people are severely threatened.[37] Thus, incrementalism must be considered in tandem with other strategies. In this sense, it is certainly positive that the ECtHR still makes use of the 'living instrument' doctrine in environmental and climate cases. As former president of the ECtHR, Robert Spano, observed, the living instrument doctrine is one of the prime elements which has allowed the Court to develop its current environmental case-law to recognise that the human rights of a person cannot be divorced from their ecological surroundings.[38] This evolution is still ongoing and the influence of the 'living instrument' doctrine is still evident, particularly in the concurring judgment of Judge Krenc in *Pavlov* in 2022, which advocated for a stronger focus on reliance on international material in environmental cases.[39] We are currently awaiting the ECtHR's judgment in the highly significant climate rights case of *Duarte Agostinho*.[40] Given the fundamental threat posed by climate change and the urgency of the situation, this case is one in which it might be fitting to return to the heavy-handed blows of the 'living instrument' doctrine and take into account the activist interpretations of environmental rights by the United Nations, Inter-American and African human rights systems, as has been argued in a written submission by several NGOs and climate groups.[41]

---

[36] King (n 28) at 293.
[37] United Nations, 'Report of the Special Rapporteur on the Issue of Humans Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment' (2019) A/74/161.
[38] Robert Spanos, 'Should the European Court of Human Rights Become Europe's Environmental and Climate Change Court?' (2020) Conference on Human Rights for the Planet, Strasbourg, 2. Accessed <https://vidivaka.mk/istrazuvanja/wp-content/uploads/2021/01/Говор-ЕСЧП-Roberto-Spano.pdf> (19 December 2023).
[39] *Pavlov and others v Russia*, App no 31612/09 (ECHR, 11 October 2022).
[40] *Claudia Duarte Agostinho and Others v Portugal and 32 Other States,* App no 29371/20 (ECHR, (unsure of date).
[41] Written Submission on Behalf of The Extraterritorial Obligations Consortium and others, regarding *Claudia Duarte Agostinho and Others v Portugal and 32 Other States,* App no 29371/20, accessed <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR0140922021ENGLISH.pdf> (19 December 2023).

E CONCLUSION

Ultimately, there is much to be said for the ECtHR's turn to incrementalism. In adopting a gradual, case-by-case approach to the evolution of Convention rights, it adapted to a hostile environment in which the suspect legitimacy and explicit activism of the 'living instrument' approach were faced with heavy criticism. Furthermore, this doctrine allowed the ECtHR to maintain the development of Convention rights when faced with an overwhelming caseload. In this way, incrementalism can be seen as a pragmatic and cautious version of the 'living instrument' doctrine, a vital adaptation, and a sensible coping mechanism. Yet, as I have shown above, an incrementalist approach is inappropriate when the Court is facing a pressing need for clarity or an urgent human rights crisis. As such, incrementalism cannot be seen as an out-and-out replacement for the 'living instrument' doctrine. Rather, incrementalism and the 'living instrument' doctrine should be viewed as complementary mechanisms to achieve 'the maintenance and further realisation of human rights and fundamental freedoms',[42] particularly when it comes to the ECtHR's response to a climate emergency which poses an unprecedented threat to human life and well-being.

[42] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Preamble.