CENTRE FOR EUROPEAN RESEARCH & EDUCATION
FACULTY OF LAW UNIVERSITY OF PÉCS

Vol. 2024/II

PJIEL

Pécs Journal of International and European Law

The on-line journal of University of Pécs - Centre for European Research and Education
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PJIEL { Pécs Journal of International and European Law

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Editorial

https://doi.org/10.15170/PJIEL.2024.2.1

In this issue

The editors are pleased to present issue 2024/II of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

In the *Articles* section, Dimitris Liakopoulos provides an analysis of how EU law perceives and regulates renewable energy and its environmental impact. Gergely Kappel presents a comprehensive literature review as regards the risks of artificial intelligence-based decision support in companies' executive-level decision-making.

In the *Case Notes and Analysis* section, Ágoston Mohay ponders the question whether the lengthy process of the EU's accession to the ECHR is finally set to end thanks to the renegotiated draft accession agreement of 2023.

In the *Book Review* section, firstly, Maria Melikidou reviews the monograph 'The European Arrest Warrant and EU Citizenship. EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure' by Joske Graat, published by Springer in 2022. Secondly, Tiwai Mhundwa looks at the edited volume 'International Labour Mobility: How Remittances Shape the Labour Migration Model' published by Palgrave Macmillan in 2023.

A word of most sincere gratitude is due to the anonymous peer reviewers of the current issue.

We encourage the reader to consider the PJIEL as a venue for your publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and EU law issues.

Renewable energy and their environmental impacts in the European Union law

Dimitris Liakopoulos[*]

https://doi.org/10.15170/PJIEL.2024.2.2

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Abstract

The present work aims to highlight the innovations of the European legislator in the field of renewable energy. The problems of the ongoing environmental crisis, and especially in the war sector, have had as their basis to open the way to new roads through the simplification of bureaucracy of a road of new stages where environmental policy has found ways to improve the life of the European people, face new energy crises in the near future and above all harmonize, integrate energy policy in the European territory as a necessity of the moment.

Keywords: energy crisis, art. 194 TFEU, European Union law, renewable energy, simplification of procedures, energy transition, COP28.

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I. Introduction

Environmental protection in recent years through a continuous crisis in the energy sector has forced the European Union to follow a more challenging path in the energy sector. Art. 194 TFEU[1] based on the functioning of an internal market that improves the environment and the policy in the energy sector according to the principle of solidarity between states[2] highlights a sector in continuous evolution that needs legal, economic, political support for more than twenty years now.[3]

Renewable sources have acquired a European framework, where in recent years recognizes a competence for the Union in the energy sector through a gradual but too slow process. The interventions of the Union in energy matters were based on a general basis of environmental policy that provided in the energy sector the use through art. 191 TFEU of a rational point of analysis and for natural energy resources.

On the one hand, art. 194 TFEU highlights and legitimizes the action of the Union in the field of energy by creating and improving the environment through objectives for the functioning of an internal market in a way that security of supply can be qualified as a promotion which connects energy networks with the development of renewable energy as a response of the Union in the energy protection sector. Energy sources can be found in a guide of a Directive based on the promotion of renewable energy[4] namely the RED III, "Renewable Energy Directive III" which seeks to disseminate projects concerning the renewable energy sector. A Directive that offers a broad overview of objectives with main activities that highlight the aspects that capture important critical aspects in the energy sector. The new Directive has the obligation through the steps of the past to create a 'global' regulatory context on renewable energy as steps forward for greater maturity of use and development in the sector.

The growth of energy from renewable sources has set mandatory objectives from a national point of view as the basis of that foreseen by the Directive RED I of 2009.[5]

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[1] HJ. Blanke, S. Mangiamelli, *Treaty on the Functioning of the European Union. A commentary* (Springer 2021); M. Kellerbauer, M. Klamert, J. Tomkin, *Commentary on the European Union treaties and the Charter of fundamental rights* (OUP 2024).

[2] S. Mayer, 'Considerations on the Principle of Energy Solidarity in the EU Legal Framework' (2023) 2 Yearbook of European Union and Comparative Law 231.

[3] RJ. Heffron, *Legal aspects of EU Energy Regulation: the consolidation of energy law across Europe* (OUP 2016); K. Huhta, L. Rein, 'Solidarity in European Union law and its application in the energy sector' (2023) 72 British Institute of International and Comparative Law 771; S. Romppanen, K. Huhta, 'The interface between EU climate and energy law' (2023) 30 Maastricht Journal of European and Comparative Law 45.

[4] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources and repealing Council Directive (EU) 2015/652 [2023] OJ L2023/2413; K., Talus, F., Gallegos, J., Pinto. 'Importing US-produced hydrogen and its derivatives into the EU-examples of unnecessary complications, barriers and distinctions' (2024) Journal of Energy & Natural Resources Law (forthcoming).

[5] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.

Particularly, it has responded to the needs of stipulating the Kyoto Protocol for the reduction of greenhouse gas emissions. By 2020, 20% of the Union's gross final consumption is expected to come from reneable sources, establishing a clear legal basis in the field of energy in the Union as a reason for a binding act, namely a Directive based on art. 114 and 191 TFEU.

The crisis emergencies and those that occurred after the Paris climate agreement[6] have as a consequence the Directive (EU) 2018/2001[7] (RED II) that brought forward the recast of RED I and the beginning of a binding overall target that respected the achievement of a share of renewable energy for energy consumption that reached 32%. The relative change was relevant for the Directive of 2018 based only on art. 194, par. 2 TFEU as a legal basis that proposed measures for the development of renewable energy thus excluding environmental protection. But hasn't renewable energy started to be used to protect human life and dignity to a healthy environment?

II. The directive (eu) 2023/2413

The need to review and regulate renewable energy, through RED III, was a reality that found its basis with the recommendation of the European Commission of September 2021[8] arriving after the proposal of Directive of 18 May 2022.[9]

It was an important building block for its energy policy. RED III had three bases namely art. 114 TFEU concerning the approximation of laws, art. 194, par. 2 TFEU which allowed the adoption of measures for the development in the renewable energy sector and art. 192, par. 1 TFEU a legal basis which modified the application of an *acquis* of the Union in the field of the environment within a well-regulated framework and provided by the Union through new instruments.[10]

The new Directive has set as objectives, on a large scale, the need to create a precise and more harmonized discipline to make energy efficiency work in the internal market, accelerate renewable energy reducing thus greenhouse gas emissions by having a more autonomous energy system, independent and at the same time suitable for the environmental needs of the member states of the Union and not only. The Directive has followed and attempted according to the European legislator to give greater importance to energy policy through renewable energy sources at a time when the energy sector has

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[6] D. Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 American Journal of International Law 288; M. Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6 Climate Law 3.

[7] A. Caramizaru, A. Uihlein, *Energy communities: an overview of energy and social innovation* (Publication Office of the European Union 2020).

[8] Commission Recommendation (EU) 2021/1749 of 28 September 2021 on energy efficiency first: from principles to practice – guidelines and examples for implementation in decision-making in the energy sector and beyond [2021] OJ L350/9.

[9] Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency' COM (2022) 222 final.

[10] ibid, para. 4.

had a contribution of 75% of total greenhouse gas emissions of the Union.[11] In this sense, the RED III has set a target that produced a general principle for the member states that collectively provide a share of energy for renewable sources with a final consumption by 2030 that will reach a figure of 42.5%.[12] A percentage of 2.5% for the member states as an attempt to further increase to reach 45% is a reality but not binding because it remains only at 42.5% and the Union thus evaluates and controls the possibility of anticipating, increasing the share of renewable energy.

The objectives of the Directive include provisions that also concern the transport sector where the contribution of reducing greenhouse gas emissions was a challenge, according to art. 25 of the RED III Directive, which required suppliers to ensure a share for renewable energy in final consumption in the sector now equal to a percentage that reached 29% by 2030.[13] Maritime and air transport were part of the decarbonization sectors[14] where through two Regulations, the first based on ReFuelUE Aviation[15], that tried to reduce carbon emission in the aviation sector and create a sustainable air transport for the Union on an equal footing. The Regulation, in such a way, has tried to avoid fragmenting the market in the air transport sector of the Union by establishing uniform rules that achieve the objectives of the RED directives.[16]

The second Regulation was named FuelEU Maritime.[17] It laid the foundations for a reduction of greenhouse gases in maritime transport with objectives that reached 80% by 2050 compared to those levels calculable by 2020. These in a general way spoke for a diffusion of renewable fuels for a market for maritime use.[18] The changes brought have inserted binding objectives in the heating sector as well as in cooling by 2030 as the share of renewable energy reached a figure of 49% for buildings and will be increased in a binding way at national level.[19] As far as buildings were concerned, the Directive underlined that they had the potential to contribute to reducing greenhouse gas emissions in the Union also following an important step based on climate neutrality.[20]

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[11] Directive (EU) 2023/2413 of the European Parliament and of the Council, recital n. 2.

[12] ibid, art. 3.

[13] ibid, art. 25. Note the increase in the target of 14% that was foreseen by the RED II which respected the 10% of the RED I Directive.

[14] K. Talus, R. Maddahi, 'Carbon capture and utilization under EU law: impermanent storage of CO2 in products and pre-combustion carbon capture' (2024) 17 The Journal of World Energy Law & Business 14.

[15] Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable aviation (ReFuelEU Aviation) [2023] OJL 2023/2405.

[16] ibid, recital n. 14.

[17] Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of low-carbon and renewable fuels in maritime transport and amending Directive 2009/16/EC [2023] OJL 234/48.

[18] Regulation (EU) 2023/2405 of the European Parliament and of the Council, recital n. 5.

[19] Directive (EU) 2023/2413 of the European Parliament and of the Council, recital n. 65.

[20] ibid, recital n. 17.

III. Has directive red iii brought any news?

The question is whether Directive RED, which certainly put a first step forward towards harmonization in the renewable energy sector, has brought news from the past and made progress towards new targets without losing what the same review that was concluded by the legislator offers? In this way, a new system for renewable sources is promoted, thus introducing tools that some will still have to be given our attention and technical and scientific scrutiny.

The Union has tried to avoid administrative complexities for the approval of new projects related to renewable sources as the main challenges that thus hindered investments, renewable energy projects and those related to the procedures for relaunching the related authorizations. The competent authorities issue the authorizations trying to screen the execution and management of projects as the beginning of rules that obtained unnecessary administrative burdens such as a wide public acceptance for the diffusion of renewable energy.[21]

In particular, the areas that will have to be renewable in an accelerated manner as a project of individual countries will have to benefit from the absence of significant effects on the environment. The projects are exempt from the obligation to conduct a precise assessment for environmental impact. The strategic environmental assessment also includes precise limits thus evaluating the impact of each individual project where the abolition of an environmental impact assessment generates negative repercussions in terms that protect the main needs that are linked to the protection of the environment that protects pollution. The risk that favors energy interests are connected to are linked to the plants that create interaction needs and not environmental ones. The new directive thus considers the impact on the soil of a landscape avoiding using other agricultural territories by installing photovoltaic systems. The RED III focused on opportunities to promote renewable energy in industrial areas, imposing effective constraints as a programming method that accomplishes in a prevalent manner a certain sensitivity at regional level. Thus, precise obligations are foreseen which limit the discretion of domestic authorities with reference to landscape areas and/or for agricultural purposes for uses which perhaps in the past these territories were uses and abuses without any precise control.

The respect of the precise needs for each member state, after the RED revision, has shown a suitable path, for all member states to carry out in a coordinated manner and in the European territory the specific areas of land, sea and internal waters as areas that can be based, develop renewable energy. The areas have taken into account the availability for energy of renewable sources that have offered to different areas the relative production of renewable energy in various types according to the technology offered. In the areas the member states have avoided developing projects in protected areas have taken into account projects and appropriate measures for the establishment and evolution of renewable energy.[22]

National authorities of member states have ensured that the authorizations to build

[21] ibid, recital n. 20.

[22] ibid, recital n. 26.

new renewable plants as identified zones, according to art. 16bis of Directive RED III, cannot be used a time frame that exceeds twelve months to give the relative authorization in the matter of renewable energy. Thus the projects and the authorization procedure does not last for more than two years where with a justified manner the circumstances for the Member States are the same and/or change at a term of about six months where the project also deserves to justify the extension for the relative project. The zones need research to be screened, organized and managed to put renewable energies in the procedural process that will be about two years in time and can be extended up to three years when talking about offshore projects.[23]

Offshore renewable energy projects, through the authorization procedures, expire within two years. This justifies the extraordinary circumstances for the member states that extend the deadlines within six months for the project developer according to the exceptional circumstances that can justify the relative extension. For renewable energy projects, which are outside the acceleration zones for renewable energy, the member states have provided for the authorization procedure that does not last more than two years. Thus the offshore renewable energy projects and the authorization procedure does not last more than three years. It is noted that the new directive thus expresses and refers to silent assent, as a blank *cheque* for investments that are approved by opposition noted in the administrative sphere, showing the simplification and deregulation of authorization procedure that build renewable energy plants which are necessary but not excessive to an overall picture of the administrative process of those interested.

IV. Towards the creation of renevewable enery communities

The new stages of renewable energy have resulted in the creation of self-consumption of renewable energy through the formation of Renewable Energy Communities (CER) that are inspired by the old Directive 2018/2001. A Directive that highlighted elements of innovation for tools that actively encouraged sustainable development and increased the share of energy for renewable sources. The member states have thus guaranteed consumers to condition self-consumers of renewable energy allowing a self-production at charges that have had disproportionate activity and did not constitute professional commercial activity.[24]

In particular, the RED II took into consideration the group that was part of two self-consumers that acted in a collective manner, i.e. a condition that was in the same building and/or condominium. Art. 22 of the directive that referred to the CER divides energy in a way that recognizes autonomous legal entities as true voluntary entities, i.e. as shareholders or members of local authorities, administrative and/or natural persons that are located near the plants that produce energy from renewable sources.[25] The objectives for legal entities are: "(…) environmental, economic or social benefits at community level to its shareholders or members or to the local areas in which it operates, rather than financial profits (…)".[26] The involvement of private entities as well

[23] ibid, art. 16.

[24] ibid, art. 2.

[25] A. Bolle, 'How Cities Can Back Renewable Energy Communities: Guidelines For Local And Regional Policy Makers' (Energy Cities, 2019) <https://energy-cities.eu/wp-content/uploads/2019/06/EnergyCities_RNP_Guidebook_Web.pdf> accessed 11 September 2024.

[26] Directive (EU) 2023/2413 of the European Parliament and of the Council, art. 2, para. 1, n.

as local authorities as consumers and producers forms a fixed point of evolution for the promotion of energy sources within the Union. The institutions of the Union have adopted the Directive trying to bring more confidence and at the same time to confirm the provisions that they introduced according to art. 22bis the use in the industrial sector thus reinvigorating an energy sector that distributed in a hierarchical way.

The stages are important but not yet at such a decisive level of the situation. On the one hand, we have the confirmation of a constant commitment on the part of the Union to collect and provide decisively new provisions of a binding nature. On the other hand, we have the member states of the union that promote through the Directive the administrative and regulatory support measures in the decarbonization sector that can lead to benefits, advantages for businesses and citizens. We need time at the national level for the matter of renewable energy sources to see the results. They have also put a base in the European Commission on 22 November 2023 in order to supporting the CER to exploit renewable energy and also expansively promote those that already existed.

The measures that we must take into consideration have to do with the incentive tariff for renewable energy that produces and recognizes the CER as a collective, individual self-consumption system for renewable energy, a contribution aimed at European territories, i.e. the European regions that will have to invest in a proper way to put in order and build a powerful and existing plant. Especially, it has based itself on art. 107, par. 3, lett. c) TFEU thus allowing member states that supported the development of economic activities not to alter the conditions for exchanges to an extent contrary to their own interest. This is how the compatibility with the support for an internal market is assessed. The European Commission has tried to carry forward the development of economic activities of renewable energy with a necessary, adequate way between environmental objectives at national level of a proportional type that corresponds to the relative financing needs that protects the aid. This is a necessary step where renewable energy plants have positive effects on the environment in a competitive manner through trade at national, European and third country level.

State aid, competition and the principle of proportionality put together the basis through the European Commission for the rules of the Union that are oriented towards a strategy that is connected with the Green Deal.[27] This is a system that allows to give answers to the possibilities that thus create a more healthy and livable environment for European citizens in the energy sector and to the territories that will be the future protagonists for the coming years of renewable energy in the European context.

V. What problems are noted between renewable energy and environmental protection?

From the previous paragraphs we have seen the innovations introduced as well as the problems regarding a new regulation, where from the administrative point of view, it has allowed the consent through authorizations that can be translated into a capacity in time where the advantages of work are many from the point of view of new hands of

16).

[27] Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

workers but also negative for a final result in connection with the problems that can be created for the protection of the environment.

There are many legal interests related to the construction of plants where environmental needs are created. The legislator of the Union promotes renewable energy related to the protection of the environment, of the areas that are involved in new power plants that produce renewable energy.

The RED III has included: "(…) case-by-case assessments to ascertain whether a renewable energy production plant and the connection of such a plant to the grid (…) of overriding public interest in a given case. Member States should consider such renewable energy production plants and the related infrastructure to be of overriding public interest and of interest to public health and safety (…) clear evidence that such projects have significant adverse effects on the environment that cannot be mitigated or compensated, or if Member States decide to limit the application of this presumption in specific and duly justified circumstances, such as reasons relating to national defence (…)"[28]. Energy interests are linked to plants that are discussed with environmental needs. This is a system that defines the public interest from the past in a prevailing way and is connected to a need that is relevant and represents a strong element where there is doubt about a combination, a balance with climate needs.

Increasing, managing the development of renewable energy independently of the protection of the territory function in a context that are expanded energy communities that interfere with the dynamics of a consumption of the territory, and they are located and that conduct their work. The lack of an evaluation of a plant on the European territory prevents some agricultural territories from installing photovoltaic. Thus, the RED III is limited to an effective industrial zone without setting constraints. Art. 15 quarter have ordered the competent authorities to give priority to artificial surfaces to build roofs, facades of buildings, transport infrastructures, parking lots, waste disposal, industrial sites, lakes, artificial basins, sites for urban waters as lands that are not used for agricultural activities.

The programming methods carried out depend mainly on the sensitivity of individual member states and local authorities where specific obligations are left at the discretion of the national authorities of certain particular areas that await the relevant revision of the legislation to close the mistakes of the past and move forward with regard to the evolution of renewable energy.

VI. Conclusions

Renewable energy is a response to the ongoing crises that are not yet over. International political aspirations have had within a general geopolitical context to elevate energy policy to a necessity that improves and increases the energy from renewable sources of the Union, as a goal of an autonomous and independent energy system.[29]

Directive RED III has set a binding framework in the revision of climate rules at global

[28] Directive (EU) 2023/2413 of the European Parliament and of the Council, recital n. 44 and art. 16.

[29] COM (2022) 222 final.

level, following for this purpose also the United Nations Conference on Climate Change (COP28) held by 27 member states from 30 November to 13 December 2023 in Dubai to protect in the international arena the general spirit based on the UN Framework Convention on Climate Change. COP28 in Dubai and art. 28, letter d) have foreseen the relative transition of fossil fuels into the renewable energy system in a precise, equitable manner accelerating and reaching a total level of zero by 2050. However, these are objectives of the past that are not maintained for many years.

The Union has tried, in a fast way, to respect the commitments to reduce emissions and take another step forward to a sustainable future necessary for energy objectives. An energy challenge has been taken into consideration especially after the Ukrainian crisis with consequences for energy supply. Thus, a new European energy geopolitics is born towards a transition that achieves independence from fossil fuels in the European territory. The challenge is still at the domestic level that should in a fast, precise and effective way provide steps forward to overcome traditional fossil fuels. Of course, political sensitivity is not lacking but it is necessary that consumers will have to acquire greater awareness for the choice and purchase of means of transport.

The final result and goal is, in a radical way, to follow the elimination in rapid times of the use of energy sources thus formulating a transition of fossil fuels (transitioning away) through decisive actions by the member states. The relative fund for losses and damages from disasters that come from climate is based within this framework. Thus, the financing for vulnerable communities and developing countries seeks to reduce the impact of climate disasters. The critical areas are many and the new Directive thus represents a step forward towards objectives that depend on the member states and to measures to be adopted and followed at a global level. It is a step forward based on RED III. Necessarily all the member states of the Union in the coming years will follow and conclude renewable energy paths as positive assumptions that favorably carry forward the reduction and simplification of bureaucracy thus decreasing the authorization processes at a European level.

Risks of Artificial Intelligence-Based Decision Support and Decision-Making Systems in Executive-Level Decision-Making in Companies – A Literature Review[1]

Gergely Kappel *

https://doi.org/10.15170/PJIEL.2024.2.3

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[1] SUPPORTED BY THE ÚNKP-23-3-I. NEW NATIONAL EXCELLENCE PROGRAM OF THE MINISTRY FOR CULTURE AND INNOVATION FROM THE SOURCE OF THE NATIONAL RESEARCH, DEVELOPMENT AND INNOVATION FUND.
The present paper is based on the manuscript in Hungarian entitled: 'Mesterséges intelligencia alapú döntéstámogató és döntéshozó rendszerek kockázatai a vállalatok vezetői szintű döntéshozatalában – Szakirodalmi áttekintés'. It is expected to be published in the Hungarian law journal Pro Futuro (online ISSN 2063-2754, printed ISSN: 2063-1987).

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Abstract

The study examines the risks associated with artificial intelligence (AI) based decision-making and decision-support systems in the decision-making processes of company executives, as well as small and medium-sized enterprises. Due to global trends and digital advancements, company management increasingly faces complex decisions, which AI-based decision-making and decision-support systems may well be suited to support. However, this carries several risks, and the study aims to identify the legal, ethical, and business risks associated with the use of such AI systems, with a particular focus on the decisions made by company executives. The analysis is based on a literature review, which will ultimately be compared with survey responses found in the *AI Index Reports* published annually by Stanford University.

Keywords: artificial intelligence, data protection, automated decision-making, risk management, literature review

I. Introduction

Due to the interconnected nature of the global economy and prevailing global trends, corporate leadership is increasingly required to make complex decisions that align with sustainable development and financial stability. From the perspective of corporate operations, this complex environment presents a range of problems and challenges, which are further exacerbated by the often stringent demands of shareholders and other stakeholders. These expectations are frequently accompanied by significant pressure, leading to potential financial losses for the company—and ultimately for the shareholders—if poor decisions are made. On average, inadequate or suboptimal decision-making at the management level costs companies at least 3% of their profits. The opportunities created by digital advancements, such as artificial intelligence (AI) -based decision-making and decision-support systems, can greatly facilitate the smooth resolution of obstacles that require rapid and complex decision-making. It is no surprise, then, that a growing number of companies are striving to integrate various AI-based systems into their daily operations.[2]

The *IBM Institute for Business Value*, in collaboration with *Oxford Economics*, conducted a study examining the decision-making processes of chief executive officers (CEOs) in relation to one of today's most highly praised innovations: AI. As part of the research, more than 3,000 CEOs were surveyed across over 30 countries and 24 industries. The study revealed, among other findings, that 43% of CEOs utilize some form of generative AI in strategic decision-making. Furthermore, 66% of board members and 64% of investors and creditors are encouraging CEOs to accelerate the corporate implementation of AI.[3] The *2024 AI Index Report* published by *Stanford University* reveals that investor interest in AI has been a key trend for several years, with global corporate investments reaching USD 189.2 billion in 2023. Of this amount, USD 95.99 billion came from private investments in the global market. The investment landscape is predominantly led by the United States, accounting for USD 67.22 billion, followed by China with USD 7.76 billion, the United Kingdom with USD 3.78 billion, and Germany in fourth place with USD 1.91 billion. Despite a decline from the peak investment levels seen in 2021,[4] the report forecasts an exponential growth in

[2] Mark Purdy and A. Mark Williams, 'How AI Can Help Leaders Make Better Decisions Under Pressure' (*Harvard Business Review*, 26 October 2023) <https://hbr.org/2023/10/how-ai-can-help-leaders-make-better-decisions-under-pressure> accessed 31 May 2024.

[3] IBM Institute for Business Value, 'CEO decision-making in the age of AI' (*IBM*, 2023) <https://www.ibm.com/downloads/cas/1V2XKXYJ> accessed 31 May 2024.

[4] According to analyses, the global private investment figure was close to USD 130 billion in 2021. See: Nestor Maslej, Loredana Fattorini, Raymond Perrault, Vanessa Parli, Anka Reuel, Erik Brynjolfsson, John Etchemendy, Katrina Ligett, Terah Lyons, James Manyika, Juan Carlos Niebles, Yoav Shoham, Russell Wald, and Jack Clark, 'The AI Index 2024 Annual Report'

AI-based software and solutions in the coming years. Notably, the investments in generative AI have surged dramatically. While in 2022, global private investments in generative AI were around USD 3 billion, they skyrocketed to USD 25.23 billion in 2023. This figure represents 26% of all private AI investments, underscoring the substantial and growing interest in this particular area of AI.[5]

With the substantial increase in investment in the field of generative AI, it is no surprise that corporate usage is also on the rise. Naturally, it is not only the number of generative AI solutions that is expanding in the realm of business applications, but it is clear that generative AI will play a dominant role in the coming business years. As the usage increases, the range of risk scenarios associated with AI-based solutions is also widening. In my view, a significant portion of these risk scenarios emerges from the application of AI-based decision-making and decision-support systems. Nevertheless, I find it necessary to accurately define the risk scenarios (particularly the most frequently occurring ones), as this can help companies better prepare for mitigating these risks. There are several ways to identify risks, but I would highlight two main approaches. Firstly, risks can be identified by examining the academic literature and expert analyses, from which we can infer the most commonly addressed risks. Secondly, risks can be identified through surveys of companies, including small and medium-sized enterprises, based on their experiences. This study, as a literature review, follows the first identification method; however, I also compare the risks frequently mentioned in the literature with those identified through surveys reported annually in the AI Index Report.

The structure of this study is as follows: The first section outlines the research process, detailing (i) data sources and research strategy, and (ii) exclusion criteria. The second section addresses the identification of risks, covering (i) the identification of risks based on the reviewed literature; (ii) the evolution of risk prioritization during the examined period; and (iii) a comparison of the results with responses provided by companies. The third section presents proposed solutions for the identified risks, as found in the reviewed academic works. The fourth section includes the conclusions drawn from the research, and finally, the fifth chapter discusses the limitations of the study.

II. Research objectives and methodology

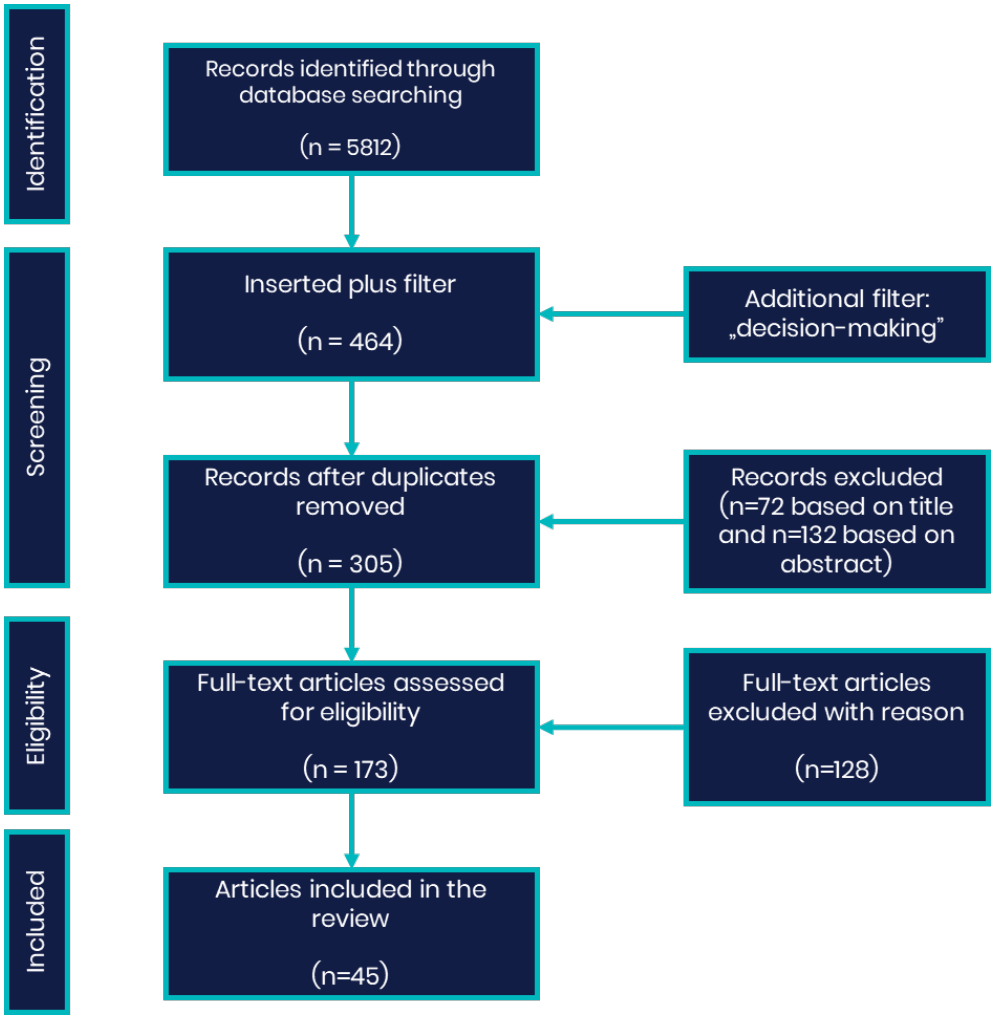
The objective of this research is to identify the legal, ethical, and business risks arising from the use of AI-based decision-making and decision-support systems,

(2024) Stanford University Human-Centered Artifical Intelligence <https://aiindex.stanford.edu/wp-content/uploads/2024/04/HAI_2024_AI-Index-Report.pdf> accessed 31 May 2024.

[5] ibid.

with a focus on decision-making at the executive level of companies, and somewhat of small and medium-sized enterprises. Given that the reviewed literature applies different legal frameworks and specific definitions, the current study refrains from providing explicit definitions of *company* and *small and medium-sized enterprise*. Therefore, this study does not follow the definitions set out in Hungarian law or those found in European Union legal frameworks and qualification criteria. For the purposes of this research, I adopt an abstract approach when referring to companies and small and medium-sized enterprises. Furthermore, my analysis is not based on Hungarian law but is conducted at an abstraction level that, in my view, best supports the objectives of the research. Nevertheless, I believe that proper identification and management of risks can prevent reputational and financial damage to businesses and can also allow for clearer delineation of responsibilities within various legal relationships. Essentially, the central question of this research is what are the most common risks identified in the literature concerning AI-based decision-making and decision-support systems. During the research, I aimed to uncover the risks and proposed solutions identified in the literature and contrast these with the risks perceived by the surveyed organizations. As a result, this study presents opinions, rather than specific recommendations.

The research process consisted of five steps (see Figure 1). In the first step, I created keywords, using OpenAI's ChatGPT service to generate synonyms for each keyword. In the second step, based on the generated keywords, I conducted a search in the Scopus and Web of Science databases, as these were the most suitable for applying the filtering criteria and performing complex keyword searches, which are described later. Initially, I intended to examine the topic within a broader context; however, due to the large volume of results, I applied additional filters and narrowed the scope of the investigation. In the third step, I eliminated duplicate entries. Next, I reviewed the abstracts of the remaining articles and further excluded those deemed irrelevant to the research, based on the exclusion criteria outlined later. In the fifth step, I reviewed the remaining articles, narrowing the selection to open-access academic works.



Figure/Table 1 – Steps of the Research Process.

1. *Data Sources and Research Strategy*

The research underlying this study was developed based on the following criteria and strategy, with the first step being the identification of a comprehensive list of keywords.[6] In the course of the research, I applied an interdisciplinary

[6] The first alternative elements of a list of keywords: Legal; regulation; Law; Contract law; Consumer law; Business law; Corporate law; Employment law; Intellectual property law; Tax law; Environmental law; Regulatory compliance; Privacy law; Cybersecurity law; Commercial litigation; Antitrust law; Banking and finance law; Real estate law; Labor law; Mergers and acquisitions; Bankruptcy law; Intellectual property rights; Data protection; Employment contracts; Trademark law; Copyright law; Product liability; Healthcare law; Estate planning; Antitrust regulations; Immigration law; Legal compliance; Taxation; Insurance law; Securities regulation; Environmental compliance; Corporate governance; Contract negotiations; Regulatory affairs; Trade secrets ; Compliance management; Employment disputes; Data privacy; Licensing agreements; Labor disputes; Financial regulations; Corporate transactions; Business contracts; Intellectual

approach, and therefore, I did not limit the selection of scholarly works based solely on legal studies. The search was conducted on 3 November 2023, in the two databases: *Scopus* and *Web of Science*. For Scopus, the following filtering criteria were applied: (i) final, (ii) in English, (iii) publications, books, book chapters, and reviews/critics. For Web of Science, the criteria were: (i) in English, (ii) publications, books, and reviews/critics. The temporal scope of the study included publications from 2013 to 2023 in both databases.[7] The resulting list of scholarly works consisted of 5,812 entries, which initially served a broader identification purpose. Recognizing that the number of scholarly articles on the broader research topic has grown exponentially in recent years, and this trend continues to this day, I applied an additional keyword, namely *decision-making*, as a filter. This narrowed the list to 464 entries.

The next major phase of the filtering process was narrowing down the found literature based on the titles (the exclusion criteria related to this are outlined below). After filtering based on the titles, the results were narrowed to 392 scholarly works, which was further reduced to 305 after eliminating duplicates. This was followed by additional filtering based on the review of abstracts (the exclusion criteria are listed below), which resulted in a narrowing of the literature review to 173 works. During the complete review of these 173 entries, additional scholarly works were excluded from the study because they were not open access or access was restricted, and I did not have permission to access them. Finally, I conducted a detailed review of 137 scholarly works, of which 45 were found to be relevant to my research objectives.

As the final phase of the research, I filtered the 45 scholarly works to identify the most frequently examined risks by the authors, and then drew my conclusions from this analysis, which are elaborated in Chapter III of this study.

property protection; Tax compliance; Legal risk management; Contract disputes; Legal counsel; Corporate litigation; Corporate governance; Legal compliance; Corporate ethics; Corporate responsibility; Legal advisory; Corporate policies; Legal department; Legal regulations; Corporate legal framework; Legal issues in business; Legal risk assessment.
The second alternative elements of a list of keywords: company; corporation; firm; business; enterprise; organization; concern; institution; agency; establishment; venture; house; conglomerate; consortium; partnership; agency; firm. The third alternative elements of a list of keywords: Artificial Intelligence; AI.

[7] In my view, the proliferation of artificial intelligence-based applications and their interdisciplinary examination have increased exponentially in recent years. Taking this into account, I limited my research to the 10 years preceding the start of my study.

2. Exclusion criteria

During the research, the exclusion criteria included any scholarly works that focused on AI-based systems used in the public sector or the judiciary. Additionally, any works that were purely focused on IT, mathematical, physical, or similar considerations and studies were excluded. Another exclusion criterion was the literature on self-driving cars and autonomous systems. I only examined articles, books, etc., that analyzed the risks of AI-based decision-making and decision-support systems in such a way that they were relevant to supporting the decisions of leaders within companies in the corporate, as well as small and medium-sized business sectors. Therefore, among the reviewed works, there are some that concern the healthcare sector but also identify risks that could be significant in decision-making at the corporate and small and medium-sized business levels.

III. Identification of risks

In this chapter, the study presents the risks that have most frequently appeared in the reviewed scholarly works in relation to AI-based tools. The research areas of the examined works show a varied picture, and for the purpose of the review, Appendix 1 of the study contains the research areas of the individual works as well as their publication dates. Below, I describe the various risks and their definitions as found in the literature, as well as the frequency of their occurrence based on the publication years of the scholarly works. The risks were identified based on the fact that the individual works examine them to some extent within the scope of the given work. However, if a risk is only mentioned briefly, it was excluded from the analysis. Among the identified risks are some that are not primarily legal risks but could become legal in nature as a secondary effect. One such example is the risk of inaccuracy, which could cause harm to companies, including small and medium-sized enterprises, thus requiring legal remedies for resolution.

1. Identification of Risks

Based on the reviewed scholarly works, the following risks and risk areas were identified most frequently: (i) bias; (ii) discrimination; (iii) fairness; (iv) transparency; (v) explainability; (vi) interpretability; (vii) intelligibility; (viii) reliability; (ix) lack of trust; (x) data protection; (xi) cybersecurity; (xii) access to data; (xiii) inaccuracy; (xiv) robustness; (xv) accountability; (xvi) lack of legal framework. These risks often overlap in the scholarly works, so it is common for one risk to be identified as an element of another risk, as a synonym for it, or as a consequence of a different risk

1.1 Bias

The definition of bias is often omitted in the scholarly works, as it is treated as self-evident. However, there are some works that refer to it as the unjust fa-

voritism or prejudice toward or against someone or something.[8] In the case of AI-based decision-making and decision-support systems, there are several forms in which bias can manifest. These include bias arising from the training data,[9] bias resulting from the input data,[10] bias caused by biased variables introduced into the algorithm by the developer,[11] historical and systematic bias,[12] cognitive bias[13] and so on. Bias as a risk appears most frequently in the examined scholarly works, with 36 out of the 45 works addressing or touching upon this issue (see: Figure/Table 2).

1.2. Discrimination

As mentioned above, from the perspective of discrimination, various risks and approaches also appear in scholarly works. On one hand, discrimination as a risk factor can be traced back to discriminatory design flaws that arise during the development of the algorithm, leading to adverse differentiation.[14] Other authors emphasize that, in AI-based systems, a breeding ground for discrimination is the use of discriminatory input data.[15] Some authors argue that the necessary subjective decisions related to machine learning lead to the discriminatory nature of AI-based decision-making and decision-support systems. In this context, they mention aspects such as the collection and handling of training data, the design of the model, and so on.[16]

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[8] Deepika Chhillar and Ruth V. Aguilera, 'An Eye for Artificial Intelligence: Insights Into the Governance of Artificial Intelligence and Vision for Future Research' (2022) 61 Business & Society 1197.

[9] Daniel Schrönberger, 'Artificial intelligence in healthcare: a critical analysis of the legal and ethical implications' (2019) 27 International Journal of Law and Information Technology 171; Kristin N. Johnson, 'Automating the Risk of Bias' (2019) Tulane Public Law Research Paper No. 19-12, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486723> accessed 3 November 2023.

[10] Johnson (n 9).

[11] Tetyana Krupiy, 'A vulnerability analysis: Theorising the impact of artificial intelligence decision-making processes on individuals, society and human diversity from a social justice perspective' (2020) 38 Computer Law & Security Review 1.

[12] Vidushi Marda, 'Artificial intelligence policy in India: a framework for engaging the limits of data-driven decision-making' (2018) 376 Philosophical Transactions of the Royal Society A 1.

[13] Johnson (n 9).

[14] Elif Kiesow Cortez and Nestor Maslej, 'Adjudication of Artificial Intelligence and Automated Decision-Making Cases in Europe and the USA' (2023) 14 European Journal of Risk Regulation 457.

[15] Marvin van Bekkum and Frederik Zuiderveen Borgesius, 'Using sensitive data to prevent discrimination by artificial intelligence: Does the GDPR need a new exception?' (2023) 48 Computer Law & Security Review 1.

[16] Andrew D. Selbst, 'Negligence and AI's Human Users' (2020) UCLA School of Law, Public Law Research Paper No. 20-01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_

1.3. Fairness

The issue of fairness predominantly appears in a broad sense in the reviewed scholarly works. In some instances, the realization of fairness is considered particularly important in order to prevent bias and discriminatory effects in AI-based systems.[17] Some authors examine the human-developed elements that influence the fairness of AI systems. These include the method used to create the AI system (e.g., the learning model, etc.), the algorithm, as well as the physical technological infrastructure.[18] In addition to the above, the issue of fairness is examined from several other aspects in the reviewed scholarly works.

1.4. Transparency

Transparency is the second most examined area in relation to the risks of AI-based decision-making and decision-support systems according to the reviewed works. The concept of transparency is consistently difficult to define, and as such, the approaches in the various works differ. The situation is further complicated by the fact that transparency carries different meanings for different stakeholders. For example, some authors suggest that, from the developer's perspective, transparency involves understanding whether the algorithm is functioning correctly, in order to resolve any emerging errors or contradictions. From the user's perspective, transparency refers to the attribute or condition of knowing what the system is doing, why it is doing it, and what led to a particular decision.[19] Others view transparency as a fundamental element of trust in AI-based systems and approach it from the perspective of informing the stakeholders involved.[20]

1.5. Explainability

A key point of investigation in the context of explainability is the so-called *black-box* effect and the fact that the explainability of a properly organized AI system significantly increases user-level trust. Furthermore, it encourages the identification process of decision-making, allowing us to interpret the causes behind a

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id=3350508> accessed 3 November 2023.

[17] Lorwai Tan, David Tivey, Helena Kopunic, Wendy Babidge, Sally Langley and Guy Maddern, 'Part 1: Artificial intelligence technology in surgery' (2020) 90 ANZ Journal of Surgery 2409.

[18] Charlotte Tschider, 'Beyond the Black Box' (2021) 98 Denver Law Review 683.

[19] Heike Felzmann, Eduard Fosch Villaronga, Christoph Lutz and Aurelia Tamò-Larrieux, 'Transparency you can trust: Transparency requirements for artificial intelligence between legal norms and contextual concerns' (2019) 6 Big Data & Society 1.

[20] Rozita Dara, Seyed Mehdi Hazrati Fard and Jasmin Kaur, 'Recommendations for ethical and responsible use of artificial intelligence in digital agriculture' (2022) 5 Frontiers in Artifical Intelligence 1.

given output.[21]

1.6. Interpretability

Interpretability as a risk is also closely related to the "black-box effect" associated with AI-based systems. The risk lies in the fact that understanding the functioning of an AI model often encounters difficulties. Essentially, it is tied to the technical realization of the decision-making process. Just like explainability, interpretability is also a fundamental element in building a reliable AI system.[22] Furthermore, by increasing interpretability, we also enhance the transparency of the AI system, which means that these two risks are interconnected.[23]

1.7. Intelligibility

The lack of understandability as a risk also stems from the black-box effect, considering that often the designers of the systems themselves are unable to explain the exact reasons behind the decisions.[24] It is a similar risk category to that arising from the lack of explainability or interpretability, yet the reviewed literature evaluates them separately.

1.8. Reliability

According to some authors, reliability refers to the ability of the AI-based system to indicate when it is likely to fail or become inoperable.[25] Others address it in the context that the decisions made by the algorithm must be reliable, especially when critical decisions need to be made, such as executing stock market transactions.[26] When examining from the perspective of output reliability, the reliability is heavily dependent on the quantity and quality of the data used. A lack of proper data can lead to the artificial intelligence-based decision-making

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[21] Sajid Ali, Tamer Abuhmed, Shaker El-Sappagh, Khan Muhammad, Jose M. Alonso-Moral, Roberto Confalonieri, Riccardo Guidotti, Javier Del Ser, Natalia Díaz-Rodríguez and Francisco Herrera, 'Explainable Artificial Intelligence (XAI): What we know and what is left to attain Trustworthy Artificial Intelligence' (2023) 99 Information Fusion 1.

[22] Ali et al. (n 21).

[23] Maryan Rizinski, Hristijan Peshov, Kostadin Mishev, Lubomir T. Chitkushev, Irena Vodenska and Dimitar Trajanov, 'Ethically Responsible Machine Learning in Fintech' (2016) 10 IEEE Access, 97531.

[24] Schönberger (n 9).

[25] Dara (n 20).

[26] Toan Huu Bui and Van Phuoc Nguyen, 'The Impact of Artificial Intelligence and Digital Economy on Vietnam's Legal System' (2023) 36 International Journal for the Semiotics of Law 969.

and decision-support system providing unreliable output predictions.[27]

1.9. Lack of Trust

Building trust in AI-based systems is a current topic in the literature, as it is seen as a necessary prerequisite for these systems to fulfill their roles. Several authors thus define trust as an attainable goal, with elements such as legality, ethics, as well as technical and social reliability, being key components.[28] There are authors who examine how transparency—especially the level of understanding—affects trust in the system.[29] From the user's perspective, particularly when implementing an AI-based system into executive-level decision-making within a company, a critical factor is how much trust the company's leaders have in the system and how successfully it becomes part of their daily decision-making process. If the AI system's design does not prioritize fostering trust, this can have negative consequences for the company in terms of costs and innovation. It is possible that an AI system is integrated into management based on a corporate decision, but the lack of trust in the system can lead to its actual use being delayed or abandoned. Therefore, a significant risk in the implementation of AI systems is whether a system that either promotes or hinders trust is integrated into executive decision-making.

1.10. Data Protection

In this context, most of the literature examines the framework defined by the 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 (GDPR),[30] particularly in relation to the implementation of personal data protection within AI-based decision-making and decision-support systems. However, other frameworks derived from different data protection regulations also appear in this area. Furthermore, in this risk category, the establishment of inadequate data management practices also emerges as a significant risk.[31] Ac-

[27] Tschider (n 18).

[28] Muzaffer Eroğlu and Meltem Karatepe Kaya, 'Impact of Artificial Intelligence on Corporate Board Diversity Policies and Regulations' (2022) 23 European Business Organization Law Review 541.

[29] Ali et al. (n 21).

[30] van Bekkum (n 15); Michelle Seng Ah Lee, Jennifer Cobbe, Heleen Janssen and Jatinder Singh, 'Defining the scope of AI ADM system risk assessment' in Eleni Kosta, Ronald Leenes and Irene Kamara (eds.) *Research handbook on EU data protection law* (Research Handbooks in European Law 2022).

[31] Michael Hilb, 'Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance' (2020) 24 Journal of Management and Governance 851.

cording to some works, the risks stemming from data protection arise from the large volume of data used, as most AI-based decision-making and decision-support systems rely on large databases for prediction.[32]

1.11. Cybersecurity

Cybersecurity as a risk is self-evident in these AI-based systems, given that they use large amounts of data for their operation. Naturally—though in sector-specific ways—many of these data sets contain sensitive, sometimes special data or other business-critical information. For example, some authors focus on the healthcare sector, emphasizing the importance of cybersecurity. They stress that the relevance of this risk is exceptionally high, as evidenced by the fact that, in 2021, healthcare cyberattacks affected around 45 million people in the United States.[33]

1.12. Access to Data

Given that AI-based decision-making and decision-support systems require vast amounts of data, the issue of access to this data becomes critical. With the right type and quantity of data, the occurrence of other risks, such as bias or accuracy issues, can be mitigated. In fact, a lack of access to data can easily lead to discriminatory decisions. A notable example is India, where the private sector has limited access to other market or public databases. As a result, individuals from disadvantaged groups, such as those identified by gender, caste, or geographical location, may become victims of discriminatory decisions.[34]

1.13. Inaccuracy

The issue of accuracy and the risks arising from its absence are also prominently featured in the reviewed literature. More than half of the works examined address the impact of this risk and its relationship to other risks. For example, some authors discuss how biased training datasets significantly affect the accuracy of the output of AI systems, and how improper training of machine

[32] Javed Iqbal, Diana Carolina Cortés Jaimes, Pallavi Makineni, Sachin Subramani, Sarah Hemaida, Thanmai Reddy Thugu, Amna Naveed Butt, Jarin Tasnim Sikto, Pareena Kaur, Muhammad Ali Lak, Monisha Augustine, Roheen Shahzad and Mustafa Arain, 'Reimagining Healthcare: Unleashing the Power of Artificial Intelligence in Medicine' (2023) 15 Cureus 1.

[33] Daniele Veritti, Leopoldo Rubinato, Valentina Sarao, Axel De Nardin, Gian Luca Foresti and Paolo Lanzetta, 'Behind the mask: a critical perspective on the ethical, moral, and legal implications of AI in ophthalmology' (2023) 262 Graefe's Archive for Clinical and Experimental Ophthalmology 975.

[34] Marda (n 12).

learning-based models can lead to inaccurate results.[35] Obviously, inaccurate decisions can have negative consequences for an AI-based decision-making or decision-support system, which—like other risks—can result in both financial and reputational damage to a company or a small- and medium-sized enterprise.

1.14. Robustness

The reviewed literature often addresses the robustness of AI systems as a necessary principle, but it generally does not provide a detailed definition or elaborate on its components. However, some authors explain that by robustness, they mean the system's ability to maintain the quality of its performance even under changing conditions.[36] Thus, the lack of stability is closely related to the lack of reliability of the system as well.

1.15. Accountability

The issue of accountability is discussed in some scholarly works together with transparency, considering the latter as a prerequisite for the former's realization.[37] The principle of accountability in AI-based decision-making and decision-support systems suggests that these systems should be able of explaining the output decisions and providing the underlying reasoning behind them.[38] In terms of responsibility, the enforcement of accountability is essential for AI-based systems, as their decisions can directly impact individuals.[39]

1.16. Lack of Legal Framework

The absence or inadequacy of a legal framework is an evident risk in the application of AI-based decision-making and decision-support systems. However, this risk factor is relatively rarely discussed in the reviewed literature. Out of the 45 reviewed works, only 4 addressed this specific risk factor. A proper legal framework can help increase trust in the use of a given AI system, which includes

[35] Veritti et. al. (n 33).

[36] Ali et al. (n 21).

[37] Marda (n 12).

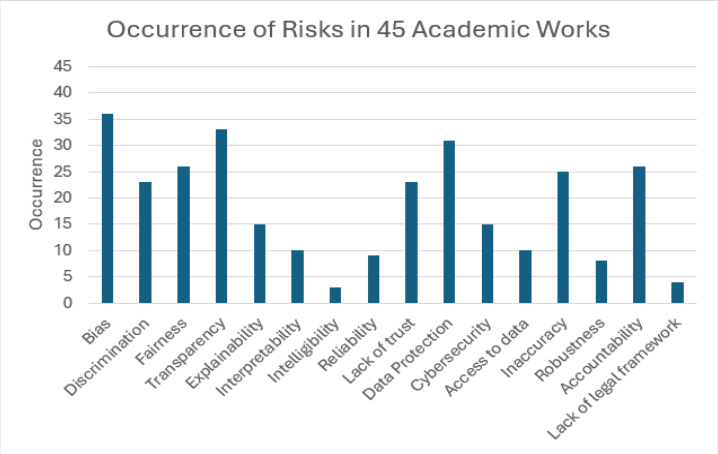
[38] Alžběta Krausová and Václav Moravec, 'Disappearing Authorship: Ethical Protection of AI-Generated News' (2022) 13 Journal of Intellectual Property, Information Technology, and Electronic Commerce Law 1.

[39] Rata Rokhshad, Maxime Ducret, Akhilanand Chaurasia, Teodora Karteva, Miroslav Radenkovic, Jelena Roganovic, Manal Hamdan, Hossein Mohammad–Rahimi, Joachim Krois, Pierre Lahoud and Falk Schwendicke, 'Ethical considerations on artificial intelligence in dentistry: A framework and checklist' (2023) 135 Journal of Denistry 1.

clarifying the responsibility issues arising from its usage.[40]

2. Evolution of Risks

The above risks appeared in different ways during the examined period in the reviewed works. The three most frequently addressed risks are (i) bias, (ii) transparency, and (iii) data privacy. However, it should be noted that some risks were occasionally assessed by the authors as subcategories of other risks. For example, the elements of a reliable (i.e., trustworthy) AI-based system include fairness, transparency, interpretability, explainability, and robustness.[41] In my view, it also happens that some of the risk names are treated as synonyms rather than distinct risks. Based on this, it is difficult to examine the occurrence rate of the risks from an objective perspective. Nonetheless, Figure/Table 2 contains the number of occurrences of each risk in the 45 reviewed works. The earliest publication in the examined literature is from 2016, while the most recent one is from 2023.



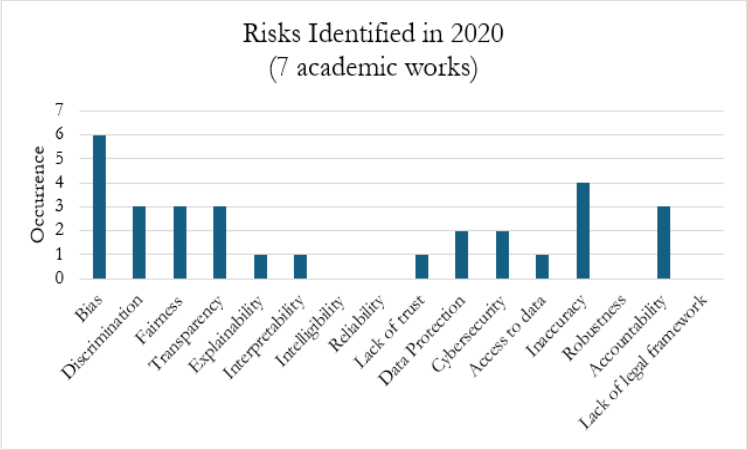
Figure/Table 2 - Occurrence of Risks in 45 Academic Works.

The above risks appeared differently in the reviewed works during the examined period. The three most commonly addressed risks were: (i) bias, (ii) transparency, and (iii) data protection. However, it is necessary to mention that some risks were occasionally considered as subcategories of other risks. For example, a trustworthy AI system element is fairness, transparency, interpretability, explainability, and stability. In my opinion, it also occurs that certain risk terms are

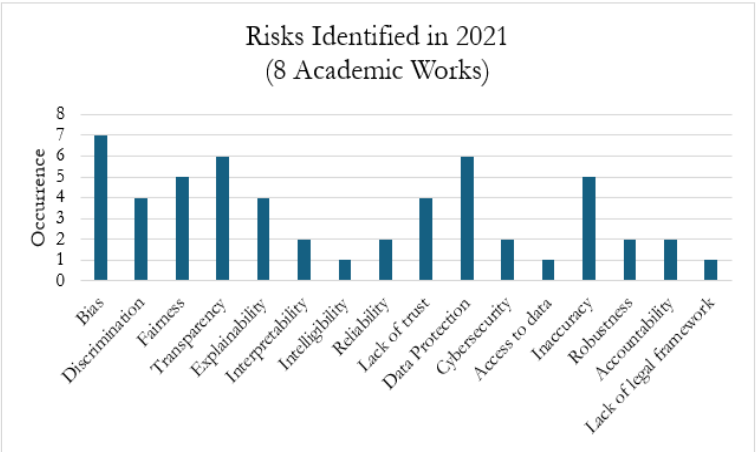
[40] Zhilian Huang, Mithun Mohan George, Yi-Roe Tan, Karthiga Natarajan, Emily Devasagayam, Evonne Tay, Abi Manesh, George M Varghese, Ooriapadickal Cherian Abraham, Anand Zachariah, Peiling Yap, Dorothy Lall and Angela Chow, 'Are physicians ready for precision antibiotic prescribing? A qualitative analysis of the acceptance of artificial intelligence-enabled clinical decision support systems in India and Singapore' (2023) 35 Journal of Global Antimicrobial Resistance 1.

[41] Ali et al. (n 21).

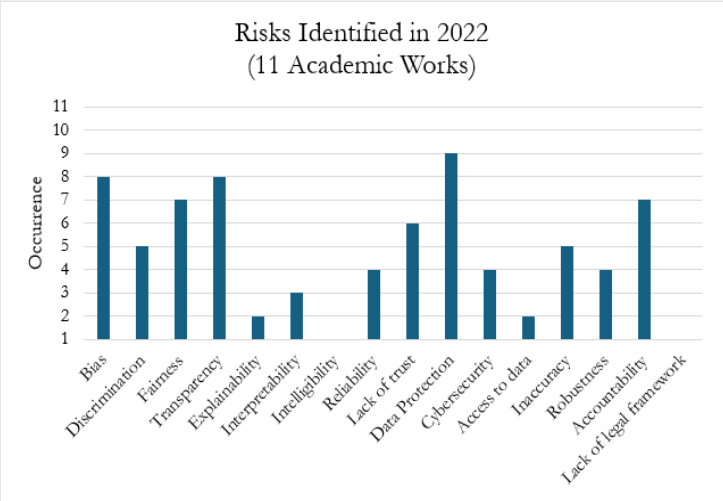
evaluated as synonyms, rather than separate risks. Based on this, it is difficult to objectively examine the occurrence ratio of the risks. Nevertheless, Figure/Table 2 presents the number of occurrences of each risk examined in the 45 works. The earliest published work in the review is from 2016, while the most recent one is from 2023.



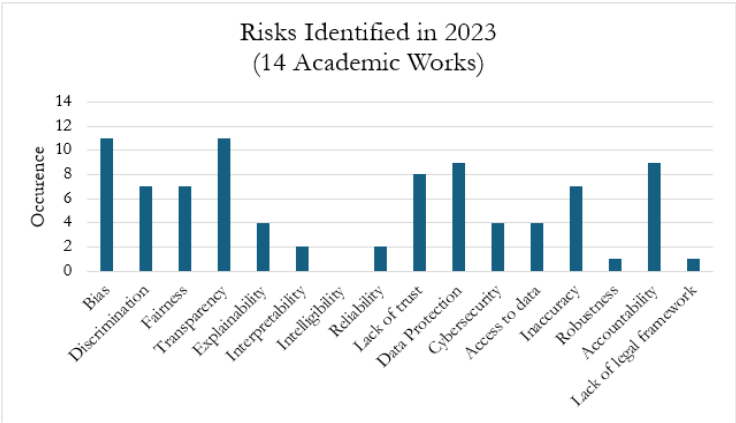
Figure/Table 3 – Risks Identified in 2020.



Figure/Table 4 – Risks Identified in 2021.



Figure/Table 5 – Risks Identified in 2022.



Figure/Table 6 – Risks Identified in 2023.

The analysis indicates a trend in the changing focus of issues that concern academic experts the most regarding AI-based decision-making and decision-support systems. However, the reviewed literature often addresses specific risk elements with minimal depth, resulting in a lack of detailed analysis for most of these risks. Furthermore, at the definitional level, the identification and clear definition of these risks are almost entirely absent. This raises the question of whether the risk elements examined by academic researchers align with the areas considered critical by market players. The following section attempts to answer this question.

3. Comparing results

To determine whether the risk areas most examined by scientific experts align with the risk areas that market participants – namely, corporations and small and

medium-sized enterprises – consider important and relevant, I base my analysis on the annually published AI Index Report, as referenced in the introduction. According to a study conducted by *McKinsey & Company* and featured in the 2021 AI Index Report, a survey of 1,872 companies in 2019 found that cybersecurity was the most relevant AI-related risk (according to 62% of respondents). This was followed by regulatory compliance (50%), explainability (45%), protection of personal data (39%), organizational reputation (35%), workforce displacement (34%), fairness and justice (including bias, according to 26% of respondents), and so on.[42] By 2022, this trend had not changed significantly. According to respondents, 59% still identified cybersecurity as the most relevant risk, followed by regulatory compliance (45%), protection of personal data (40%), explainability (37%), organizational reputation (32%), fairness and justice (30%), and workforce displacement (28%).[43]

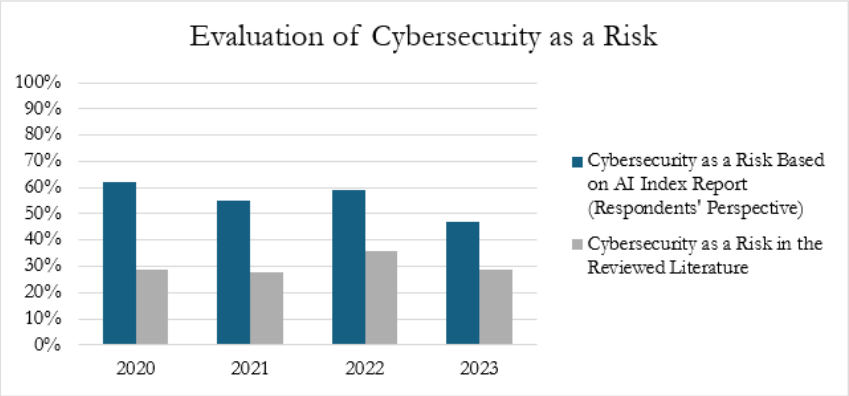
In contrast to the previous years, the 2024 AI Index Report indicates that, based on responses from over 1,000 organizations across 20 countries and 19 industries, the greatest perceived risk is related to the protection and management of personal data. This is followed by concerns about the reliability of AI systems, their security (including cybersecurity), transparency, and fairness.[44]

It is evident that the risks examined by scientific experts present a distinctly different picture compared to the responses from market organizations and stakeholders. An exception to this is the risk related to data protection, which remains a top priority according to the 2024 AI Index Report. However, biases—considered under the category of fairness in the AI Index Report—are viewed as a relatively less significant risk (see, for example, Figures/Tables 7-9).

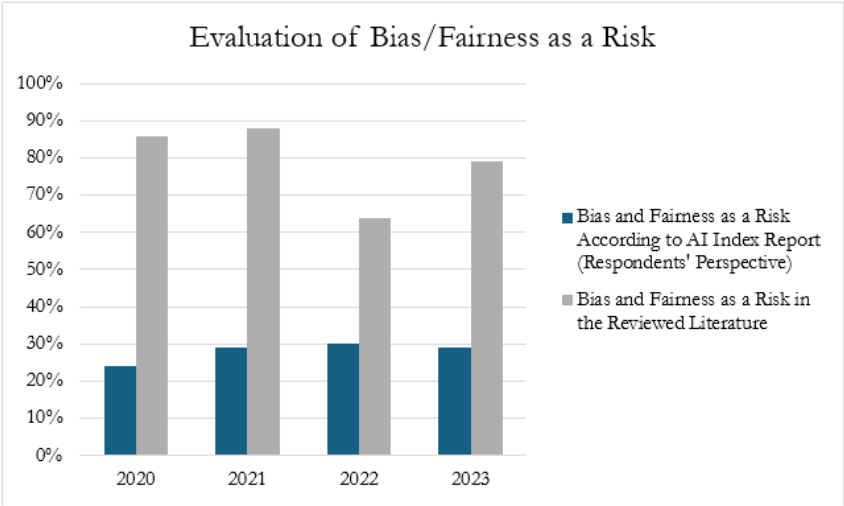
[42] Daniel Zhang, Saurabh Mishra, Erik Brynjolfsson, John Etchemendy, Deep Ganguli, Barbara Grosz, Terah Lyons, James Manyika, Juan Carlos Niebles, Michael Sellitto, Yoav Shoham, Jack Clark, and Raymond Perrault, 'The AI Index 2021 Annual Report' (2021) Stanford University Human-Centered Artifical Intelligence <https://aiindex.stanford.edu/wp-content/uploads/2021/11/2021-AI-Index-Report_Master.pdf> accessed 12 July 2024.

[43] Nestor Maslej, Loredana Fattorini, Erik Brynjolfsson, John Etchemendy, Katrina Ligett, Terah Lyons, James Manyika, Helen Ngo, Juan Carlos Niebles, Vanessa Parli, Yoav Shoham, Russell Wald, Jack Clark, and Raymond Perrault, 'The AI Index 2023 Annual Report' (2023) Stanford University Human-Centered Artifical Intelligence <https://aiindex.stanford.edu/wp-content/uploads/2023/04/HAI_AI-Index-Report_2023.pdf> accessed 12 July 2024.

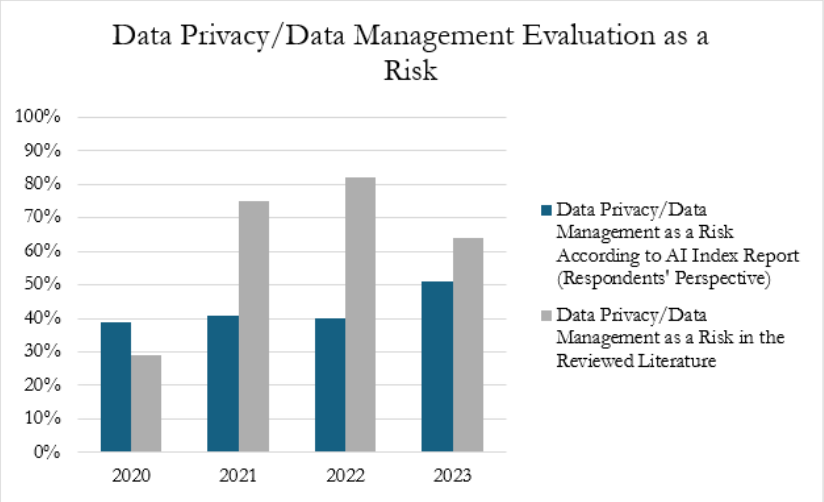
[44] Maslej et al. (n 4).



Figure/Table 7 – Evaluation of Cybersecurity as a Risk.



Figure/Table 8 – Evaluation of Bias/Fairness as a Risk.



Figure/Table 9 – Evaluation of Data Privacy/Data Management as a Risk.

IV. Proposed solutions to address the risks

Among the reviewed literature, several works also present potential solutions to address the aforementioned risks. From these, the following strategies—selected based on subjective evaluation—appear to be suitable for mitigating and managing the identified risks effectively.

In my view, corporate leadership must place significant emphasis on minimizing the aforementioned risks or, at the very least, take comprehensive measures to achieve such minimization. Beyond preventing financial losses for the company, implementing an effective risk management protocol can also safeguard corporate reputation during the implementation of AI-based decision-making and decision-support systems. To effectively minimize these risks, it is advisable, based on the reviewed literature, to first assess the planned AI system from a contextual perspective. This involves examining the industry's regulatory environment, especially if the AI application targets a highly regulated sector with specific compliance requirements. Additionally, it is essential to evaluate the potential negative impacts of erroneous AI decisions, such as the scope of impact, the vulnerable groups affected, whether the consequences are internal or external from the company's standpoint, the potential effects on human rights, the reversibility of the impact, and the expected duration of any negative outcomes. From a procedural standpoint, it is necessary to consider the technical aspects related to the complexity of the system and its degree of interoperability. In terms of business considerations, factors such as the company's risk appetite, the extent of human intervention, and alternative protocols for damage control must be analyzed. On the technological side, it is important to determine the type of algorithm used, whether third-party involvement (e.g., external IT

support) is necessary, the level of transparency achieved, the expected accuracy, and the speed of the system's learning process. From the data management/ data base perspective, it is crucial to examine the dataset used for input-output processing, whether it includes personal data (or special categories of data), the presence of anonymization measures, as well as the size and coverage of the database.[45]

If management has mapped out the aforementioned factors, it is worth considering which type of AI-based system should be implemented to support the given operational decision-making process. In other words, how much decision-making power should be allocated to human judgment versus the AI-based system. In this regard, we can consider three main categories. Moving in the order of decreasing human autonomy, we first have the so-called *human-in-the-loop* solution, where the AI-based system serves as a simple support tool. In this case, the independence of the AI system is low, and management is fully involved in the decision-making process, thus bearing the responsibility as well. A more autonomous solution is the *human on-the-loop* model, where management's role is limited to approving or rejecting the decision. Here, the AI system operates with a higher degree of independence, but the final decision still lies with management. Finally, we can talk about the *human-out-of-the-loop* system, which is fully automated, meaning that management does not participate in the decision-making process. Based on the above, if the decisions require rapid resolution, the outcome of the decision is unlikely to involve human rights violations, and the decision-making process is frequently repeated, it is advisable to implement a human out-of-the-loop system. In cases where the decision-making process may potentially involve human rights concerns or is generally complex and intricate, it is recommended to use either a human in the loop or, if appropriate, a human on the loop system.[46] In my view, the corporate AI implementations that will succeed in the coming years are those preceded by comprehensive risk analysis and risk management efforts. This is essential for management to not only reduce the likelihood of potential risks but also to minimize the occurrence of damages during day-to-day operations.

When implementing AI-based decision-making and decision-support systems, as well as during their application within the European Union, it is necessary to comply with the regulatory environment shaped by two major legal frameworks. Firstly, due to the automated decision-making process—if it involves the processing of personal data—it is essential to meet the specific requirements outlined in the GDPR. One of the specific requirements is that data controllers using automated decision-making must inform data subjects, during the prelimi-

[45] Lee (n 30).

[46] Stanislav Hristov Ivanov, 'Automated decision-making' (2023) 25 Foresight 1.

nary information process, about the fact of automated decision-making, the logic employed, and its significance and potential consequences. This same obligation to inform applies when the data subject exercises his or her right of access.[47] The GDPR provides additional rights to data subjects in cases where decisions based solely on automated data processing (i.e., automated decision-making) would have legal effects or similarly significantly affect them. In such cases, the data subject may choose to opt out of this type of data processing. However, there are exceptions where this right cannot be exercised. For example, if the decision is based on the data subject's explicit consent, or if it is necessary for entering into or performing a contract between the data subject and the data controller, etc. Nevertheless, even in these scenarios, the data subject has the right to request human intervention from the data controller, express their viewpoint, and contest the decision.[48] A question may arise as to which of the three types of automated decision-making and decision-support systems mentioned above are subject to this specific rule. At first glance, it is clearly the human out-of-the-loop model that requires the application of these special GDPR provisions. However, the Court of Justice of the European Union, in case C-634/21 SCHUFA Holding (Scoring), concluded that it also qualifies as an automated individual decision if the data controller decides on a contract with a client by employing a third-party service provider that uses automated decision-making to determine the positive or negative outcome of the contract, and the data controller automatically adopts this decision.[49] As a result, even the human-in-the-loop model may fall under the scope of automated decision-making regulated by the GDPR. Therefore, during corporate integration, special attention must be given to this aspect. It is advisable to establish procedures that ensure decisions made by human-in/on-the-loop-based systems are not classified as automated decision-making under the GDPR. This approach can help mitigate legal risks and ensure compliance with data protection regulations.

On the other hand, the regulatory framework for compliance is provided by the EU Regulation on Artificial Intelligence (AI Act).[50] For AI-based decision-making and decision-support systems used by companies, including small and medi-

[47] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1, art. 13 and 15.

[48] ibid, art 22.

[49] C-634/21 *SCHUFA Holding (Scoring)* [2023] ECLI:EU:C:2023:957.

[50] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L 2024/1689.

um-sized enterprises, the AI Act sets different compliance requirements based primarily on the category of the system, and secondarily on the role of the organization (e.g., as a provider or user). For instance, if a decision-support system is employed for monitoring employee performance and involves profiling, it will be classified as a high-risk AI system. In such cases, the system must meet stringent compliance criteria, including transparency obligations, risk management processes, and human oversight mechanisms, due to the potential impact on individual rights and freedoms.[51] In this case, organizations must comply with requirements such as implementing a risk management system, establishing effective data governance, providing technical documentation, maintaining records, ensuring transparency, and offering adequate information to users. Although compliance with these requirements will only be mandatory starting from August 2, 2027,[52] it is advisable to begin integrating these measures into corporate or small and medium-sized enterprises' AI systems now. It is worth noting, however, that in addition to the aforementioned requirements, the AI Act imposes many other compliance criteria. Therefore, it is crucial to identify the specific regulatory requirements and frameworks tailored to the particular AI system being integrated. This proactive approach will help ensure that the system meets all relevant legal obligations and is well-prepared for future compliance audits.

V. Conclusion and suggestions for further research

Based on the results of the research, I conclude that there is a greater need for examining risks related to the cybersecurity, data management, and reliability of AI-based systems for market players, i.e., companies, as well as small and medium-sized enterprises, rather than focusing on bias and other risks described above. Furthermore, there is a strong demand for a deeper, possibly sector-specific investigation of individual risks, which could contribute to the risk management of market players. One of the risks associated with AI-based systems that is missing is environmental protection. Additionally, an ESG (Environmental, Social, Governance) perspective is also lacking in the examination of these types of AI-based systems. Based on the above, I also identify the impact of these supporting systems on the workforce as an area for further investigation. Moreover, I consider it useful to review the risk database related to AI published by researchers from the *Massachusetts Institute of Technology* in August 2024,[53] with a

[51] ibid, art. 6, para 3.

[52] ibid, sec. 2 and art. 113(c).

[53] Peter Slattery, Alexander K. Saeri, Emily A. C. Grundy, Jess Graham, Michael Noetel, Risto Uuk, James Dao ,Soroush Pour, Stephen Casper, Neil Thompson, 'A systematic evidence review and common frame of reference for the risks from artificial intelligence' (2024) <https://www.researchgate.net/publication/383089263_The_AI_Risk_Repository_A_Comprehensive_Meta-Review_Database_and_Taxonomy_of_Risks_From_Artificial_Intelligence?channel=-doi&linkId=66bc0c43299c327096c752dc&showFulltext=true accessed> 23 August 2024.

focus on AI-based decision-making and decision-support systems used by managers of companies, as well as small and medium-sized enterprises.

VI. Limitation

I would like to highlight the following limitations regarding the current research:

- In many cases, the scholarly articles do not define the specific risk, i.e., what exactly is meant by it, which sometimes leads to the same risk being identified under two different names.
- Given the vast amount of literature on AI that is published monthly, the literature review as a genre can only provide a snapshot of the current body of work on AI-related risks.
- The literature review may not be entirely suitable for examining the subject from a social science perspective, as it is subject to the author's subjectivity.

Appendix 1 - The Reviewed Scholarly Works

Name of the author(s)	Title of the article	Scope of the study	Date of publication
Maryanrizinski, Hristijan Peshov, Kostadin Mishev, Lubomir T. Chitkushev, Irena Vodenska, And Dimitar Trajanov	*Ethically Responsible Machine Learning in Fintech*	Ethical challenges in the fintech sector, particularly bias, discrimination, differentiated pricing, conflicts of interest, and data privacy	2016
Vidushi Marda	*Artificial intelligence policy in India: a framework for engaging the limits of data-driven decision-making*	Recommendation of a framework for understanding the impacts of AI, focusing on the three main stages of introducing machine learning: the data, model, and application stages	2018

Daniel Schönberger	*Artificial intelligence in healthcare: a critical analysis of the legal and ethical implications.*	The decision-making capabilities of AI technologies	2019
Kristin N. Johnson	*Automating the Risk of Bias*	Increased gender inclusion in the development of AI technologies and its impacts	2019
Heike Felzmann, Eduard Fosch Villaronga, Christoph Lutz and Aurelia Tamó Larrieux	*Transparency you can trust: Transparency requirements for artificial intelligence between legal norms and contextual concerns*	The significance of the GDPR-based transparency requirement in the case of AI and automated decision-making systems	2019
Tetyana (Tanya) Krupiy	*A vulnerability analysis: Theorising the impact of artificial intelligence decision-making processes on individuals, society and human diversity from a social justice perspective*	Social issues related to the application of AI decision-making processes	2020
Lorwai Tan, David Tivey, Helena Kopunic, Wendy Babidge, Sally Langley and Guy Maddern	*Artificial intelligence technology in surgery*	The significance of AI in surgery	2020
Sergio Alberto Gramitto Ricci	*Artificail Agents in corporate boardrooms*	The use of AI in corporate boards	2020
Helen Smith, Kit Fotheringham	*Artificial intelligence in clinical decision-making: Rethinking liability*	Possible outcomes of *negligence* lawsuits filed against clinicians and software development companies regarding the use of AI-based systems with human clinical oversight	2020

Christopher M. Bruner	*Distributed ledgers, artificial intelligence and the purpose of the corporation*	The impact of emerging technologies from both positive and normative perspectives, focusing on how these developments might influence debates regarding corporate objectives in the context of publicly listed companies	2020
ANDREW D. SELBST	*Negligence and ai's Human Users*	Examining four complications arising from the unique nature of AI in relation to negligence	2020
Michael Hilb	*Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance*	How the continuous development and adaptation of AI impacts the practice of corporate governance	2020
Jocelyn Maclure	*AI, Explainability and Public Reason: The Argument from the Limitations of the Human Mind*	Interpretation of the explainability problem of AI and highlighting its ethical significance	2021
Charlotte A. Tschider	*Beyond the "black box"*	Examination of transparency and explainability	2021

Marcus Buckmann, Andy Haldane and Anne-Caroline Hüser	*Comparing minds and machines: implications for financial stability*	Does human or artificial intelligence better support a stable financial system? - Aspects of human and artificial intelligence decision-making behavior	2021
Ricardo Francisco Reier Forradellas and Luis Miguel Garay Gallastegui	*Digital Transformation and Artificial Intelligence Applied to Business: Legal Regulations, Economic Impact and Perspective*	The impact of AI and digital transformation on business	2021
Fiorella Operto	*Elements of Roboethics*	The ethical, legal, and societal implications of robotics, with particular focus on advanced robotics applications	2021
Björn Lundgren	*Ethical machine decisions and the inputselection problem*	The role of factual uncertainty in moral decision-making	2021
Friedrich Hamadziripi, Howard Chitimira	*The Integration and Reliance on Technology to Enhance the Independence and Accountability of Company Directors in South Africa*	The integration of technology and the reliance on technology is intended to be discussed in order to improve corporate governance principles in developing countries, such as South Africa	2021

Tae Wan Kim, Bryan R. Routledge	*Why a Right to an Explanation of Algorithmic Decision-Making Should Exist: A Trust-Based Approach*	It examines algorithmic decision-making and the right to explanation	2021
Leo H. Chiang, Birgit Braun, Zhenyu Wang, Ivan Castillo	*Towards artificial intelligence at scale in the chemical industry*	Application of AI in the chemical industry	2022
Oscar Rodríguez-Espíndola Ali Emrouznejad	*Analysis of the adoption of emergent technologies for risk management in the era of digital manufacturing*	The application of big data, AI, cloud computing, and blockchain in risk management	2022
Therese Enarsson, Lena Enqvist, Markus Naarttijärvi	*Approaching the human in the loop – legal perspectives on hybrid human/algorithmic decision-making in three contexts*	Different forms of hybrid decision-making systems	2022
Jingchen Zhao	*Artificial Intelligence and Corporate Decisions: Fantasy, Reality or Destiny*	The role of AI in corporate boards	2022
Deepika Chhillar and Ruth V. Aguilera	*An Eye for Artificial Intelligence: Insights Into the Governance of Artificial Intelligence and Vision for Future Research*	The intersection of corporate governance and AI	2022
Lee, M.S.A.; Cobbe, J.; Janssen, H.; Singh, J.	*Defining the scope of AI ADM system risk assessment*	It examines the ambiguity of definitions inherent in AI and their relationship with automated decision-making, as well as the potential consequences for the organizational understanding of system risks	2022

Alžběta Krausová and Václav Moravec	*Disappearing Authorship Ethical Protection of AI-Generated News from the Perspective of Copyright and Other Laws*	It demonstrates that the current Czech legal environment does not encourage accountability, responsibility, and transparency	2022
Muzaffer Eroğlu, Meltem Karatepe Kaya	*Impact of Artificial Intelligence on Corporate Board Diversity Policies and Regulations*	The potential impacts of AI on corporate board diversity policies and regulations	2022
Rozita Dara, Seyed Mehdi Hazrati Fard and Jasmin Kaur	*Recommendations for ethical and responsible use of artificial intelligence in digital agriculture*	Ethical challenges of AI application in agriculture, including fairness, transparency, accountability, sustainability, privacy protection, and robustness	2022
Agata Leszkiewicz, Tina Hormann and Manfred Krafft	*Smart business and the social value of AI*	Analysis of AI benefits and costs for a B2B company and its internal, external, and societal stakeholders	2022
Toan Huu Bui, Van Phuoc Nguyen	*The Impact of Artificial Intelligence and Digital Economy on Vietnam's Legal System*	The integration of AI and digital transformation into various applications and their regulations	2022

Zhilian Huang, Mithun Mohan George, Yi-Roe Tan, Karthiga Natarajan, Emily Devasagayam, Evonne Tay, Abi Manesh, George M. Varghese, Ooriapadickal Cherian Abraham, Anand Zachariah,	*Are physicians ready for precision antibiotic prescribing? A qualitative analysis of the acceptance of artificial intelligence-enabled clinical decision support systems in India and Singapore*	AI-based decision support systems used in the healthcare sector	2023
Elif Kiesow Cortez and Nestor Maslej	*Adjudication of Artificial Intelligence and Automated Decision-Making Cases in Europe and the USA*	Legal cases related to AI and automated decision-making	2023
Anna van der Gaag; Robert Jago; Ann Gallagher; Kostas Stathis; Michelle Webster; and Zubin Austin	*Artificial Intelligence in Health Professions Regulation: An Exploratory Qualitative Study of Nurse Regulators in Three Jurisdictions*	The potential role and value of AI technologies in regulatory practice	2023
Stanislav Hristov Ivanov	*Automated decision-making*	Analysis of decision-making approaches related to AI: human in the loop, human on the loop, human out of the loop	2023
Daniele Veritti, Leopoldo Rubinato, Valentina Sarao, Axel De Nardin, Gian Luca Foresti, Paolo Lanzetta	*Behind the mask: a critical perspective on the ethical, moral, and legal implications of AI in ophthalmology*	The dangers, controversial aspects, and consequences of the application of AI in ophthalmology and other areas related to medicine	2023

Ralitsa Raycheva, Kostadin Kostadinov, Elena Mitova, Nataliya Bogoeva, Georgi Iskrov, Georgi Stefanov and Rumen Stefanov	*Challenges in mapping European rare disease databases, relevant for ML-based screening technologies in terms of organizational, FAIR and legal principles: scoping review*	Identification of the key challenges arising during the mapping of European databases for rare diseases, which are relevant from the perspectives of organizational, FAIR, and legal principles in relation to machine learning-based screening technologies	2023
Tanya Brigden, Colin Mitchell, Elizabeth Redrup Hill, Alison Hall	*Ethical and legal implications of implementing risk algorithms for early detection and screening for oesophageal cancer, now and in the future*	Identification of ethical and legal issues related to the application of an esophageal cancer risk prediction tool in primary care	2023
Rata Rokhshad, Maxime Ducret, Akhilanand Chaurasia, Teodora Karteva, Miroslav Radenkovic, Jelena Roganovic, Manal Hamdan, Hossein Mohammad-Rahimi, Joachim Krois, Pierre Lahoud, Falk Schwendicke	*Ethical considerations on artificial intelligence in dentistry: A framework and checklist*	Providing a framework and a checklist for evaluating AI applications used in dentistry from this perspective	2023

Andrew Mowbray, Philip Chung, Graham Greenleaf	*Explainable AI (XAI) in Rules as Code (RaC): The DataLex approach*	It examines the fundamental necessity of explainability and transparency in the implementation of *Rules as Code* and explores the similarity of this requirement with the concept of *explainable AI*	2023
Sajid Ali, Tamer Abuhmed, Shaker El-Sappagh, Khan Muhammad, Jose M. Alonso-Moral, Roberto Confalonieri, Riccardo Guidotti, Javier Del Ser, Natalia Díaz-Rodríguez, Francisco Herrera	*Explainable Artificial Intelligence (XAI): What we know and what is left to attain Trustworthy Artificial Intelligence*	It examines evaluation methods, available tools, *explainable AI datasets*, and other related aspects	2023
Tetyana (Tanya) Krupiy and Martin Scheinin	*Disability Discrimination in the Digital Realm: How the ICRPD Applies to Artificial Intelligence Decision-Making Processes and Helps in Determining the State of International Human Rights Law*	The impact of AI decision-making processes on individuals with disabilities	2023

Javed Iqbal, Diana Carolina Cortés Jaimes, Pallavi Makineni, Sachin Subramani, Sarah Hemaida, Thanmai Reddy Thugu, Amna Naveed Butt, Jarin Tasnim Sikto, Pareena Kaur, Muhammad Ali Lak, Monisha Augustine, Roheen Shahzad, Mustafa Arain	*Reimagining Healthcare: Unleashing the Power of Artificial Intelligence in Medicine*	The impact of AI on healthcare and the importance of ethical and balanced integration	2023
Tyler R Ray, Ryan T Kellogg, Kyle M Fargen, Ferdinand Hui, Jan Vargas	*The perils and promises of generative artificial intelligence in neurointerventional surgery*	It examines the dangers and promises of generative AI in neurointerventional surgery	2023
Marvin van Bekkum, Frederik Zuiderveen Borgesius	*Using sensitive data to prevent discrimination by artificial intelligence: Does the GDPR need a new exception?*	The GDPR rules regarding special categories of personal data hinder the prevention of AI-based discrimination	2023

EU Accession to the ECHR: At the End of the Long and Winding Road?

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https://doi.org/10.15170/PJIEL.2024.2.4

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Abstract

Accession to the European Convention on Human Rights has been on the European Union's agenda for decades. The Lisbon Treaty has removed the initial legal barriers, but actual accession has not been achieved to date: the reconciliation of the special characteristics of EU law with the Convention has proved to be a rather complex issue, illustrated well by Opinion 2/13 of the Court of Justice of the European Union (CJEU). The new draft accession agreement, which was drawn up during the relaunched negotiations, sought to address the issues raised by the Opinion 2/13, but questions remain, in particular regarding legal remedies in the Common Foreign and Security Policy (CFSP) as well as the EU law principle of mutual trust. Following an overview of the accession process so far, the paper concentrates on the analysis of these two selected issues, assessing the solutions included in (or indeed missing from) the 2023 draft.

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Keywords: EU accession, ECHR, European Court of Justice, European Court of Human Rights, fundamental rights, judicial interpretation, CFSP, mutual trust

I. Preliminary remarks

The European Convention on Human Rights (ECHR), as a fundamental human rights standard, has served as a point of reference for European integration for decades, despite the fact that the European Union is not currently a party to this international agreement. First, the ECHR has influenced EU law through the case-law of the Court of Justice of the European Union as a source of inspiration[1] for fundamental rights which form part of Community law in the unwritten form of general principles.[2] In addition to the protection of fundamental rights via case-law starting in the 1970s, the Union (or its predecessors) has had two alternatives to the development of an EU system for the protection of fundamental rights in writing: developing its own fundamental rights catalogue or joining an external (international law based) human rights system – in the latter case, it was clear that the reasonable choice would the ECHR, to which all EU Member States are parties.[3] In the end, the Union did not opt for one alternative, but a choice of both paths combined, although the achievement of either objective was not an easy task.

This paper does not concern the case law of the CJEU in relation to the ECHR or a detailed analysis of the current role of the ECHR in EU law; nor does it examine the underlying political processes relating to the development of fundamental rights protection, but, more narrowly, confines itself to examining the accession process. In this context, it should be noted that membership of an external system of human rights protection is necessary for the Union, regardless of the fact that own system of protection of fundamental rights has been established and is fully functional (in particular after the entry into force of the Treaty of Lisbon). Indeed, if it accedes to the ECHR, the EU will be obliged to comply with an external human rights standard and monitoring system, where compliance with obligations is monitored by a judicial body and where individuals can assert their human rights against the EU in court. The principles of unwritten primary law and the Charter of Fundamental Rights are, by definition, *internal* standards of fundamental rights review for the Union. Currently no international human rights monitoring mechanism with jurisdiction over EU law

[1] Case 29/69 *Stauder v Ulm* [1969] ECLI:EU:C:1969:57.

[2] Case 4/73 *Nold v Commission* [1974] ECLI:EU:C:1974:51.

[3] The importance of the ECHR was highlighted in a joint statement (legally non-binding) by the Parliament, the Council and the Commission, in which the institutions stood up for the importance respect for fundamental rights. Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms [1977] OJ C103/1.

exits that is independent of the Union.[4]

II. From Opinion 2/94 to the Lisbon Treaty

The EU's first accession attempt took place in the 1990s, which failed for reasons of competence: the European Court of Justice stated in its Opinion 2/94 that the European Community has no competence to accede to the ECHR.[5] The Court found that the Treaties did not confer on the Community any power to legislate on general human rights issues, nor could it conclude an international agreement in this area; this would have required an amendment of the Treaties.[6] That situation was initially the subject of an attempt by the Member States to change that situation by[7]providing for the accession of the European Union to the ECHR by means of the Constitutional Treaty, but as is known that that treaty did not enter into force.

However, the Treaty of Lisbon incorporates the relevant provision of the Constitutional Treaty in substance, with the result that, in the primary EU law in force, Article 6(2) TEU imposes a legal obligation on the EU to accede to the ECHR.[8]

With regard to accession, primary EU law imposes the following conditions in Article 6(2) TEU and in the relevant Protocol[9]:

- accession shall not affect the competences of the Union and its institutions as defined by the Treaties;
- the accession agreement should provide for the preservation of the specific characteristics of EU law;
- it shall ensure that accession does not affect Member States' relations with the ECHR;
- the provisions of the Agreement shall be without prejudice to Article 344

[4] Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU). A Commentary* (Springer 2013) 310.

[5] The opinion was requested from the Court of Justice pursuant to art. 218(6) EC [now art. 218(11) TFEU, with the same substantive content].

[6] In the opinion procedure, the Commission, the Council and some Member States argued that art. 235 TEC (which today is art. 352 TFEU) could serve as a legal basis for accession to the ECHR, but the Court did not agree (as many Member States didn't either). See Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, OUP 2006) 370-371.

[7] Treaty establishing a Constitution for Europe [2004] OJ C310/1.

[8] The wording "shall accede" used in the English version also clearly refers to the binding character.

[9] Protocol (No. 8) relating to art. 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

TFEU.[10]

Although not legally binding, mention should also be made of Declaration No 2 on Article 6(2) TEU, according to which the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that the accession of the Union to the ECHR should take place while preserving the specificities of EU law, in order to ensure the regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights, which 'can be strengthened upon accession'.[11] As far as the ECHR is concerned, since only States have so far been contracting parties, an amendment was also necessary; thanks to Protocol No 14, Article 59(2) of the ECHR now provides that the European Union may accede to the ECHR.[12]

In view of the obligation to accede, as a follow-up to the negotiations between the Council of Europe and the Union, a draft Accession Agreement was drawn up in 2013 to address the institutional and legal aspects of accession.[13] Here the paper refrains from dealing with the process of negotiation of the original draft international agreement on accession (hereinafter: original DAA), the positions taken by the parties involved, or the overall analysis of the DAA, only the most relevant substantive aspects.[14]

Of particular importance in the original DAA is the question of co-respondents in the relation between the Member States and the EU (which allows the EU and the Member States to become co-respondents in the event of one of them being sued; thus, there is no need for the ECtHR to decide whether the EU and/or one or more Member States are the appropriate respondent, or how the division of responsibility between them should occur)[15]and the procedure for the prior involvement of the European Court of Justice to ensure that the European

[10] According to that provision, Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

[11] Declaration on art. 6(2) of the Treaty on European Union.

[12] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. The Protocol entered into force on 1 June 2010.

[13] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[14] For other issues in this context, see in particular: Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 361; Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham International Law Journal 1114; Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon' in Sybe De Vriesm, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing* (Hart 2015).

15 See art. 3 (1)-(5) of the DAA.

Court of Justice is able to review the fundamental rights compatibility of an EU act before the ECtHR decides on the compatibility of EU law with the ECHR.[16]

The European requested an opinion from the European Court of Justice pursuant to Article 218(11) TFEU, which thus gave the ECJ the opportunity to examine whether the DAA was in conformity with primary law. The Commission explained in its submission that for its part, it considered the Agreement to be compatible with the Treaties.[17]

III. Opinion 2/13

Unsurprisingly, the Court's Opinion No 2/13 was anxiously expected. The negative opinion issued in December 2014 found the DAA to be incompatible with primary EU law on a number of points including Article 53 of the EU Charter (the level of protection of fundamental); the EU law principle of mutual trust; the preliminary ruling procedure and the advisory opinion procedure provided for in Protocol No 16 to the ECHR; the obligation enshrined in Article 344 of the TFEU; the co-respondent mechanism as well as the prior involvement of the Court of Justice in proceedings before the ECtHR; and, last but certainly not least, the issue of jurisdiction over CFSP acts. For the purposes of this paper, only three that are particularly relevant will be highlighted.

With regard to *mutual trust*, the Court stressed its particular importance between Member States: this principle enables the Union to establish an area of freedom, security and justice without internal frontiers. It requires Member States to consider all other Member States as complying with the standards of EU law and, in particular, with the fundamental rights recognized by EU law, unless there are exceptional circumstances.[18] The Member States of the Union may therefore, when implementing EU law and on the basis of its provisions, be obliged to 'to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the funda-

[16] See art. 3(6) of the DAA.

[17] Case Opinion 2/13 *Opinion pursuant to Article 218(11)* [2014] ECLI:EU:C:2014:2454, para. 73. The European Parliament (EP), the Council and twenty-four Member States submitted comments in the procedure, and although there are differences in reasoning, the EP, the Council and the Belgian, Bulgarian, Czech, Danish, German, Estonian, Ireland, Greek, Spanish, French, Italian, Cypriot, Latvian, Lithuanian, Hungarian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and the UK Governments all concluded that the DAA was in fact compatible with the Treaties (see: Opinion 2/13, paras. 108-109).

[18] Opinion 2/13, para. 191.

mental rights guaranteed by the EU.'[19] As the European Convention on Human Rights (ECHR) would (also) require EU Member States to examine the respect of fundamental rights by another EU Member State on the basis of the ECHR, while EU law requires mutual trust between the Member States, accession could undermine the 'balance on which the European Union is founded' and undermine the autonomy of EU law, and the DAA does not provide a solution for the avoidance of that situation.[20]

With regard to *Article 344* of the TFEU, the Court recalled that, according to its settled case law, international agreements concluded by the EU must not undermine the system of competences established by the Treaties and the autonomy of the EU legal order. [21] This principle is, inter alia, expressed in Article 344, according to which Member States undertake to settle disputes concerning the interpretation or application of the Treaties solely by means of the procedures provided for in the Treaties. According to the Court, the fact that Article 5 of the DAA states the proceedings before the Court of Justice are not a means of resolving disputes which the contracting parties have waived[22] under Article 55 of the ECHR and are not sufficient to preserve the exclusive jurisdiction of the Court of Justice. That provision merely limits the scope of the obligation under Article 55 of the ECHR, with the result that it remains possible for the European Union or the Member States to bring an action before the ECtHR on the[23] basis of Article 33 of the ECHR because of an alleged infringement of the ECHR bya Member State or by the European Union in relation to EU law, since that possibility infringes the Article 344 TFEU.[24] Article 344 and the autonomy and constitutional principles of EU law cannot be prejudiced by such an agreement.

As regards the *CFSP jurisdiction issue*, the starting point of Court of Justice was

[19] Opinion 2/13, para. 192.

[20] Opinion 2/13, paras. 194-195.

[21] Opinion 2/13, para. 201.

[22] Art. 55 of the ECHR concerns the exclusion of the settlement of disputes by other means: 'The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.'

[23] Art. 33 – Inter-State matters: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.'

[24] Opinion 2/13, paras. 207-208. According to the Court, the appropriate solution would be to expressly exclude, in the draft agreement, the jurisdiction of the ECtHR arising from Article 33 of the ECHR in disputes between EU Member States and between EU Member States and the EU concerning the application of the ECHR falling within the material scope of EU law (ibid, para. 213).

that it has only very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU and review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU. This means that certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice. The DAA, however, would have empowered the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, whereas the Court lacks such jurisdiction, entrusting judicial review to a non-EU institution. Yet according to the Court of Justice's case law, jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.[25]

It was with regard to all of the above that the CJEU concluded that the DAA was not compatible with Article 6 (2) TEU and Protocol No. 8.

IV. The renegotiated draft agreement

Since Opinion 2/13 was delivered on the basis of Article 218(11) TFEU, two options were possible which could allow for the continuation of accession: amending the EU Treaties themselves or preparing a new accession agreement – and as the first option was not on the agenda at all in this context, the EU chose the second option: following Opinion 2/13, the Member States meeting in the Council agreed on the need for a reflection period, while reaffirming their commitment to accession.[26] The Commission was tasked with analysing the obstacles set out in Opinion 2/13; the analyses were discussed in the Council Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) and invited the Commission to prepare proposals for the revision of the new Accession Agreement.[27] Both the Commission and the Council of Europe had confirmed that the intention to facilitate the EU's accession to the ECHR remains unchanged, yet no formal progress has been made for years.
Following an informal meeting in June 2020[28], accession negotiations were of-

[25] Opinion 2/13, paras. 250-258.

[26] Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17), 3.

[27] See: Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play, 3 and General Secretariat of the Council: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), 14639/18, 10 December 2018, 1.

[28] Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+ 1") on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020.

ficially resumed in September 2020.[29] The issues raised in Opinion 2/13 were grouped into "negotiation baskets" that required a solution.[30]

At its 18th meeting in March 2023, the Negotiating Group reached a provisional unanimous agreement to resolve the issues raised in Opinion 2/13, with the exception of the CFSP.[31] According to the Negotiating Group, the solutions proposed for baskets 1, 2 and 3 were in line with the general principles agreed by the Group, i.e. preserving equal rights of individuals and applicants, maintaining equality between all contracting parties (be they States or the EU) and preserving, as far as possible, the control mechanism of the ECHR, and ensuring that it applies to the EU in the same way as to all other parties.[32] At the same meeting, the EU informed the Negotiating Group that it intended to solve the CFSP issue 'internally', so that the Negotiating Group 'does not need to address this issue as part of its own work.' The Negotiating Group rightly noted that it would nevertheless be necessary for all participants in the accession negotiations to be properly informed of the way in which the EU intends to solve the problem of basket 4, which is a prerequisite for the conclusion by all parties of a final agreement on the accession of the EU; the EU has committed to inform the CDDH accordingly.[33]

The full analysis of the renegotiated draft agreement would go beyond the scope of this study, so, as above, we will confine ourselves to examining two selected issues: the CFSP jurisdiction problem and the CJEU's concerns with mutual trust.

4.1. The CFSP jurisdiction problem

With regard to the CFSP issue, in its initial position presented at the beginning of the negotiations, the Union stressed the need to find a solution reflecting the 'reflecting the EU internal distribution of competences for remedial action in

[29] The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission. Réf. DC 123(2020)

[30] Basket 1: the EU-specific mechanisms of the procedure before the European Court of Human Rights; Basket 2: the operation of inter-party applications (Art. 33 of the Convention) and of references for an advisory opinion (Protocol No. 16 to the Convention) in relation to EU Member States; Basket 3: the principle of mutual trust between the EU Member States; and Basket 4: EU acts in the area of the Common Foreign and Security Policy (CFSP) that are excluded from the jurisdiction of the CJEU. See Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms, 47+1(2020)01, 5 March 2020.

[31] 46+ 1(2023)35FINAL, 30 March 2023.

[32] ibid.

[33] ibid.

the allocation of responsibility for the EU acts at issue for the purpose of the ECHR system."[34] In a subsequent non-paper, the EU drew attention to the fact that in the meantime the CJEU has had the opportunity to reflect on the limitation of its competence in the CFSP and concluded that the limitation should be interpreted narrowly.[35] The EU pointed to the judgments in *Rosneft,*[36] *Bank Refah Kargaran*[37] and *Elitaliana Spa*[38] and *H*[39], which reflect the CJEU's position[40] that the general rule in the CFSP is not in fact the limited nature of the Court's jurisdiction: on the contrary, the Court assumes that, under Article 19 TEU, it has general jurisdiction to carry out judicial review, from which the limited powers provided for in the CFSP are exceptions – that logic is totally at odds with what a grammatical interpretation would suggest.[41]

During the relaunched negotiations, the EU proposed a solution that, at least in its own view, avoids the conflict of jurisdiction perceived by the CJEU (or, in other words, the challenge to the autonomy of the EU legal order) and at the same time avoids a gap in jurisdiction within the CFSP. Such a solution would be tantamount to introducing a "reattribution" rule applicable to CFSP acts. According to the solution proposed in March 2021, the EU should be able to allocate responsibility for an act adopted under the CFSP to one or more Member States where the act does not fall within the jurisdiction of the CJEU.[42] In

[34] European Union Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms. 47+ 1(2020)01, 5 March 2020, 5.

[35] Non-paper for the 7th meeting of the CDDH Ad Hoc Negotiation Group („47+1") on the Accession of the European Union to the European Convention on Human Rights <https://rm.coe.int/non-paper-basket-4-003-/1680a170ab>.

[36] Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236.

[37] Case C-134/19 P *Bank Refah Kargaran v Council* [2020] ECLI:EU:C:2020:793.

[38] Case C-439/13 P *Elitaliana Spa v Eulex Kosovo* [2015] ECLI:EU:C:2015:753.

[39] Case C-455/14 P *H v Council and Commission* [2016] ECLI:EU:C:2016:569.

[40] In the meantime, the CJEU has clarified that it interprets its jurisdiction in relation to the CFSP as covering not only annulment proceedings but also preliminary rulings on the validity of legal acts (*Rosneft*) and actions for damages (*Bank Refah Kargaran*) and introduced a 'centre of gravity' test for measures that could potentially be considered to fall within or outside the scope of the CFSP *(H.)*. Interestingly, in her View in Opinion 2/13, Advocate General Kokott argued that actions for damages do not fall within the limited CFSP jurisdiction of the Court of Justice and argued against a very broad interpretation of the relevant provisions of primary law [Case Opinion 2/13 *Opinion pursuant to Article 218(11)* [2014] EU:C:2014:2475, View of the Advocate General, paras. 89-95].

[41] Ramses A. Wessel, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' (2019) Presented at the workshop Contemporary Challenges to EU Legality, European University Institute, Florence, 6-7. <https://ris.utwente.nl/ws/portalfiles/portal/113162240/wesselconf19.pdf>

[42] 9th meeting of the CDDH ad hoc negotiation group ("47+ 1") on EU accession to the

practice, this would mean that acts for which the EU could not be held accountable by either the CJEU or the ECtHR would be 'reattributed' to one or more EU Member States by the Union. In essence, the concept would therefore not follow a classic approach of attribution of liability (adhesive to the conduct), but would shift the responsibility to an actor that is otherwise *not* responsible, in order to fill the accountability gap.

It should be noted that, following the agreement in the Ad Hoc Negotiating Group, the CJEU ruled on two further cases where it further refined and expanded its (increasingly less exceptional) jurisdiction in the CFSP. In Neves77, it ruled on the permissibility of preliminary rulings on interpretation in the CFSP.[43] In the joined cases KS and KD[44] it also took a permissive position on actions for damages vis-à-vis CFSP acts which are not individual sanctions, albeit limiting its statement by introducing a kind of 'EU poltical question doctrine', ruling out the CJEU's review of 'strategic or political decisions' in the context of the CFSP.[45] Of course, in the process of renegotiation so far, these two judgments could not yet have been relevant due to the time factor but will certainly be an additional point of reference for the EU in terms of the CJEU's ability to adequately guarantee the right to an effective remedy also in the CFSP.

With a reattributrion solution, the EU would deviate from the overall logic of attribution under international law[46]; however, the EU has not further clarified how or on what basis it would "redistribute" responsibility to some Member States in the situation outlined. Making the attribution of responsibility an internal issue could, in principle, make the situation of potential applicants easier (because they have an entity they can sue), yet the dogmatic background of such a concept is unclear, at least in the absence of official documents on the details.[47]

European Convention on Human Rights. Meeting Report 25 March 2021, p. 3.

[43] Case C-351/22 *Neves 77 Solutions SRL v Agenția Națională De Administrare Fiscală* [2024] ECLI:EU:C:2024:723.

[44] Joined Cases C-29/22 P and C-44/22 KS and KD v Council and Others [2024] ECLI:EU:C:2024:725.

[45] Ibid, para. 117. Cf. for the comparison with the political question doctrine: Thomas Verellen, 'A Political Question Doctrine for the CFSP: The CJEU's Jurisdiction in the KS and KD Case' (*Verfassungsblog,* 24 September 2024) <https://verfassungsblog.de/political-question-doctrine/> accessed 29 January 2025.

[46] The cornerstones of liability and attribution in international law are (primarily) the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) (GA Res. 56/83, 28 January 2002) and (albeit with a much more debated character) the Articles on the Responsibility of International Organizations (ARIO) (GA Res. 66/100 9 December 2011). Of course, international liability in itself raises numerous questions of interpretation and application.

[47] The representatives of the EU have themselves pointed out the difficulty of the issue or indeed finding an alternative solution. See: 13th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human

The sensitivity of the CFSP problem is illustrated by the fact that, among the numerous working documents submitted to the Ad Hoc Negotiation Group on accession, the document entitled 'Proposals by the European Union on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union' was one of the very few documents not publicly available.[48] Also, even in light of (especially) the KS and KD judgement, gaps in judicial review in the CFSP remain: apart from the aforementioned strategic or political decisions, the concept of factual *conduct* as a source of fundamental rights infringements seem to be absent from the CJEU's line of though as it focuses strongly on 'decisions'.[49]

4.2. The question of mutual trust

As we have seen, the fundamental problem for the CJEU regarding the principle of mutual trust was that the ECHR would require EU Member States (just like other ECHR states parties) to examine the respect of fundamental rights by other EU Member States under the Convention; if necessary, even by bringing state-vs.-state proceedings before the Strasbourg court. Rather interestingly, in *Aranyosi and Căldăraru*, the Court specifically emphasised, in the context of the EAW, that the authority of a Member State must concretely and precisely examine whether there are serious and substantiated grounds for believing that there is a breach of the Charter of Fundamental Rights in another Member State to which the person to be surrendered would actually be exposed – and, if the answer to that question is in the affirmative, postpone the decision on surrender and decide whether it is at all enforceable; the Court referred here specifically to the ECHR and the relevant case-law of the ECtHR.[50] However, regardless of the principle of mutual trust, it is clear that breaches of EU law or of EU fundamental rights by EU Member States are not at all exceptional cases, as – to name just one factor – the ECtHR often finds violations of human rights enshrined in the ECHR by EU Member States as well.[51]

During the renegotiation of the accession agreement, a number of possible approaches have been identified from a methodological point of view, i.e. that

Rights, CDDH46+1(2022)R13. pp. 7-8.

[48] See e.g. Report on the 13rd meeting of the CDDH CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, 46+1(2022)R13.

[49] Stian Øby Johansen, 'The (Im)possibility of a CFSP "Internal Solution"' (2024) 9 European Papers, 797.

[50] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, para. 92.

[51] Nuala Mole, 'Can Bosphorus be maintained?' (2015) ERA Forum 467, 479

(1) there should be a provision referring to the issue of mutual trust in the draft agreement, (2) there should be no explicit provision, (3) an attached declaration should address the issue, or (4) the issue should only be addressed in the explanatory report annexed to the draft; in the end, a substantive provision was inserted into Article 6 of the new draft, its Preamble and the Explanatory Report also mention the issue.[52]

The wording of the substantive provision has changed significantly as compared to the originally proposed one. Initially, the CDDH Secretariat tabled the following text for adoption: "Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust in the context of mutual-recognition mechanisms within the European Union provided that such application is not automatic and mechanical to the detriment of human rights in an individual case. [53] That version was designed to take into account the relevant case-law of the ECtHR[54] and, in addition to the declared general rule, provided for the possibility of a derogation, which was in essence no different from what the CJEU postulated in *Aranyosi and Caldararu*. Yet the provision was significantly diluted in the new draft[55], mainly due to the insistence of the EU representatives: according to the new version: 'Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.'[56] The reference to the automaticity of mutual recognition resulting from mutual trust as a potential risk to fundamental rights was omitted and replaced by a general reference to the ECHR. The specific reference to its case-law has been relocated to the explanatory report[57], which may be relevant to the interpretation but has no legal binding effect. It is not difficult to see in this solution a fear that the CJEU would once again give a negative

[52] Eleonora Di Franco and Mateus Correia de Carvalho, 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?' (2023) 8 European Papers 1221, 1223.

[53] 10th Meeting of the CDDH Ad Hoc Negotiation Group ("47+ 1") on the Accession of the European Union to the European Convention on Human Rights 47+1(2021)8, 8 June 2021. <https://rm.coe.int/cddh-47-1-2021-8eng/1680a2da31> accessed 29 January 2025.

[54] *Avotiņš v. Latvia* App no. 17502/07 (ECtHR, 23 May 2016); *Bivolaru and Moldovan v. France* App nos. 40324/16 and 12623/17 (ECtHR, 25 March 2021).

[55] EU negotiators referred, *inter alia*, to the fact that the original proposal would unnecessarily limit the further development of rights by the CJEU in the area of mutual trust. See Di Franco and de Carvalho (n 49) 1224.

[56] 18th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, 46+ 1(2023)36, 17 March 2023. <https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd> accessed 29 January 2025.

[57] Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 88.

opinion regarding an accession instrument that takes a 'harder' stance.[58]

V. Concluding remarks

The broadly interpreted 'procedure of accession' has been a legal and political process spanning decades taking a number of less expected turns. With the provisional text of the renegotiated draft agreement adopted in 2023, the EU and the Council of Europe are both trying to close these much-discussed issues. However, as demonstrated by the analysis of just two selected issues, a successful closure is not absolutely guaranteed.

As regards the CFSP issue, if the redistribution described above will be governed solely by the internal rules of the Union, the EU will not be in the same position as the other Contracting Parties[59] and would in part weaken the external judicial review carried out by the ECtHR (one could also say partly: it would eliminate it in part), as the ECtHR ultimately would not have jurisdiction to decide to whom responsibility should be attributed.[60]

Moreover, the internalisation of the question of the CFSP issue could have negative consequences for applicants, as it may complicate and/or draw out access to justice, adversely affecting the right to an effective remedy (as enshrined in the Charter of Fundamental Rights).[61] Furthermore, it is far from certain whether the internal reattribution of responsibility (or whatever it will finally be called) within the EU, to the exclusion of the ECtHR, will be acceptable as a prospective solution for non-EU states parties to the ECHR (or even for some

[58] Di Franco and de Carvalho, (n 49) 1232-1233.

[59] Yet this was one of the stated principles for the drafting of the original draft accession agreement (see: Steering Committee for Human Rights: Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights. CDDH(2011)009, p. 16. This principle is also the strongest argument against maintaining the Bosphorus presumption following the eventual accession. See: Leonard F.M. Besselink, 'Should the European Union ratify the ECHR?' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), Co*nstituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013), 310-312. Even without the presumption, many believe that the EU would have been in a privileged position under the original draft accession agreement [see e.g. Korenica Fisnik, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015), 99-100] – the same is true regarding the revised agreement.

[60] Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and Hard Place?' in Christine Kaddous, Yuliya Kaspiarovich, Nicolas Levrat and Rasmes Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 248.

[61] ibid 247.

EU Member States).[62] The most recent CJEU judgments in the field of CFSP (Neves77 and KS and KD) throw some new light on the issue of judicial review, but one cannot but wonder whether an almost purely case-law based solution is the most ideal one, bearing in mind the principle of legal certainty and foreseeability among other things.[63] That being said, a modification of the EU Treaties in this context does not seem to be on the agenda.

The provision in the new draft agreement aimed at resolving the issue of mutual trust could be seen as potentially only sweeping the problem under the carpet rather than actually solving it.[64] Of course, as regards certain rights (see e.g. Article 3 of the ECHR and Article 4 of the Charter), there is a clear convergence of interpretation and practice in the jurisprudence of the two European courts, but this conclusion cannot be stated with certainty in general for all fundamental rights potentially affected – therefore, the mutual trust provision in the new draft does not adequately serve or guarantee the convergence of fundamental rights between the courts of Luxembourg and Strasbourg.[65]

Of course, it is unsure at the moment how and when the accession process will formally proceed at all: indeed, no formal progress has been made since spring 2023, which is understandable to the extent that the new set of rules would only be complete with the EU's internal regulatory solution on the CFSP issue, but the latter remains unavailable.[66]

[62] As regards the overall perspective of non-EU states, see Alain Chablais, 'EU Accession to the ECHR: The non-EU Member State Perspective' (2024) 9 European Papers 715.

[63] The CJEU regards the principle of legal certainty as a general principle of EU law. See e.g. Jérémie Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 European Law Review 275.

[64] Di Franco and de Carvalho, (n 49) 1232.

[65] ibid 1233.

[66] Thomas Giegerich, 'The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance?' (2024) 27 Zeitschrift für Europarechtliche Studien 590, 627. According to Giegerich, the Union should 'take the risk' and ask the CJEU for an opinion on the new draft agreement in its current form.

Valentina Vasile et al (eds.): International Labour Mobility: How Remittances Shape the Labour Migration Model[1]

*Tiwai Mhundwa**

https://doi.org/10.15170/PJIEL.2024.2.5

Migration has been studied for decades by using several socio-economic factors as a beginning point to understand its origins. However, this phenomenon is still yet to be fully understood, especially with the evolution of human beings. Migration dates back over 200,000 years ago from the movement of mankind from Africa to Southern and then Northern Europe (pp. 41-42). Although the reasons for migration have evolved from what they used to be, some similarities can still be drawn in the driving force of migration patterns. Historically the reasons for migration included moving from hunting to cultivating and harvesting land, attraction to better living standards as seen through the migration of The Huns and Germanic tribes during 300 - 500 AD as they sought the wealth of the Western Roman Empire and the migration of Northern tribes to the South due to climate change (pp. 41-42). This does not fall far from current factors of migration which also relies on similar reasons. *International Labour Mobility: How Remittances Shape the Labour Migration Model*, however, examines more specifically the role of remittances in labour migration. By exploring the microeconomic as well as macroeconomic consequences of remittances, the book highlights the externalities of labour mobility, enabling a better understanding of the phenomenon of migration and its effects on the economy.

The definition of remittances has evolved over time. Initially considered as transfers made by migrant residents employed in a foreign country, the IMF now views remittances as personal transfers to broaden the scope to include other transfers between households, regardless of the income source, relationship or purpose (p. 5). The new framework of the IMF's Balance of Payments methodology (BPM6) defines total remittances which includes personal transfers, employee compensation, capital transfers and social benefits (p. 6). Understanding the components of this definition is crucial as the book clarifies how remittances are measured, the role each component plays in economic development, and

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[1] Valentina Vasile et al (eds.), International Labour Mobility: How Remittances Shape the Labour Migration Model (Palgrave Macmillan 2023)

the contributions of migrants to both the host and home countries. The book highlights different viewpoints of remittances in order to evaluate the extent of their externalities for the countries involved. Regarding the transfer channels of remittances, a more neutral approach seems to have been taken. Both formal and informal channels are explored, weighing the advantages and disadvantages of each. The author is not staunch in promoting the use of legal and formal channels as they understand that the use of more formal channels may be costly or unavailable especially in areas which are more undeveloped and may not have the technologies implemented in their transfer agencies (p. 12). This links to a consistent point that has been made in the book which is the need to reduce the costs of remitting to make it more accessible and stimulate the volume of remittances which is the goal of the World Bank Smart Remitter Target (p. 12).

There are nine migration theories which have been highlighted in the book. Highlighting these different theories is crucial for the reader's understanding in why migration takes place and its impact. It is important however to emphasize that none of these theories individually fully encompass the phenomenon of migration. Therefore, the use of these migration theories in the book is to further understand the role of remittances and its occurrence. For instance, under the push-pull theory, remittances can be seen as a pull factor as the prospect of higher wages encourages people to move to certain destination countries for them to have higher incomes to support their families back home (p. 19). In addition to this the push-pull, rational choice and neoclassical economics theories hinge on the desire of migrants seeking better economic situations for themselves and their families. Moreover, the book highlights several social causes of migration, linking them to remittances to create a more holistic view. Age, education, living conditions and family size are not only determinants of migration, but they also impact remittances and their volume. The size of one's family determines how much they send in remittances or whether there is a need to send any at all. The book also makes an interesting observation regarding the level of education. Highly educated people usually make the choice to migrate for professional and career development and not to remit as those with lower levels of education would (p. 141). Making these links that otherwise would be undermined is important in understanding the factors which impact remittance levels which is crucial for countries whose economies depend on remittances.

One of the most relevant observations the book makes is the relation between remittances and economic growth. To highlight this, Chapter five explores the impact of remittances and foreign direct investment through comparative and data analysis. However, a downside to this analysis is that the data used is restrictive as it focuses on European Union countries, leaving out other countries which would be vital in understanding the link between remittance, FDI and economic growth (pp. 89-90). In the analysis, the book classifies countries according to the rate of external labour mobility, creating three subdivisions as people in labour mobility are known to have more motivation to remit compared to those

whose residence is in a different state, hence the emigration rate was not used in this analysis (p. 87). From the data, the authors prove that remittances have a strong positive impact on economic growth in less developed countries such as Moldova and even in EU Member State Croatia (p. 97). To be specific, with each $1 increase in remittances there is an increase of $6.89 of GDP (p. 98). This shows the dependency of poorer countries on remittances due to labour migration driven by economic hardship and wage differentials. Additionally, this impact can also be seen in more developed countries albeit to a lesser extent.

When it comes to the impact of FDI on economic growth an interesting observation in less developed countries can be seen. The book highlights how for the same reason that less developed countries rely on remittances, they are also less attractive to investors due to economic or social instability (p. 99). Hence this lessens the impact that FDI will have on economic growth in less developed countries. Making these observations is important in understanding the impact of remittances on the economy of countries, more specifically less developed countries. The book also illuminates the impact of Covid-19 on the volume of remittances and how this affected economies. Due to the pandemic, there was a decrease in remittances due to technical unemployment and the return of labour migrants to their home country. This can be seen in the case of Romania, which is in the first category of a less developed country (p. 186). The book aptly analyses the impact of Covid-19 in Romania as well as how it changed migration patterns and labour mobility. However, there was not enough data to statistically show the direct effect Covid had on GDP and remittances which would have been even more valuable.

In order to provide a more comprehensive analysis of the impact of remittances, the book provides an unconventional assessment of the externalities of remittances. The authors make use of a simple linear regression model to test the impact on factors such as the labour market, consumption and expenditures on education (p. 110). This analysis focuses specifically on research done in Romania and Moldova. Firstly, in the labour market, remittances have a negative effect on the active working population due to work discouragement and labour mobility (p. 111). Regarding consumption, remittances have a significant macroeconomic impact by changing consumption to import dependent consumption, thus affecting the balance of payments and domestic production (p. 117). In addition to this, the impact on education can be viewed in both a positive and negative light. There is an increase in the expenditure of education for children left behind through better access to education. On the other hand, due to brain drain, there is also a decrease in the student population due to labour migration and the need for family reunification. By analysing these factors, the book allows a semi-balanced assessment of the positive and negative externalities of remittances and migration. To achieve a more balanced review, more emphasis could be placed on the need to explore more positive impacts of remittances on the receiving and sending country.

Regardless of the comprehensive analysis done in the book, it is important to highlight the disparities in the research and data provided. The book makes use of data limited to Europe, specifically Romania and Moldova. To provide a thorough analysis of the research topic, the book could have possibly delved deeper into the impact of remittances in different continents. Whilst the book identifies the need for policies in areas such as the reduction of transfer, it does not fully highlight the implementation of policies which would make the reliance on remittances more sustainable. Additionally, since the book had focused on European countries and European Union member states, an exploration into how specific EU policies and legislation would affect the level and impact of remittances in origin countries would have been significant in understanding the role that legal institutions have in this regard.

In conclusion, the book provides a substantial foundation in understanding the role of remittances and labour migration in the economy of both the origin and destination country. It draws attention to theories and socio-economic implications that are significant in understanding migration and efficiently provides a link between these theories and remittances to develop understanding on how they can impact the economy. Whilst there is still more research to be done, the book paves the way for more conversation on the impact of remittances and could be seen as a valuable starting point in exploring future policies and research in the field.

Joske Graat: The European Arrest Warrant and EU Citizenship. EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure[1]

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https://doi.org/10.15170/PJIEL.2024.2.6

Judicial cooperation within the European Union (EU) has undergone significant changes over the past two decades, with the European Arrest Warrant (EAW) standing out as one of the most significant creations. The EAW has become a cornerstone of the Area of Freedom, Security, and Justice (AFSJ), designed to facilitate swift and efficient extradition between Member States. However, as with any instrument of such scope and ambition, the EAW has not been without its controversies. A key issue among these is the tension between the operation efficiency it seeks to achieve and the fundamental rights of individuals it impacts, particularly in terms of foreseeability and jurisdictional clarity.

In *The European Arrest Warrant and EU Citizenship: EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure,* Joske Graat addresses these challenges head-on. Published by Springer in 2022, this book offers a deeply analytical examination of the EAW, placing it within the border context of EU citizenship and fundamental rights. Graat goes beyond the mere legal technicalities; to explore how European legal frameworks interact with and shape the lived experiences of EU citizens. By focusing on foreseeability - the ability of individuals to predict and understand how the law will apply to them -Graat illustrates a critical yet underexplored aspect of the EAW's implementation.

The book is systematically divided into well-structured chapters, each addressing distinct yet interconnected sides of the EAW and its implications for EU citizenship. The introductory chapter sets the stage by outlining the central research questions and the context of the study, particularly the promises made to EU citizens in term of security and justice. Subsequent chapters delve into the

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[1] Joske Graat, *The European Arrest Warrant and EU Citizenship: EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure* (Springer 2022).

historical evolution of EU citizenship, the principle of mutual recognition, and the specific challenges posed by the EAW framework. Graat's multidisciplinary methodology incorporates legal analysis, comparative studies, and a critical evaluation of case law and legislative instruments.

Key chapters investigate the legality principle enshrined in Articles 47 and 49 of the Charter of Fundamental Rights of the European Union (CFR) and its application to the EAW. Graat's detailed examination of the foreseeability of criminal offences and jurisdictional claims is particularly compelling. By exploring the absence of harmonised EU rules on jurisdiction and forum choices, the author sheds light on the potential for arbitrary decisions that could undermine the rights of EU citizens.

Graat begins by tracing the development of EU citizenship and its integration into the AFSJ. The Treaty of Maastricht-which formally recognized by EU citizenship-and subsequently legal instruments, such as the Treaty of Lisbon, are positioned as milestones in creating a European identity rooted in both rights and obligations. The author emphasizes the dual promises of free movement and security, highlighting how these ideals often clash in practice. The EAW, introduced as a tool to combat cross-border criminality, is analysed within this broader narrative of European integration. One of the book's strengths is its discussion of the principle of mutual recognition, which underpins the EAW framework. Graat explains how this principle, while facilitating efficient judicial cooperation, often fails to accommodate the diversity of national legal systems and the fundamental rights of individuals. This tension sets the stage for the book's critical analysis of the EAW's shortcomings.

A recurring theme in the book is the foreseeability of jurisdictional claims and criminal sanctions. Graat argues that the lack of harmonised rules on jurisdiction in the EU creates significant legal uncertainty for individuals subject to the EAW. The author illustrates this point with hypothetical scenarios and real-world examples, such as cases where multiple jurisdictions claim competence over the same offence. These situations, Graat contends, raises serious questions about compliance with the legality principle, which requires the laws be accessible and foreseeable. This analysis extends to the procedural aspects of the EAW, such as the discretion granted to national authorities in forum decisions. Graat critiques this discretion as potentially arbitrary, emphasizing the need for EU-level rules to resolve conflicts of jurisdiction. The discussion is enriched by references to case law from the Court of Justice of the European Union (CJEU) and national courts, providing a comprehensive view of the legal landscape.

One of the book's highlights is its comparative analysis of national legal systems, focusing on the Netherlands, Germany, and England and Wales. By examining how these jurisdictions implement the EAW, Graat identifies common challenges and divergent approaches. For instance, the author explores the Dutch legal

system's emphasis on fundamental rights, Germany's constitutional prohibition on extraditing nationals, and the United Kingdom's forum bar mechanism. These comparisons not only illustrate the practical implications of the EAW but also highlight the need for greater harmonisation within the EU.

Graat's discussion of intergovernmental and transnational perspectives on the EAW is another notable contribution. The author critiques the intergovernmental approach for prioritizing state interests over individual rights and advocates for a transnational perspective that places EU citizenship at the centre of judicial cooperation. This shift, Graat argues, would align the EAW with the normative goals of the AFSJ, including the protection of fundamental rights and the promotion of free movement.

The concluding chapters offer actionable recommendation for addressing the shortcomings of the EAW framework. Graat proposes the development of EU-level rules on jurisdiction and forum choices to enhance legal certainty and protect fundamental rights. The author also advocates for a transnational legality principle, which would harmonise the interpretation and application of Article 47 and 49 CFR across Member States. These proposals are grounded in a detailed analysis of existing legal instruments and institutional practices, making them both practical and theoretically sound.

Graat's book is characterized by its thorough research, clear writing, ad balanced critique. The author's ability to integrate legal theory with practical insights makes the work accessible to a wide audience, including legal scholars, policymakers, and practitioners. The comparative analysis of national legal systems adds depth to the discussion, while the focus on EU citizenship provides a fresh perspective on the EAW's implications.

The book's interdisciplinary approach is another strength. By combining legal analysis with insights from political science and sociology, Graat offers a holistic view of the EAW's role in the AFSJ. This approach not only enhances the book's academic value but also makes it relevant to ongoing policy debates.

While the book is comprehensive, some readers may find the discussion of certain legal concepts, such as the foreseeability principle, to be overly detailed. Additionally, the focus on the EAW's challenges may overshadow its successes, such as its role in facilitating cross-border justice. A more balanced assessment of the EAW's impact could strengthen the book's conclusions.

Joske Graat's *The European Arrest Warrant and EU Citizenship* is a significant contribution to the study of EU law and criminal justice. By critically examining the EAW's implications for fundamental rights and legal certainty, the book sheds light on one of the most pressing challenges facing the AFSJ. Graat's proposals for reform, particularly the call for a transnational legality principle, offer a clear

pathway for aligning the EAW with the EU's normative goals.

This book is an essential read for anyone interested in the intersection of EU citizenship, judicial cooperation, and fundamental rights. It not only advances academic debates but also provides practical insights for policymakers and legal practitioners. In an era of increasing cross-border criminality, Graat's work serves as a timely reminder of the need to balance security with justice in the European legal order.

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