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FACULTY ADVISOR'S PREFACE

This is the Second Issue of Volume 22 of the *Journal of International Business and Law (JIBL*), a publication by the students of the Law School of Hofstra University. I am honored to serve as a faculty advisor to the *Journal*.

As a faculty advisor, my task has been to support the student members of the *Journal* in their ongoing work to maintain this publication's traditions, which include a focus on interdisciplinary scholarship, a focus on both international business and law, and the publication of academic articles written by students, faculty, and professionals.

Volume 22 Number II contains articles on law, business, and related research. It includes work by scholars, practitioners, and students. The topics are all relevant and timely in the field of international business and law, examining a variety of subjects.

I would like to express my sincere gratitude and appreciation to Liam Sugrue, Editor-in-Chief and to all of the editorial board members for their invaluable work in making this issue a meaningful contribution to interdisciplinary research in the areas of international business and law.

We welcome manuscripts all year round. Please submit your manuscript to:

> Julian Ku
> Faculty Advisor
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Manuscripts sent to the Journal of International Business and Law should be:

- Original
- Academic in nature
- Not have already been published or accepted for publication elsewhere.

I hope you find this issue of *JIBL* to be interesting and engaging. I encourage and seek your active participation and patronage in this endeavor.

Julian Ku
Faculty Advisor
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Spring 2023

EDITOR'S PREFACE

"You shall, I question not, find a way to the top if you diligently seek for it; for nature hath placed nothing so high that it is out of the reach of industry and valor.." – Alexander the Great. In order to reach the pinnacle, one must always continue to evolve and change with the adversity that comes their way. A sharp legal mind seeks to address issues before they occur, and through our new global interconnectivity we can learn from each other and solve the legal problems across the globe at a faster rate than ever before. We, at the *Journal of International Business & Law,* strive to recognize and solve important legal problems by exploring the nexus between business, international policy, and law.

This issue features three articles from distinguished authors, as well as several student-written works. The first article, by author Lior Frank, discusses ESG's and monopolistic excessive and unfair pricing. The work calls for the adoption of a more balanced approach that compels monopolies to take the interests of the consumers into consideration without neglecting the legitimate interests of the shareholders. The second article in this issue, by author Jorge Brito Pereira, discusses multiple voting shares and explores the reasons for the common conservative approach, which appear to lie mostly in early 20th-century experiences of multiple voting rights in countries such as France, Germany, and Italy. The third article in this issue, by author Dimitra Tsiaklagkanou, is a comparative analysis of French tort law with the regulations of other legal systems, and reevaluates the proposed novelties adopted by French legal texts.

In addition, this issue includes three student-written works by three of our staff members. The first work, by Daryl Caffarone, discusses Irish tax code and how capital allowances for intangible assets continue to draw tech giants to Ireland's shores. The second work, by Joseph Foster, discusses the newly formed LIV golf versus the PGA tour. This note specifically addresses the antitrust issues involved and proposes a solution to return the world of professional golf to normalcy The third work, by Adriana Montante, analyzes New York's evolving approach to addressing fossil fuel electric use in proof-of-work bitcoin mining's operational contribution to climate change. This note proposes a solution that is a feasible method to address an imminent environmental existential threat to the world.

Finally, I would like to thank our faculty advisor, Professor Julian Ku, the journal staff members, our prestigious article authors, and the journal's managing board. It has been a pleasure getting to work with each and every one of you. Additionally, I would like to thank my family and friends for their overwhelming love and support.

We sincerely hope you enjoy the second issue of Volume XXII of the *Journal of International Business & Law*. We invite you to view our website at https://www.hofstrajibl.org/, where you can view previous issues of the journal.

Liam Sugrue
Editor-in-Chief
Journal of International Business & Law, Volume XXII
Spring 2023

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MONOPOLISTIC EXCESSIVE PRICING AS AN "ESG VIOLATION"

*Lior Frank**

ABSTRACT

ESG (environmental, social, and governance) considerations are on the rise, and corporations that fail to adequately address and implement them in their business agenda are exposed to legal risks and liabilities. Such social considerations weaken the prevalent notion that the paramount purpose of the corporation is to maximize its shareholders' wealth, even at the expense of the stakeholders' (e.g., consumers) interests. In this 'new era' of ESG, corporations are compelled to take stakeholders' interests into account, otherwise, they might face legal action. Accordingly, this article contends that monopolistic excessive pricing, which is currently deemed lawful under U.S. antitrust law, should be regarded as an "ESG violation", as this pricing practice entirely disregards the stakeholders' interests and primarily promotes the wealth of the shareholders. A proper ESG duty should prohibit monopolistic firms from causing harm to stakeholders by way of charging unfair high prices which have no correlation to the product's production costs.

Keywords

Antitrust and competition law, monopolistic excessive and unfair pricing, abuse of dominant position, exploitative abuses, ESG considerations, corporate social responsibility, corporate purpose, shareholder primacy approach, stakeholder governance approach, corporate sustainability.

1. INTRODUCTION

In recent years, there has been a dramatic rise in environmental, social, and governance considerations (hereinafter "ESG considerations").[1] In the past, corporations could voluntarily choose whether to adopt and implement ESG considerations; nowadays – corporations that neglect such considerations might face legal action.[2] For example, ExxonMobil is currently facing legal proceedings in the Massachusetts Superior Court for allegedly misleading consumers and investors regarding the impact of climate change on its business.[3] ESG related cases of this type underscore the fact that such considerations can impose significant risks and liabilities on corporations,[4] especially when they fail to implement

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[1] *See, e.g.,* Elizabeth Pollman, *The Making and Meaning of ESG* 6-15 (U. Penn and ECGI, Working Paper No. 659, 2022); *see also* Pierre J. Allegaert, *Codetermination and ESG: Viable Alternatives to Shareholder Primacy?*, 52 N.Y.U. J. INT'L L. & POL. 641 (2019).

[2] *See id.*

[3] *See Commonwealth v. Exxon Mobil Corp.*, 2021 WL 3488414 (Mass. Super. Oct. 24, 2019).

[4] *See, e.g.,* David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 ENV'T L. REP., 10849-50 (2020).

and embed them properly in their business agenda. Accordingly, ESG considerations challenge the prevailing approach that business corporations serve as a mere vehicle for increasing their shareholders' stock value (which became known as the "shareholder primacy" approach), even at the expense of the stakeholders' (who are non-shareholder constituencies, such as consumers) interests.[5] Simply put, ESG considerations compel corporations to behave in a more social and responsible manner towards the stakeholders. For that reason, they are marked as a turning point in the 'shareholder primacy vs. stakeholder governance' ongoing debate.[6]

As for monopolistic excessive pricing, the U.S. Supreme Court's *Trinko* and *Linkline* cases[7] set forth that monopolistic pricing is deemed lawful under current U.S. antitrust law. One can argue that these cases reflect the "shareholder primacy" approach. More specifically, these cases convey that dominant firms can entirely disregard the interests of the consumers and are allowed to charge excessive prices that are primarily meant to increase the wealth of their shareholders.[8] On this background, the article will analyze the phenomena of monopolistic excessive pricing through the lens of the "shareholder primacy" approach, and separately - through the opposing lens of the "stakeholder governance" approach. More broadly, the article will argue that in the current ESG landscape, cases like *Trinko* and *Linkline* which affirmed that monopolistic excessive pricing is lawful under U.S. antitrust law – can no longer be considered valid, and therefore monopolistic excessive pricing should be regarded as an "ESG violation". The article contends that a proper ESG duty should prohibit monopolistic firms from causing harm to consumers by way of charging unfairly high prices that have no correlation to the product's production costs. Thus, this article aims to offer a new doctrinal framework that prohibits excessive monopolistic pricing in the boundaries of corporate law (hereinafter "stakeholderist standpoint") and calls for the adoption of measures that can potentially curtail unfair pricing practices of this type.

The remainder of this article consists of the following: Sections 2 and 3 present the opposing "shareholder primacy" and "stakeholder governance" approaches. Section 4 will describe the period before the enactment of antitrust laws in the U.S., and how acts that had the potential to hinder or diminish competition were mostly prohibited under corporate law. Section 4 sets the foundation for the claim that excessive monopolistic pricing should be prohibited in the U.S., considering the "stakeholder governance" approach, which was mainly advanced in corporate law. Section 5 shows that ESG considerations have already found their path into antitrust law, and such considerations are no longer exclusive to corporate law. Section 6 will explain how the U.S. Supreme Court's *Trinko* and *Linkline* cases reflect the "shareholder primacy" approach. Section 7 explains how excessive monopolistic pricing harms consumer welfare. Section 8 explains why the "stakeholder governance" approach and the "consumer welfare" standard (advanced by the Chicago School of Thought) do not lead to the

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5 Milton Friedman, *A Friedman Doctrine – The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

6 *See* Allegaert, *supra* note 1.

7 *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (hereinafter *Trinko*); *see also Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109 (2009) (hereinafter *Linkline*).

8 *See, e.g.,* Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236 (2017) ("In concrete terms, monopoly pricing on goods and services turns the disposable income of the many into capital gains, dividends, and executive compensation for the few").

same outcome, and in fact, the latter approach is more aligned with the "shareholder primacy" approach. Section 9 argues that monopolistic excessive and unfair pricing should be regarded as an "ESG violation" and offers various legal tools to potentially curtail such abusive conduct. Section 10 explains why monetary relief (pursuant Sections 5 and 19 of the FTC Act) should be the optimal remedy for the harm caused to consumers by excessive monopolistic pricing. Section 11 calls for a balanced approach between the interests of the shareholders and stakeholders, that only prohibits monopolistic excessive and unfair pricing and does not compel firms to minimize profits at "all costs." Section 12 concludes.

2. THE "SHAREHOLDER PRIMACY" APPROACH

The "shareholder primacy" approach is mainly premised on the notion that a corporation is ultimately owned by its shareholders, and as such, it should serve only one purpose – maximizing shareholders' stock value.[9] The 1919 seminal case, *Dodge v. Ford*, is best known for affirming the "shareholder primacy" approach.[10] The facts of this case, by way of summary, are that in 1916, Mr. Henry Ford – the founder and controlling shareholder of the Ford Motor Company ("Ford Company") – declared his intention not to pay special dividends to the company's shareholders, and decided instead to raise the employees' salaries, and to cut the prices of the company's products (cars) for the benefit of the consumers.[11] Following this declaration, a lawsuit was filed against the Ford Company by its minority shareholders - the Dodge brothers, who possessed 10% of the company's shares.[12] In their lawsuit, the Dodge brothers demanded that Ford refrain from lowering the company's prices and raising the employees' salaries, as he intended to do, and instead required him to distribute the special dividends to the shareholders.[13] The case was appealed to the Supreme Court of Michigan, which held that a "business corporation is organized and carried on primarily for the profit of the stockholders."[14] In other words, the Ford Company was not allowed to take into consideration the interests of the non-shareholder constituencies, such as the company's employees and customers, and it must focus primarily on increasing profits for the benefit of its shareholders.[15]

In the years following *Dodge v. Ford*, courts continued to hold that the primary purpose of the corporation is to maximize shareholder value.[16] For instance, in *eBay Domestic Holdings, Inc. v. Newmark*,[17] the Court of Chancery of Delaware held that it "cannot accept as

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[9] *See, e.g.,* Elaine Sternberg, *The Defects of Stakeholder Theory*, 5.1 CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 3-10 (1997) ("The owner – shareholder may designate the use of his property or to exercise control over the use of his property"); *see also* Julian Velasco, *Shareholder Ownership and Primacy*, U. ILL. L. REV. 897, 954 (2010).

[10] *See Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

[11] *See id*. at 671.

[12] *See id*. at 670-71.

[13] *See id*. at 674.

[14] *See id*. at 684.

[15] *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 650 (2005) (*Dodge v. Ford* can be considered as "the high point of shareholder primacy".).

[16] *See, e.g.,* UNIVERSITY OF CHICAGO PRESS, THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 50 (Steven D. Solomon & Randall S. Thomas eds., 2019).

[17] *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

valid…a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a…corporation for the benefit of its stockholders."[18]

Furthermore, the "shareholder primacy" approach was also backed by prominent legal and economic scholars. Milton Friedman, in his book, Capitalism and Freedom,[19] contended that "corporations have no higher purpose than maximizing profits for their shareholders". Bernard Black and Reinier Kraakman claimed that the "efficiency goal of maximizing the company's value to investors remains . . . the principal function of" the corporation.[20] These are, of course, only a handful of statements echoed by the proponents of the "shareholder primacy" approach. In recent years, however, one can witness a shift from the strict and somewhat narrow "shareholder primacy" approach towards a more social approach that strives to promote the stakeholders' interests.

3. THE SHIFT TOWARDS THE 'STAKEHOLDER GOVERNANCE' APPROACH

Compared to the "shareholder primacy" approach, the "stakeholder governance" approach is based on the notion that the commercial success of the corporation also depends on the investment of various non-shareholder constituencies.[21] For instance, companies need consumers to purchase their products, otherwise they will not be able to generate any revenues and operate successfully in the market.[22] Therefore, a corporation has to take into account not only the interests of its shareholders, as they are not the only party that invests in it, but also the interests of the different classes of stakeholders, including the consumers, who are also involved in the commercial activities of the corporation.[23]

The "stakeholder governance" approach is supported and substantiated in legal and business literature by the principle of "fairness".[24] As the corporation (and its shareholders) derives benefits from various classes of stakeholders, it ought to treat them in a fair manner. In the context of competition law, as dominant firms derive benefits also from the consumers, who are purchasing their products or services, they should treat the consumers fairly, and refrain from exploiting them, including by way of charging excessive prices.

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[18] *See id.* at 34.

[19] *See* Friedman, *supra* note 5.

[20] *See* Bernard Black and Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996); *see also* Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

[21] *See* Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

[22] *See e.g.,* Themistokles Lazarides, Stamatios Kontsas, and Electra Pitoska, *Customer! The Forgotten Stakeholder*, ECMLG2012-Proceedings of the 8th European Conference on Management, Leadership and Governance: ECMLG. Academic Conferences Limited (2012).

[23] *See* Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629 (2001).

[24] *See* Robert A. Phillips, *Stakeholder Theory and a Principle of Fairness*, 7(1) BUS. ETHICS Q. 51 (1997); EliBukspan, *Corporate Purpose and Stakeholder Fairness Through the Lens of Behavioral Economics: Legal Implications*, SSRN (Nov. 28, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3972970.

In summary, the "stakeholder governance" approach is more flexible, allowing corporations to deviate from the more stringent "shareholder primacy" approach, to promote the interests of the stakeholders.[25]

One of the more notable cases that mark the shift towards a more stakeholder-centric approach is the U.S. Supreme Court case, *Burwell v. Hobby Lobby Stores, Inc*.[26] With regard to the question of what the objective of the corporation is, the Supreme Court stated:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits.[27]

In other words, and opposed to the ruling in the *Dodge* case, companies are allowed to pursue various ESG goals and are not required to take actions that are only meant to maximize shareholder value.[28]

A more recent and notable case that weakens the "shareholder primacy" approach to a greater extent, is the Delaware Court of Chancery's ruling in the matter of *Boeing Co. Derivative Litig*.[29] In this case, the Boeing Company ("Boeing") introduced a new airplane model – the 737 MAX.[30] By doing so, Boeing sought to gain a competitive advantage over its rival, the Airbus Company, and to maximize its profits rapidly.[31] However, this new airplane model was inherently flawed in its design and the managers of the Boeing Company completely disregarded safety issues and dangers that could possibly arise from these flaws.[32] The safety issues came to a head when two of Boeing's 737 MAX airplanes crashed between 2017 and 2019, tragically resulting in the deaths of the crew members and passengers that were aboard both planes.[33] A lawsuit was filed against the managers of the Boeing Company asserting that they failed to conduct proper oversight of the 737 MAX model's safety, which eventually led to the two fatal accidents.[34] The Court of Chancery held that "[r]ather than prioritizing safety,

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[25] Robert A. Phillips, *Stakeholder Theory and a Principle of Fairness*, 7(1) BUS. ETHICS QUARTERLY 55 (1997).

[26] *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 712 (2014).

[27] *Id.* at 718-19.

[28] *See also* Lyman Johnson and David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (2014).

[29] *See In re Boeing Co. Derivative Litig*., No. 2019-0907, 2021 Del. Ch. LEXIS 197, 25 (Sept. 7, 2021).

[30] *Id.* at 9.

[31] *See id.* at *18-19 (stating that in 2008 Boeing was dragging behind in production and sales in comparison with Airbus and in 2010, Airbus launched the A320neo, which quickly became popular increasing Airbus's sales and affected the sales of "Boeing's 737, which had not been updated since the late 1990s.").

[32] *See id.* at *15 (discussing Boeing's 737 MAX and how the Audit Committee neglected to address the topic of safety and safety issues regarding the 737 MAX in terms of the model and its manufacture).

[33] *See id.* at *31, *44.

[34] *See id.* at *68-69.

Defendants lent their oversight authority to Boeing's agenda of rapid production and profit maximization."[35] This case clearly demonstrates that a corporation that fails to take ESG considerations (which also encompasses stakeholders' interests) into account and solely prefers to promote the interests of its shareholders, especially by increasing profits at the expense of the stakeholders, is exposed to real legal risks and liabilities.[36]

Recent research in the field of stakeholder governance shows how laws such as consumer protection, labor law, product liability, that are external to corporate law, tend to weaken the prevalent "shareholder primacy" approach.[37] Such "external" laws also enable stakeholders to "privately enforce" their rights in litigation proceedings, such as through class action suits.[38] This article mainly contends that antitrust law should also be part of those "external" laws that weaken the "shareholder primacy" approach, especially by compelling dominant firms to charge prices in a fair manner and to avoid harming consumer welfare.

Notably, there are initiatives in the U.S. that propose to turn the "stakeholder governance" approach into a mandatory and binding "blackletter law." For example, a federal bill titled the "Accountable Capitalism Act" was proposed by Senator Elizabeth Warren in 2018.[39] According to this proposed bill, corporations will be obliged "to consider the interests of all corporate stakeholders – including employees, customers, shareholders, and the communities in which the company operates."[40] Even if the legislature will not adopt this bill in the near future, there can be no doubt that in this current "era" of ESG, corporations are indeed obliged to take into account the interests of the various stakeholders, instead of focusing on increasing the wealth of the shareholders.[41] Otherwise, they might be exposed to legal risks and liabilities, as elaborated above.

In the United Kingdom, Section 172 of The Companies Act 2006 explicitly obliges the managers of a company to "promote the success of the company" for the benefit of other constituencies, including the company's customers.[42] In other words, The Companies Act 2006 explicitly compels corporations to take the interests of the stakeholders into account.[43] The UK Supreme Court, in the recent case of *BTI 2014 LLC v. Sequana S.A.*,[44] held that according to

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[35] *See id.* at *8.

[36] *See* Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. CORP. L. 119, 142 (2022).

[37] *See* Anne Choike, *A New Urban Front for Shareholder Primacy*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 79, 101 (2019).

[38] *See* Bukspan, *supra* note 24, at 72 ("the law of class actions provides an additional perspective on the relationship of the law to the question of corporate purpose, including the externalities and legal risks of corporate activity towards stakeholders.").

[39] *See* Accountable Capitalism Act, S. 3348, 115th Cong. (2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf.

[40] *See Accountable Capitalism Act*, https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf (last visited, Feb. 13, 2023).

[41] *See* Boffo, R., & R. Patalano, *ESG Investing: Practices, Progress and Challenges*, OCED PARIS, https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf (last visited Feb. 13, 2022).

[42] *See* Companies Act 2006, *Section 172: Duty to promote the success of the company,* THE NATIONAL ARCHIVES, https://www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2#:~:text=Section%20172%3A%20Duty%20to%20promote%20the%20success%20of%20the%20company&text=The%20duty%20requires%20a%20director,regard%20to%20the%20factors%20listed (last visited Feb. 13, 2023).

[43] *See id.*

[44] *BTI 2014 LLC v. Sequana S.A.* [2022] UKSC 25, at 136.

Section 172, "shareholders are not given absolute superiority over other stakeholders. The directors are placed under an obligation to regard other stakeholders' interests."[45] The Supreme Court further stated that "[u]nder the statutory statement the directors have the obligation, not simply the discretion, to consider the likely consequences of their decision in the long term, and to take into account the company's relationship with other stakeholders, such as employees, suppliers and local communities."[46]

Moreover, in recent years the business community itself has embraced ESG goals. For instance, in 2019, 181 Chief Executive Officers of America's largest corporations signed the Business Roundtable's "Statement on the Purpose of a Corporation,"[47]committing to lead their corporations in such a way that will benefit the stakeholders. Hence, the adoption of ESG goals by the business community also signifies the shift towards a more social approach that does not solely rely on profit maximization for the benefit of the shareholders and underscores that ESG goals have become more widespread in recent years.[48]

In the European Union, a proposal for a "Corporate Sustainability" directive was recently published. According to its proposed Article 25, corporations in the EU member states will be obliged to consider "sustainability matters, including, where applicable, human rights, climate change and environmental consequences."[49] In conclusion, all the above clearly demonstrates the global shift towards the "stakeholder governance" social approach.

4. HOW PAST CORPORATE LAW RESTRICTIONS COULD POTENTIALLY PROMOTE COMPETITION

The connection between corporate law and antitrust law is rarely discussed in legal and economic literature.[50] Edward B. Rock explains in his article, *Corporate Law Through an Antitrust Lense*, that it is common belief that "[a]ntitrust is about markets; corporate law is about firms. Antitrust is about competition; corporate law is about cooperation. Antitrust regulates relations among firms; corporate law governs relations within firms."[51]

However, before antitrust laws were enacted in the U.S., corporate law imposed various restrictions on acts that could potentially hinder or diminish competition.[52] For instance, corporate law prevented one company from holding stock in other companies, and as a result, a company could not merge with its competitors, and cause markets to become more concentrated.[53] Furthermore, corporate law imposed restrictions on the scope of the company's

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[45] *See id.*
[46] *See id.*
[47] *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUSINESS ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans
[48] *See* Boffo & Patalano, *supra* note 41.
[49] *See* Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
[50] *See* Nicholas Walter, *Antitrust and Corporate Law: Revisiting the Market for Corporate Control*, 15 U. PA. J. BUS. L. 755 (2012).
[51] *See* Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497 (1992).
[52] *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279 (2012).
[53] *See* Walter, *supra* note 50, at 758.

activities (including its maximum allowed capital) and its size.[54] It also compelled companies to operate only within the geographic territory of a single state in the U.S., instead of allowing them to freely operate in multiple states.[55] In general, corporate law sought to ensure that corporations will not grow "big" enough, by imposing restrictions on their size and scope of activities, including their ability to accumulate wealth.[56] Such restrictions were eventually abolished, and as of today, all anti-competitive practices are mainly restricted by antitrust laws. Thus, it seems that corporate law and antitrust law are not entirely at odds with each other, and corporate law can also be utilized in such a way that can restrict behaviors that are meant to hinder or diminish competition, especially in cases where antitrust law cannot offer any viable solution.

Since current U.S. antitrust law does not restrict monopolistic excessive pricing[57] the "stakeholder governance" approach, which was advanced in corporate law, should "fill the gap" and be considered as the basis for imposing concrete restrictions on monopolistic firms that will prevent them from abusing their dominant position by charging excessive and unfair prices.

5. ESG CONSIDERATIONS IN ANTITRUST LAW

ESG considerations are not exclusive to corporate law, and it seems that they have already found their way into antitrust law.[58] This is especially apparent in cases where firms colluded with each other to avoid the promotion of ESG goals. A recent notable example in this regard is the European *Car Emissions* case,[59] in which the European Commission held that Daimler, BMW and Volkswagen Group coordinated in such a way that stifled the technical development of clean car technology in the market of "car emission cleaning technologies for passenger cars."[60] In other words, the colluding parties prevented the promotion of a more environment-friendly technology to avoid production and development costs, and with the aim of increasing profits.[61] The European Commission imposed a total fine of €875 million on the Car Emissions cartel members for breaching EU antitrust law.[62] In her statement on the above case, Commissioner Margrethe Vestager emphasized that "[i]n today's world, polluting less is an important characteristic of any car. And this cartel aimed at restricting competition on this

[54] *See id*. at 759.
[55] *See id*. at 760.
[56] *See id*. at 759.
[57] *See Trinko* at 7; *see also Linkline* at 7.
[58] *See e.g.*, Stefan Thomas and Roman Inderst, *The Scope and Limitations of Incorporating Externalities in Competition Analysis Within a Consumer Welfare Approach*, 45.3 W. COMP. 351 (2022); David Henry and Jacques Buhart, *Think Green Before You Apply: EU Competition Law and Climate-Change Abatement*, 44.2 W. COMP. 147 (2021). Amelia Miazad, *Prosocial antitrust*, 73(6) Hasting Law Journal 1637 (2021).
[59] *See* European Commission, *AT.40178 Car Emissions* (08.07.2021), https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40178.
[60] *See* Case AT.40178-Car Emissions, Comm'n Decision (July 8, 2021) https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf.
[61] *See id.*
[62] *See* European Commission, *Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars* (08.07.2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581.

key competition parameter."[63] Cases of this type demonstrate that collusion between competitors can restrict not only price and quantity competition, but also the promotion of ESG goals, which are also beneficial for the stakeholders. Therefore, such practices should be labeled as "ESG violations" that harm the stakeholders' welfare.

As will be argued in the following sections, unilateral conduct (as opposed to collusion between multiple firms), such as charging monopolistic excessive prices, should be regarded as an 'ESG violation' as well.

6. THE TRINKO AND LINKLINE CASES REFLECT THE 'SHAREHOLDER PRIMACY' APPROACH

In the U.S. Supreme Court's *Trinko* case, which mainly revolved around the incumbent monopolist's refusal to deal with its rivals, Justice Scalia, who delivered the opinion of the Court, stated clearly that monopolistic excessive pricing "is not only not unlawful" but it "is an important element of the free-market system."[64]

Similarly, the U.S. Supreme Court in the *Linkline* case, which dealt with a monopolist's anti-competitive pricing practice that was allegedly meant to exclude its competitors from the market, stated clearly (while also referring to the *Trinko* case) that "antitrust law does not forbid lawfully obtained monopolies from charging monopoly prices."[65]

Both cases convey that monopolistic excessive pricing is deemed lawful under current U.S. antitrust law, and that a monopolist is permitted to charge any price that its customers are willing to pay, even if this price is disproportionally higher than the product's production costs.[66] Accordingly, one can argue that these cases pretty much reflect the "shareholder primacy" approach. Holding that a monopolist is allowed to charge any price that the consumers are willing to pay, without violating antitrust laws, entirely disregards the consumers' interest in purchasing products that are priced fairly (i.e., prices that have some reasonable correlation to the product's production costs).[67] Thus, this article will argue that due to the recent rise of ESG considerations, which obliges firms to take into account the interests of the stakeholders (including those of the consumers), cases like *Trinko* and *Linkline* can no longer be accepted as valid, and monopolistic excessive pricing should be regarded as an "ESG violation" that harms consumer welfare.[68]

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[63] *See* European Commission, Statement by Executive Vice-President Vestager, *Commission Decision to Fine Car Manufacturers €875 million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars* (08.07.2021), https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3583.

[64] *See Trinko* at 7.

[65] *See Linkline* at 14.

[66] *See also Berkey Photo, Inc. v. Eastman Kodak Co*., 603 F.2d 263, 274 n.12 (2d Cir. 1979) ("Nor is a lawful monopolist ordinarily precluded from charging as high a price for its product as the market will accept").

[67] *See* CFI Team, *Shareholder Primacy*, CORPORATE FINANCE INST. (Jan. 11, 2023), https://corporatefinanceinstitute.com/resources/equities/what-is-shareholder-primacy/#:~:text=What%20is%20Shareholder%20Primacy%3F,community%2C%20consumers%2C%20and%20employees.

[68] *See, e.g.*, David C. Hjelmfelt & Channing D. Strother, *Antitrust Damages for Consumer Welfare Loss*, 39 CLEV. ST. L. REV. 505 (1991).

7. MONOPOLISTIC EXCESSIVE PRICING HARMS CONSUMER WELFARE

According to legal and economic scholars, monopolistic excessive pricing harms consumers in two distinct ways. First, when a monopolistic firm charges excessive prices for its products, the majority of the transaction value (surplus) is transferred from the consumers to the "pockets" of the monopolistic firm and its shareholders and managers.[69] Consequently, the monopolistic firm enjoys the majority of the surplus created by the transaction, while the consumers pay more for the product than they would have paid in a more competitive market.[70] Second, excessive prices can discourage consumers from purchasing the products that they would like to purchase, and this also harms consumer welfare,[71] especially when compared to a setting in which the products are priced fairly.

As opposed to the *Trinko* and *Linkline* cases, the U.S. Supreme Court in the case *Apple v. Pepper*,[72] in which several consumers claimed that "Apple charges too much for apps," mentioned (although in obiter dicta) that "[a] claim that a monopolistic retailer…has used its monopoly to overcharge consumers is a classic antitrust claim."[73] Statements of this kind convey that monopolistic firms are no longer allowed to charge excessive prices, without being exposed to antitrust proceedings. Such statements also weaken the notion that the sole objective of the corporation is shareholder value maximization and leans towards a more consumer-centric approach.

It should also be noted that a very recent staff report, published by the Subcommittee on Economic and Consumer Policy,[74] indicates that especially in the last few years, American consumers are suffering from price hikes in certain essential industries, such as meat processing, gas and oil, and rental cars. It was stated explicitly in the above-mentioned report that "[m]any corporations have prioritized excess price hikes, record profits, and widening profit margins at the expense of the American consumer."[75]

Thus, it seems that there can be no more doubt that monopolistic excessive pricing harms consumer welfare, and such unfair pricing practices are at odds with the social "stakeholder governance" approach. As a result, monopolistic excessive pricing can no longer be deemed lawful under U.S. antitrust law, nor in any other jurisdiction.

8. THE "STAKEHOLDER GOVERNANCE" APPROACH AND THE "CONSUMER WELFARE STANDARD" DO NOT LEAD TO THE SAME OUTCOME

As well known to antitrust scholars and practitioners, the "consumer welfare" standard (a term that was originally coined by Judge Robert Bork and supported by the Chicago

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[69] *Id.* at 506.

[70] *See, e.g.*, Robert O'Donoghue & Jorge Padilla, *Excessive Pricing*, in The Law and Economics of Article 102 TFEU, 3rd ed. (HPU, 2020), at 741.

[71] *See* David C. Hjelmfelt & Channing D. Strother, *supra* note 68.

[72] *See Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

[73] *Id*. at 1.

[74] *See* Staff Report of Subcommittee on Economic and Consumer Policy (November, 2022), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2022.11.04%20ECP%20Staff%20Report%20re%20Excess%20Corporate%20Profits.pdf.

[75] *Id.* at 15.

School of Thought), is commonly recognized as the primary purpose of antitrust laws.[76] According to this standard, antitrust laws ought to ensure that prices in the various sectors of the economy are as low as possible, and are meant to condemn any anti-competitive practices that can potentially increase the price of the product or service.[77] At first glance, it seems that the "consumer welfare" and "stakeholder governance" approaches should lead to the same outcome, that is -condemning monopolistic excessive pricing under antitrust laws.[78] One might also think that both of these approaches are at odds with the 'shareholder primacy' approach which disregards the welfare of the consumers and other non-shareholder constituencies in favor of maximizing shareholder value.

However, this is not the case. Counterintuitively, and with concern to the phenomena of monopolistic excessive pricing, the "consumer welfare" approach is more aligned with the "shareholder primacy" approach.[79] This is due to the fact that monopolistic excessive pricing is believed to attract new entrants into the market and to drive forward the competitive process in such a way that will lead to price decreases, the result of which will benefit the consumers in the long run (in other words, high prices will "self-correct" the markets by attracting new entrants into them, with no need for any regulatory intervention).[80] As Justice Scalia explained in the *Trinko* case, "the opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[81] Hence, monopolistic excessive pricing will probably be justified when analyzed through the lens of the 'consumer welfare' standard, and through the lens of the 'shareholder primacy' approach. By contrast, if monopolistic excessive pricing is regarded and defined as an "ESG violation" – based on the 'stakeholder governance' approach – then monopolies will not be able to justify such unfair pricing practices by simply claiming that it might benefit the consumers in the long run.[82] On the contrary, such an ESG duty will, in the short term, compel monopolists to take consumers' interests into consideration rather than focusing on profit maximization for the benefit of the shareholders, and to charge prices that are reasonably correlated to the product's production costs. It can be summarized that the interests of the shareholders and stakeholders will be more sufficiently balanced when considering monopolistic excessive pricing as an 'ESG violation,' especially in comparison to the 'consumer welfare standard' that counterintuitively justifies monopolistic excessive pricing.

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[76] *See, e.g.*, Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J. L & PUB. POL'Y 449 (2008).

[77] Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, WHARTON PUBLIC POL'Y INITIATIVE (Sept. 19, 2018).

[78] *Id*. at 3.

[79] Ramsi A. Woodcock, *The Antitrust Case for Consumer Primacy in Corporate Governance*, 10:4 U.C. IRVINE L. REV. 1395, 1450 (2020).

[80] Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64(1) ANTITRUST BULL. 79, 87-88 (2019).

[81] *See Trinko* at 407; *see also Berkey Photo, Inc. v. Eastman Kodak Co*., 603 F.2d 263, 275 n.12 (2d Cir. 1979), ("…high prices, far from damaging competition, invite new competitors into the monopolized market.").

[82] Ducci & Trebilcock, *supra* note 80.

9. EXCESSIVE MONOPOLISTIC PRICING SHOULD BE DEEMED AS AN 'ESG VIOLATION' AND BE PROHIBITED

After establishing that monopolistic excessive pricing should be considered unlawful under antitrust laws from a "stakeholderist" point of view, one might ask what should be the appropriate legal tools that can curtail monopolistic excessive pricing. Moreover, one should also ask what legal tools are aligned with the concept of promoting stakeholders' interests. In the *Linkline* case, the Supreme Court held that 'charging monopoly prices does not violate § 2' of the Sherman Act, which generally applies to unilateral conduct.[83] This mainly stems from the fact that exploitative abuses, such as monopolistic excessive pricing, are not regarded as 'monopolization' or 'attempt to monopolize',[84] and thus, such abuses cannot be enforced under Section 2 of the Sherman Act.[85] As a result, Section 2 of the Sherman Act cannot be considered a viable tool for prohibiting monopolistic excessive pricing and promoting consumer interests.

Notwithstanding the provisions of Section 2 of the Sherman Act, the vast majority of the U.S. states have adopted price gouging laws.[86] However, such laws only prohibit price hikes that occur in a state of emergency (e.g., COVID-19).[87] Due to the fact that excessive pricing harms consumer welfare without emergency situations, one can argue that price gouging laws should not be limited only to times of crisis.[88] Hence, it is more rational to prohibit monopolistic excessive pricing by adjusting the current laws or enacting new laws that outright ban such unfair pricing practices.[89]

Provisions that outright ban monopolistic excessive pricing, exist in EU competition law.[90] Article 102 of the Treaty on the Functioning of the European Union ("TFEU") prohibits monopolies from charging unfair prices.[91] This Section was interpreted by EU courts to apply to monopolistic excessive pricing.[92] In recent years, there has been a surge in excessive pricing cases in the pharmaceutical industry,[93] in which Article 102 of the TFEU was applied. Only in the last two years, three EU national competition authorities (Netherlands, Italy, and Spain)

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[83] *Linkline* case, *supra* note 7, at 1118.

[84] Sherman Act, 15 U.S.C § 2 (2004) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce … [among the several States, or with foreign nations] shall be deemed guilty of a felony…") (only such anti-competitive conduct that excludes competitors from the market is covered under § 2).

[85] Ducci & Trebilcock, *supra* note 80, at 87.

[86] Christopher Buccafusco et al., *Price Gouging in a Pandemic* 70 (Univ. Chi. Coase-Sander Inst. For L. & Econ., Working Paper No. 652, 2021).

[87] Matt Zwolinski, *Price Gouging and Market Failure*, in ESSAYS ON PHILOSOPHY, POLITICS & ECONOMICS 333, 361 (Christi Favor et al., 2010).

[88] Michael Giberson, *The Problem with Price Gouging Laws*, CATO INST.: REGULATION (2010).

[89] Fiona Scott Morton et al., *Do We Need a New Sherman Act?*, COLUM. BUS. L. REV. 42, 65 (2022).

[90] *See, e.g.*, Alla Pozdnakova, *Excessive Pricing and the Prohibition of the Abuse of a Dominant Position*, 33 WORLD COMPETITION L. & ECON. REV. 121 (2010).

[91] *See Consolidated Version of the Treaty on European Union*, EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT (last visited Mar. 5, 2023).

[92] *See, e.g.*, Case 27/76, *United Brands v. Comm'n*, 1978 E.C.R. 207.

[93] *See, e.g.*, Harry First, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L. J. 701 (2019); *see also* Margherita Colangelo & Claudia Desogus, *Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: A Comparative Study of the Italian and UK Experiences*, 41 WORLD COMPETITION L. & ECON. REV. 225 (2018).

held that the dominant firm Leadiant, charged an excessive price for a life-saving drug, breaching Section 102 of the TFEU.[94]

It is interesting to note that Section 8 of the South African Competition Act (hereinafter "Competition Act"),[95] explicitly prohibits monopolies from charging excessive prices. Section 8(1)(a) of the Competition Act states clearly that "[i]t is prohibited for a dominant firm to - charge an excessive price to the detriment of consumers or customers."[96] According to Section 8(3) of the Competition Act, in order to show that the price that a monopoly has charged violates the provisions of Section 8, it must be proven that the "price is higher than a competitive price" and that it is "unreasonable".[97] Section 8(3) of the Competition Act goes on and sets various 'factors' that are meant to help determine whether the price charged by the monopoly is indeed excessive and unfair.[98] The price that the monopoly charges can be compared, for example, to the price charged by its competitors, the prices it charges from consumers in other geographic markets, and the price charged by itself for the same goods in the past.[99]

Other factors set in Section 8(3) of the Competition Act that can indicate that the price charged by a monopoly is excessive are: the price-cost margin of the monopoly, internal rate of return, return on capital invested, or profit history.[100] Section 8(2) of the Competition Act provides that "[i]f there is a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was "reasonable."[101] In other words, even after indicating that the price charged by the monopoly is excessive, the monopoly can still justify the price charged to show that it is "reasonable". For example, the monopoly can show that it had to bear such costs that compelled it to charge high prices for its products. Note, that in recent years, Section 8 of the Competition Act was applied against two monopolistic face-mask suppliers that abused their dominant position during the time of the COVID-19 pandemic, by setting excessive and unfair prices for the face-mask they supplied.[102] Neither of these dominant firms could justify the prices charged for their products, which resulted in the South African Competition Tribunal holding that the firms sought to exploit

[94] *See* Autoriteit Consument & Markt, *Summary of decision on abuse of dominant position by Leadiant*, ACM, https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-leadiant.pdf (last visited Mar. 1, 2023) (Netherlands) (ACM imposes fine on drug manufacturer Leadiant for CDCA's excessive price); Autorita' Garante della Concorrenza e del Mercato, *ICA fines Leadiant 3,5 million euros for abusing its dominant postion*, AGCM, (May 31, 2022) https://mcusercontent.com/80a2795e9aa8aacac0c148b3b/files/8b50ea8b-ec11-dbd8-0503-153d69f6dc06/2022_05_31_Press_Release_AGCM.pdf (Italy); *see also Spanish Competition Watchdog Fines Drugmaker Leadiant*, COMPETITION POLICY INTERNATIONAL, https://www.competitionpolicyinternational.com/spanish-competition-watchdog-fines-drugmaker-leadiant/ (last visited Mar. 1, 2023) (Spain).

[95] South African Competition Act § 8.

[96] South African Competition Act § 8(1)(a).

[97] South African Competition Act § 8(3).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] South African Competition Act § 8(2).

[102] *See Competition Commission v. Babelegi Workwear Overall Manufacturers and Industrial Supplies* 2020 Case 003/CR/Apr20, Competition Tribunal (S. Afr.);*see also Competition Commission v. Dis-Chem Pharmacies* 2020 Case 008/CR/Apr20, Competition Tribunal (S. Afr.).

consumers in order to gain profits during the crisis period.[103] In light of the above, the South African Competition Tribunal imposed a fine on both of these firms.[104]

Thus, it only seems plausible that such provisions, which explicitly prohibit monopolistic excessive pricing, should be transplanted into U.S. antitrust law(s). It can be argued that laws that put an outright ban on excessive prices reflect the "stakeholder governance" approach in the most clear and accurate way, for such laws explicitly compel dominant firms to consider the consumers' interest in purchasing products that are priced in a fair manner.

Another viable way to prohibit monopolistic excessive pricing, without amending any of the existing laws or enacting new ones, is applying Section 5 of the Federal Trade Commission Act (hereinafter "the FTC Act").[105] This section prohibits "unfair methods of competition in or affecting commerce", and it also extends beyond the reach of Section 2 of the Sherman Act.[106] As explained in the recently published Policy Statement of FTC, Regarding the "Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act",[107] Section 5 of the FTC Act applies, *inter alia*, to practices that are meant to exploit consumers.[108] Hence, it seems that Section 5 of the FTC Act can be used to prohibit monopolistic excessive pricing, as this type of abusive behavior belongs to the realm of exploitative abuses that are subject to enforcement under the FTC Act.[109] Furthermore and as already mentioned above, monopolistic excessive prices are unfair to consumers, and thus, it seems rational that they should be regarded as "unfair methods of competition" according to the provisions of Section 5 of the FTC Act.

Section 5 of the FTC Act grants the Federal Trade Commission (hereinafter "FTC") the power to conduct quasi-judicial hearings and to prevent "unfair methods of competition," such as exploitative abuses.[110] Accordingly, the FTC may conduct hearings against monopolies that have allegedly charged excessive and unfair prices.[111] In such hearings, the monopolistic firm will be allowed to try to justify the price charged by it, and to prove that the price should not be held as "unfair". If it fails in doing so, then the FTC will compel the dominant firm to refrain from charging unfair prices. This article will not delve into the question of what profit

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[103] *See id.*

[104] *See* Robyn Davie, *Company Fined R76000 For Excessive Pricing During Covid-19 Pandemic,* NORTONS, INC. (Jul. 14, 2020), https://www.nortonsinc.com/post/company-fined-r76-000-for-excessive-pricing-during-covid-19-pandemic*; see also* John Oxenham et. al., *COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases,* J. OF EUR. COMPETITION L. & PRAC. (2020).

[105] *See* Harry First, *Unfair Drug Prices and Section 5*, CPI Antitrust Chronicle,16 (2015).

[106] *See E.I. du Pont de Nemours v. Fed. Trade Comm'n*, 729 F.2d 128 (2d Cir. 1984).

[107] *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FED. TRADE COMM'N (Nov. 10, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission.

[108] *Id.* at 9.

[109] *See FTC interprets "unfair competition" broadly in new Section 5 policy statement*, DAVISPOLK (Nov. 15, 2022), https://www.davispolk.com/insights/client-update/ftc-interprets-unfair-competition-broadly-new-section -5-policy-statement (discussing the "broader interpretation of Section 5" of the FTC Act adopted in the November 2022 FTC Policy Statement, which identifies a "wide range of conduct it considers to be unfair competition under Section 5, including: practices that violate the Sherman or Clayton Act").

[110] *Id.* at 6.

[111] *Id.*

margin should be deemed excessive and unfair, and the FTC will determine this on a case-by-case basis. Even in cases where the FTC concludes that the price charged by the monopoly is excessive and unfair, the FTC's decision may be reviewed by the U.S Federal Courts.[112] Thus, it can be concluded that Section 5 of the FTC Act can prohibit excessive monopolistic pricing which harms consumer welfare, and as such, the FTC Act is aligned with the "stakeholder governance" approach and the concept of promoting ESG goals.[113]

Another way to curtail excessive monopolistic pricing is by empowering consumers to file class action lawsuits against monopolies that have allegedly charged excessive and unfair prices for their products or services. In the pending U.K. case *Le Patourel v. BT Group Plc*, the plaintiff claims that the defendant, BT Group, has charged excessive and unfair prices in two telecommunications markets.[114] The Competition Appeal Tribunal (hereinafter "CAT") has certified a class action suit against the BT Group monopoly, stating that in order to substantiate the claim that a monopoly has indeed abused its dominant position, it must be shown that the price that the monopoly charged is both excessive and unfair (i.e., a 'two-limb' test).[115] Most recently in the United Kingdom, a class action suit was filed against Sony in which the consumers claimed that Sony abused its dominant position by charging excessive prices for video games.[116]

In the *Coca-Cola* case, the Israeli Supreme Court held, for the first time, that plaintiffs are allowed to file class action suits against monopolies, asserting that the monopoly has abused its dominant position by charging excessive and unfair prices.[117] The Israeli Supreme Court also held that the relevant test for proving that the monopoly has charged an excessive price, is a "two-limb" test.[118] According to this test, the plaintiff is required to show that the monopoly has charged a price that can be deemed "excessive", and then the burden will shift to the monopoly to show that the price it charges is fair and not abusive.[119] If the monopoly cannot succeed in doing so, then the court will certify the class action suit.[120] It is also notable to mention that the Israeli Supreme Court in *Coca-Cola* case, entirely rejected the American approach, which as elaborated above, is more aligned with the "shareholder primacy" approach, according to which, a monopoly is free to set any price that the market can bear and the consumers are willing to pay.[121]

[112] *Id.* at 7.
[113] Ira Kay et al., *The Stakeholder Model and ESG*, HAR. L. SCH. F. ON CORP. GOVERNANCE (Sept. 14, 2020), https://corpgov.law.harvard.edu/2020/09/14/the-stakeholder-model-and-esg/.
[114] *Le Patourel v. BT Group Plc and British Telecommunications Plc* ([2021] CAT 30).
[115] *Id.*
[116] Betsy Reed, *Sony Could Face £5bn in Legal Claims Over PlayStation Game Charges*, The Guardian (Aug. 22, 2022), https://www.theguardian.com/technology/2022/aug/22/sony-could-face-5bn-in-legal-claims-over-playstation-game-charges.
[117] *See* Avraham Morel, *A Class Action Can be Held Against a Monopoly on Grounds of Excessive Pricing*, PEARL COHEN (Dec. 21, 2022), https://www.pearlcohen.com/a-class-action-can-be-held-against-a-monopoly-on-grounds-of-excessive-pricing/.
[118] *See id*.
[119] *See id*.
[120] *See id*; *see also* Competition Act 89 of 1998 § 8(2) (S.Afr.) (the 'Israeli version' of the 'two-limb' test pretty much reflects the provisions of Section 8 of the South African 'Competition Act', as the burden shifts to the monopoly to show (and justify) that the price charged by it is fair and not abusive).
[121] *See generally* Irit Brodsky, Israel Supreme Court: Monopolies May Be Sued for Charging Unfair Excessive Prices, JDSUPRA (Aug. 1, 2022), https://www.jdsupra.com/legalnews/monopolies-may-be-sued-for-charging-

As mentioned in section 3 of this article, stakeholder litigation plays a key role in the promotion of stakeholders' interests. Thus, private litigation, including class action suits against monopolies that allegedly charged excessive prices, can also be considered as a viable tool for enhancing and promoting ESG considerations.

10. OPTIMAL REMEDY FOR THE HARM CAUSED TO THE CONSUMERS BY MONOPOLISTIC EXCESSIVE PRICING

Another crucial question that must be addressed, is what should be the *optimal remedy* in cases where it is established that the monopoly has indeed abused its dominant position by charging excessive and unfair prices from the consumers (i.e., the stakeholders). The common remedies in antitrust law are structural and behavioral remedies.[122] A behavioral remedy can potentially prevent the monopoly from continuing to abuse its dominant position by extracting excessive and unfair prices from the consumers.[123] A structural remedy, like a monopoly break-up, might enhance or promote competition in the relevant market which in turn might lower prices.[124] However, both structural and behavioral remedies do not compel the monopoly to return the profits that were derived from its misconduct. As explained in Section 7 of this article, it seems that these common remedies do not offer sufficient relief, especially when considering that the main harm caused to the consumers by excessive and unfair pricing is the transfer of wealth from the consumers to the monopoly.

For that reason, the appropriate remedy for the harm caused to consumers by excessive pricing should be restitution (monetary relief).[125] According to Section 19 of the FTC Act, the FTC can peruse monetary relief after initiating administrative proceedings according to Section 5 of the FTC Act. In other words, the request for monetary relief follows the FTC's order to the monopoly to cease its abusive behavior. [126] In general, such a remedy deprives the violator of any benefit gained from his illegal conduct.[127] As for monopolistic excessive pricing, and with accordance to Section 19 of the FTC Act, the monopoly will be required to return a sum that reflects the gap between the price charged by it and the price that would have prevailed in a more competitive market.[128] This sum (i.e. that was derived from the monopoly's abuse of

8932772/ ([T]he Supreme Court ruled that courts must exercise caution and restraint when intervening in prices retroactively in a free market in order not to harm companies' investment incentives or damage free competition.").

[122] *See* e.g., Frank P. Maier-Rigaud and Benjamin Lörtscher, *Structural vs. Behavioural Remedies*, COMPETITION POL'Y INT'L 2-3 (2020).

[123] *See* R. SHYAM KHEMANI, A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY, 70 (1999).

[124] *See Emphasizing Structural Remedies*, U.S. DEP'T OF JUSTICE (Jun. 23, 2020), https://www.justice.gov/atr/division-operations/antitrust-division-update-2020/emphasizing-structural-remedies.

[125] Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J 79, 79-80 (2009).

[126] *See generally* AMG Capital Management, LLC v. FTC, 141 S. Ct. 1341 (2021) (section 19 allows federal courts to grant monetary relief in cases where an injury was caused to consumers, and after applying Section 5 of the FT act).

[127] *See, e.g*., Caprice L. Roberts, *Statutory Interpretation and Agency Disgorgement Power*, 96 ST. JOHN'S L.J. 1-7 (2022).

[128] *See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FEDERAL TRADE COMMISSION (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

its dominant position) shall be determined on a case-by-case basis. Such a remedy can potentially deter monopolistic firms, because if they are aware that they will have to return the profits gained from their abusive behavior, then they will probably have less incentive to exploit consumers by charging excessive pricing from them.[129]

It should be noted, that Einer Elhauge in his article, *Disgorgement as an Antitrust Remedy*, claims that the prohibition on excessive pricing should be applied only in cases where such a pricing practice followed a particular anti-competitive act that drove competitors out of the market, and the monopolistic position itself was obtained by the abusive conduct.[130] According to his view, only in such cases should monetary relief should be used as a remedy for the harm caused by the charge of an excessive price.[131]

This article does not agree with Elhauge's view. More broadly, this view entirely ignores the fact that by charging excessive and unfair prices, the monopoly exploits the lack of competitive restraints in the relevant market, in order to extract supra-competitive prices form the consumers, and thus, such an exploitative act should also be regarded as an abuse of dominant position, even without any prior abusive conduct that drove competitors out of the market. Furthermore, this view contradicts the "stakeholder governance" approach, as monopolistic excessive pricing also harms consumers in cases where such an unfair pricing practice does not follow any exclusionary act.

As elaborated above, the prohibition on excessive and unfair pricing was applied in the EU and South Africa in cases where there was no prior exclusionary conduct.[132] Those cases held that charging excessive pricing is deemed by itself an abuse of dominant position and constitutes a breach of antitrust law.[133] Thus, it can be concluded that the prohibition on monopolistic excessive pricing should be applied even in cases where such pricing did not follow any exclusionary conduct; in other words, this prohibition should also be applied in cases of "pure" exploitation and monetary relief should be the optimal remedy in such cases as well.[134]

11. A BALANCED APPROACH FOR THE APPLICATION OF THE PROHIBITION ON MONOPOLISTIC EXCESSIVE PRICING

It is important to emphasize that the prohibition on monopolistic excessive and unfair pricing should not be overextended by competition agencies and courts, and should be applied in such a way that strikes a proper balance between the interests of the shareholders and stakeholders.

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[129] *See* Thomas A. Donovan et al., *How Often Will the FTC Use Its Recently Reaffirmed Authority to Compel Disgorgement?*, K&L GATES (Sept. 6, 2018), https://www.klgates.com/How-Often-Will-the-FTC-Use-Its-Recently-Reaffirmed-Authority-to-Compel-Disgorgement-09-06-2018.

[130] *See* Elhauge, *supra* note 125, at 91.

[131] *See id.*

[132] *See* Murco Mijnlieff, *ACM Imposes Fine on Drug Manufacturer Leadiant for CDCA's Excessive Price*, AUTHORITY FOR CONSUMERS & MARKETS (July 19, 2021), https://www.acm.nl/en/publications/acm-imposes-fine-drug-manufacturer-leadiant-cdcas-excessive-price; *see also* CR003Apr20. *Competition Commission v. Babelegi Workwear Overall Manufacturers and Idustrial Supplies CC* (1.6.2020).

[133] *See id*.

[134] *See id*.

Ramsi A. Woodcock argues that in order to promote consumer welfare, antitrust laws should impose a duty on firms to minimize profits, and charge only such prices that are necessary to cover costs. Simply put, Woodcock claims that monopolies should not generate profits at all.[135] Woodcock argues that only in such a way consumers will "enjoy all of the surplus generated by firms". In conclusion, Woodcock calls for the promotion of a "consumer primacy" approach.[94]

This article does not agree with this view, as it disregards the fact that shareholders also invest in the company and have a legitimate (and lawful) interest in pursuing profits. In stark contrast, this article holds the view that firms should only be prohibited from generating profits illegally, especially when the price of the product has no reasonable correlation to its production's costs, and in cases where the price charged cannot be justified by the monopoly, and antitrust laws should not prevent firms from pursuing profits lawfully (e.g., by requiring them to minimize profits).[136]

It is important to note that the "stakeholder governance" approach is not equal by any means to a "consumer primacy" approach, as the former only compels firms to take the stakeholders' interests into account, without entirely neglecting the interests of the shareholders.[137] Thus, this article calls for a more balanced approach between the interests of the shareholders and those of the stakeholders; an approach that only prohibits monopolistic excessive and unfair pricing and does not compel firms to minimize profits at all costs. This article does not support the "shareholder primacy" approach, nor does it call for the promotion of a "consumer primacy" approach, but rather it leans towards a more balanced approach that considers the interests of all parties that are linked to the corporation's commercial activities.

12. CONCLUSION

In this current "ESG era", monopolistic excessive and unfair pricing can no longer be justified under U.S. antitrust law. Accordingly, ESG considerations cannot accommodate the *Trinko* and *Linkline* cases, which affirmed that monopolistic excessive pricing is lawful, as they do not properly account for the interests of consumers.[138] From a "stakeholderist" point of view, such exploitative abuses should be prohibited by specific laws, such as those prevalent in other jurisdictions, like in the EU and South Africa, or by applying Section 5 of the FTC Act. Nevertheless, this article does not suggest that monopolies should not generate profit at all or strive to minimize profits; it only calls for the adoption of a more balanced approach that compels monopolies to take the interests of the consumers into consideration without neglecting the legitimate interests of the shareholders, and to refrain from trying to gain unfair profits that are solely meant to be beneficial for the firm's shareholders and managers.

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[135] *See* Ramsi A. Woodcock, The Antitrust Case for Consumer Primacy in Corporate Governance, 10 U.C. IRVINE L. REV. 1395, 1398 (2020); *see also* Ramsi A. Woodcock, The Antitrust Duty to Charge Low Prices, 39 CARDOZO L. REV. 1741, 1744 (2017).

[94] *See* Woodcock, supra note 135.

[136] *See* Compare to: Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933, 944 (2022).

[137] *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 155 (2020).

[138] *See Trinko* at 410; *see also Linkline* at 451.

ONCE BITTEN, TWICE SHY – MULTIPLE VOTING SHARES IN CONTINENTAL EUROPE

Jorge Brito Pereira

ABSTRACT

Over the last decade, several jurisdictions in continental Europe have lifted regulatory restrictions on multiple voting shares (hereinafter "MVS") in the form of dual-class share structures and/or loyalty shares. Though more heterogenous than coherent, all such reforms have been overly conservative and fall short of allowing the legal freedom of jurisdictions such as the United States and the United Kingdom. This approach may be difficult to understand in a globalized environment of regulatory and stock-exchange competition. This paper explores the reasons for the common conservative approach, which appear to lie mostly in early 20th-century experiences of multiple voting rights in countries such as France, Germany, and Italy. For comparative purposes, the paper also investigates the completely different experience of the United Kingdom, where a liberal MVS framework produced distinct outcomes.

Keywords:

Multiple voting shares, dual-class voting shares, loyalty shares, tenured voting rights, preferred shares, *one share-one vote*, *Decreto Competitività*, *Loi Florange*, regulatory competition, Capital Markets Union.

1. INTRODUCTION

Strict prohibitions on multiple voting shares (hereinafter "MVS") have been somewhat relaxed in continental Europe over the last decade, with regulations allowing dual-class share structures and/or loyalty shares. Relevant legislation includes, *inter alia*, Law n.º 116 of 2014 in Italy *(also known as Decreto Competitività)*[1]; Law n.° 2014-384 of March 29, 2014, in France *(also known as Loi Florange)*;[2] the new Belgian Code of Companies and Associations[3], approved in April 2019, introduces the new article 527 *ter* to the Spanish *Ley de*

[1] Decreto legge 24 giugno 2014, n. 91, G.U. Giugno 24 2014, n. 144 (It.).

[2] Loi 2014-38 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014-38 of March 29, 2014 aimed at regaining the real economy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 29, 2014, p. 5. Loyalty shares were already authorized in France before the *Loi Florange*, which changed the default voting system for listed companies to tenure voting.

[3] Loi du 23 mars 2019 introduisant le Code des sociétés et des associations et portant des dispositions diverses [introducing the Companies and Associations Code and laying down various provisions], M.B., Mar. 23, 2019, art. 11, https://justice.belgium.be.

Sociedades de Capital [4]; Law n.º 99-A/2021, approved on December 31, 2019 revised Portugal's Securities Code *(Código de Valores Mobiliários).*[5]

In September 2022, the European Commission published its second action plan on the Capital Markets Union.[6] One proposed legislative initiative that followed in December 2022 is a directive on MVS structures in companies that seek admission to trading of their shares on a small and medium-sized enterprise (hereinafter "SME") growth market.[7] As the explanatory memorandum reasons, minimum harmonization is needed because exclusive regulation of MVS structures at the national level creates an uneven playing field for companies in different Member States:[8]

> Entrepreneurs and companies from Member States that prohibit multiple-vote share structures are at a comparative disadvantage with companies from Member States that permit multiple-vote share structures. Entrepreneurs and companies looking to introduce multiple-vote share structures and benefit from the flexibility are faced with a choice of remaining private or moving to another Member State (or a non-EU country), thus restricting their funding choice and increasing their cost of capital.

This seemingly coordinated regulatory movement is far from coincidental and is the consequence of a combination of common causes. First, it results from regulatory competition between European jurisdictions since the European Court of Justice ruled that the real seat theory is incompatible with freedom of establishment rules.[9] A notable example of the effects of this regulatory competition is the Chrysler–Fiat merger in 2014, particularly the shocking

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[4] *Artículo 527 ter de la Ley de Sociedades de Capital*, CONCEPTOSJURIDICOS.COM, https://www.conceptos juridicos.com/ley-sociedades-capital-articulo-527-ter/. Law 5/2021, of April 12, introducing the new article 527 ter to the Spanish Ley de Sociedades de Capital.

[5] Lei n.° 99-A/2021 de 31 de dezembro [Act no. 99-A/2021 of 31 December], https://dre.pt/dre/detalhe/lei/99-a-2021-176907512 (Port.). *See also Report On The Proportionality Principle In The European Union*, at 17, 27, 42 (May 18, 2007), https://www.ecgi.global/sites/default/files/final_report_en.pdf. Other countries such as Sweden, Finland, and Denmark have a long tradition of dual-class structures. According to the 2007 Report on the proportionality principle in the European Union, the majority of listed companies in Sweden issue listed ordinary Series B shares with one vote each and Series A shares with ten votes each; in Finland and Denmark, companies also issue A shares and B shares with different voting rights, and it is only mandatory to list the B shares.

[6] Nicolas Véron & Guntram B. Wolff, *Capital Markets Union: A Vision for the Long Term*, 2 J. FIN. REGUL. 130, 131 (2016).; Teemu Juutilainen, *The Law of the Economic and Monetary Union: Complementing, Adapting or Transforming the EU Legal Order?*, 6 EUROPEAN PAPERS 1505, 1516-17 (2021).

[7] *Proposal for a Directive Of The European Parliament And Of The Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market*, at 4, COM (2022) 761 final (Jul. 12, 2022). Article 2 of the proposed directive defines a "multiple-vote share structure" as a company share structure containing at least one class of shares belonging to a separate class and carrying higher voting rights at the shareholders meeting compared to another class of shares with voting rights.

[8] *Id*.

[9] Case C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, 1999 E.C.R. I-1484.; Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH, 2001 E.C.R. I-9922.; Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, 12 EUROPEAN L. J. 440, 448-49 (2006).; Klaus Heine & Wolfgang Kerber, *European Corporate Laws, Regulatory Competition and Path Dependence*, 13 EUROPEAN J. OF L. & ECON. 47, 50 (2002).

decision to transfer the registered office of an iconic Italian company to the Netherlands.[10] In February 2020, Campari (also known as Davide Campari-Milano S.p.A) announced that he had also decided to transfer Campari's registered office to the Netherlands.[11] These are just two of the many similar examples of delocalization by European companies caused, at least in part, by regulatory reasons (including tax).

The second explanation is the fierce competition between stock exchanges striving to attract company listings at a time when markets have become increasingly peripheral and large stock exchanges more central.[12] It seems undisputed that stock-exchange competition puts pressure on the regulatory framework.[13]

The third explanation is the rapid perspective shift regarding MVS by most continental European governments and the European Commission. In the context of the 2003 Action Plan on Company Law and Corporate Governance, European Union (hereinafter "EU") member states considered implementing a hard version of the *one share, one vote* principle.[14] In 2005, European Commissioner Charlie McCreevy called on economic agents to "eliminate discriminatory treatment of shareholders" by adopting one-vote-per-share voting rules.[15] Less than ten years later, the Commission shifted its priorities to combating *short-termism* and

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[10] The close relation between the Chrysler–Fiat merger and the approval of the *Decreto Competitità* is undisputed. *See* Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat*, ECGI (Mar. 2015), http://ssrn.com/abstract_id=2574236; *see* Damiano di Vittorio, *Le Azioni a Voto Potenziato: Dinamiche Societarie e Analisi D'Impatto Della Maggiorazione Del Voto Sui Corsi Azionari Di Società Quotate*, LUISS, (2018), pp. 37–38; *see* Umberto Tombari, *Le Azioni a Voto Plurimo*, Rivista Del Diritto Commerciale e Del Diritto Generale Delle Obbligazioni (2016), 583–584; Chiara Mosca, *Should Shareholders Be Rewarded for Loyalty: European Experiments On the Wedge Between Tenured Voting and Takeover Law*, Mich. Bus. & Entrepreneurial L. Rev. 8 (2018), 9–10; Piergaetano Marchetti, *Osservazioni e Materiali Sul Voto Maggiorato*, RIVSOC (2015), 448–49; Paolo Montalenti, *Il Diritto Societario Europeo Tra Armonizzazione e Concorrenza Regolatoria*, IMPRESE, SOCIETÀ DI CAPITALI, MERCATI FINANZIARI (2016).

[11] *Clarifications of Certain Rumour Concerning Campari's Redomiciliation to the Netherlands*, CAMPARI GROUP (May 29, 2020), https://www.camparigroup.com/en/pressrelease/2020-05-29/clarifications-certain-rumour-concerning-camparis-redomiciliation.

[12] This competition became especially fierce over the last decade with the declining number of initial public offerings (IPOs), particularly in non-Asian markets, and the exponential availability of *private* funds. Xiaohui Gao, Jay R Ritter et al., *Where Have All the IPOs Gone?*, J. of Fin. and Quantitative Analysis 48, no. 6 (2013); Elisabeth De Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, HASTINGS LAW J. 68 (2016); Craig Doidge, Kathleen M Kahle et al., *Eclipse of the Public Corporation or Eclipse of the Public Markets?*, JoACF 30, no. 1 (2018). This competition goes far beyond the European region. A good example of this regulatory pressure is Singapore's review of the Companies Act after missing out on Manchester United PLC's IPO in 2012.

[13] Marco Pagano, Ailsa A Röell et al., *The geography of equity listing: why do companies list abroad?*, Journal of Finance 57, no. 6 (2002); Khaled Amira and Mark L Muzere, *"Competition among stock exchanges for equity*", Journal of Banking & Finance 35, no. 9 (2011); Carmine Di Noia, *"Competition and integration among stock exchanges in Europe: Network effects, implicit mergers and remote access*", European Financial Management, no. 1 (2001).

[14] *See European Union, European Action Plan on Company Law and Corporate Governance*, THOMSON REUTERS (May 21, 2003), https://uk.practicallaw.thomsonreuters.com/2-102-3448?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=fd611caaedfa4819aae386e40badc235&comp=pluk&OWSessionId=9ec234e840704eab9c311eea69c0a6fe&skipAnonymous=true&firstPage=true.

[15] Tobias Buck, *EU Seeks to End Bias Among Investors-Commission Wants 'One Share, One Vote' Principle*, FINANCIAL TIMES (Oct. 17, 2005), https://www.ft.com/content/ae17a66e-3e6f-11da-a2cb-00000e2511c8.

became more open to the non-proportionality of cash flow and voting rights.[16] This shift was manifested in, *inter alia*, the 2012 Action Plan on European Company Law and Corporate Governance, the 2013 Green Paper on Long-term Financing of the European Economy, the 2017 Shareholders Directive, and the 2022 Proposal for a Directive on MVS structures.[17]

However, below this external veil, the regulatory movement towards the acceptance of MVS is more heterogeneous and chaotic than coordinated and coherent. Each jurisdiction has adopted a different formula, creating a very puzzling situation: some countries only have regulated loyalty shares, with variation over the default regime; meanwhile, other countries only have regulated dual-class structures, with variation as to whether only listed companies or pre-IPO non-listed companies can use these structures.[18]

The Italian *Decreto Competitività* allows dual-class structures only for closely held corporations with a maximum of three votes per share. In listed companies, only loyalty shares are accepted, subject to amending the articles of association; granting a maximum of two votes per share after no less than two consecutive years.[19] In France, loyalty shares have been permitted since the 1996 reform. However, the *Loi Florange* altered the default voting system for listed companies to loyalty shares and gave companies two years to opt out if they preferred to keep the *one share-one vote* rule; in other words, France's opt-in/opt-out regime is the exact opposite of Italy's.[20] A further complication is that French corporate law does not accept dual-class share structures.[21] Spanish law is even more conservative, particularly in the procedural requirements for deviating from *one share, one vote.* Only loyalty shares are permitted, with a maximum of two votes per share and a minimum holding period of two years.[22] The adoption of a new voting system based on loyalty shares requires a majority *quorum* of at least 60 percent or 75 percent, whereas the rule can be revoked by absolute majority or a two-thirds majority;

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[16] *See generally* European Commission, *Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 9-10, COM (2012) 740 final (Dec. 12, 2012).

[17] *See generally id.* at 11*; Green Paper Long-Term Financing of the European Economy*, at 7, 15, COM (2013) 150 final (Mar. 25, 2013); Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, 2017 O.J. (L 132) 4, 12, 14; *Proposal for a Directive of the European Parliament and of the Council on Multiple-Vote Share Structures in Companies that Seek the Admission to Trading of Their Shares on an SME Growth Market*, at 4, COM (2022) 761 final (Dec. 7, 2022).

[18] *See* Paul Hodgson, *Dual Class Share Structures: The European Experience*, ISS INSIGHTS (Feb. 6, 2023), https://insights.issgovernance.com/posts/dual-class-share-structures-the-european-experience/.

[19] *See* Decree n. º 34 of May 19, 2020 *(Decreto Rilancio*) (draft issued May 13, 2020) (implementing measures fighting the effects of the epidemiological emergency of COVID-19. Article 45.º of the draft Decree proposed to introduce dual-class share structures for listed companies. However, when approved a few days later, the final text had abandoned that provision). *See also* Michelle Corgatelli, *Multiple Voting Shares: competition among jurisdictions in the draft of the Italian "Decreto Rilancio,"* FORDHAM J. OF CORP. & FIN. L BLOG (July 24, 2020), https://news.law.fordham.edu/jcfl/2020/07/24/multiple-voting-shares-competition-among-jurisdictions-in-the-draft-of-the-italian-decreto-rilancio/.

[20] *See Short-term or short-changed? Enhanced rights for loyal investors are increasingly touted as a way to make companies think for the long term*, THE ECONOMIST (May 2, 2015), https://www.economist.com/business/2015/05/02/short-term-or-short-changed.

[21] *See* Hodgson, *supra* note 18.

[22] *See id.*

in both cases, the required proportion depends on the quorum attendance.[23] Moreover, shareholders are required to vote on whether to continue with the system five years after its adoption.[24] Portuguese regulation is also overly conservative and applies completely opposite solutions to those of France and Italy regarding MVS and listing status: dual-class voting shares are only accepted for listed companies and limited to five votes per share, while there is no express reference to loyalty shares.[25]

This chaotic landscape could not have been intentionally designed. Intriguingly, though, all continental European reforms have been quite conservative and cautious in the MVS solutions adopted.[26] Consequently, the freedom granted to MVS in the United States[27] and United Kingdom is still unparalleled in continental Europe. While an Italian, French, Spanish, Belgian, or Portuguese company may now be slightly more inclined to incorporate and list locally, the regulatory regimes in continental Europe lag far behind in the freedom allowed for designing MVS.

This paper dives into the reasons for this generalized conservative approach and finds its primary roots in the troubled history of MVS during the early 20th century in influential countries such as Germany, France, and Italy. After the First World War, much of Europe experienced similar problems – the need to protect national industries from foreign investors; a challenging macroeconomic environment amid hyperinflation and currency devaluation and the urgency to recapitalize companies in very difficult conditions for attracting investment. In this context, MVS appeared to be the perfect solution for controlling incumbent shareholders, and in a short time, recourse to MVS grew exponentially in continental Europe. However, the principal outcome was generalized abuse, in which a central role was played by incumbent shareholders with privileged status, who led the process for MVS adoption. This paper describes how, unlike in the United Kingdom, investors in the capital markets of continental Europe lacked sufficient power to overcome the strong incentives for abusing MVS structures.

The rest of the paper is structured as follows; Section 2 describes the two MVS structures generally adopted in Europe: dual-class share structures and loyalty shares. Although these have much in common, since both confer voting power disproportionate to equity shareholdings, they also have many differences; Section 3 details the most important historical chapters of MVS in continental Europe during the early 20th century, explaining how the massive popularization of MVS in countries such as Germany, France, and Italy led to many clear abuses by incumbent shareholders, including banks, families, and even the government; Section 4 describes the unfolding of the generalized prohibition of MVS in continental Europe from the 1930s to 1960s, as national legal systems sought an efficient response to a common

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[23] *See e.g., id.* (comparing France where "loyalty voting rights are granted by default, unless opposed by a two-thirds majority" to Italy and Belgium where "a two thirds majority of shareholders is required to introduce loyalty shares.").

[24] *See id.* (stating "the holders of the special class of shares have to approve any change to the voting rights structure.").

[25] There are different interpretations of whether loyalty shares are, nonetheless, permitted. Jorge Brito Pereira, *O Voto Plural na Sociedade Anónima* (Almedina, 2022), 483–491.

[26] *See* Paul Hodgson, *supra* note 18, at 3.

[27] A parallel example of such a regulatory gap is the mandatory takeover bid rule. *See* Jorge Brito Pereira, *An Ocean Apart: The Mandatory Takeover Rule in Brazil and in Europe*, 10 EMORY CORP. GOV. AND ACCT, R. 67 (2022).

problem; Section 5 analyzes the (very different) experience of MVS in the United Kingdom and explains the underlying reasons.

2. DUAL-CLASS SHARES AND LOYALTY SHARES

In a dual-class voting structure, the company's articles of association establish different classes of shares with differentiated voting rights, whereby at least one class of shares has superior voting rights while at least one other class has inferior voting rights.[28] A significant number of US-listed companies, including Facebook/Meta, Visa, CBS, Ford, Berkshire Hathaway, Alphabet/Google, and Nike—have dual-class structures, and these structures have been increasingly adopted since the 2004 IPO of Google.[29] Conversely, loyalty shares (or tenured voting rights) do not affect the company's capital architecture because all shares are fungible and equal; instead, they confer an individual advantage under company bylaws to long-term shareholders, who are rewarded with enhanced voting rights for continuously holding the shares for a pre-established period.[30] There are some variations on these typical features, subject to local regulatory conditions. Although permitted under Delaware law, and already validated by Delaware Courts, loyalty shares are quite uncommon in the United States[31] but are becoming increasingly popular in Europe, especially in France.[32]

Dual-class shares and loyalty shares are both deviations from the *one share, one vote* rule, resulting in voting power disproportionate to equity shareholdings.[33] However, the many differences between them make it overly simplistic to regard loyalty shares as "dual-class shares in disguise."[34]

First, there are differences in the transferability of enhanced voting rights. Superior voting rights attached to special class shares are not lost on transfer.[35] This is the basis for one fundamental criticism of dual-class shares – they allow entrenchment by insulating controlling shareholders from the discipline of the market for corporate control.[36] By contrast, loyalty shares confer rights connected with the relevant shareholder's position and their relationship

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[28] Google/Alphabet is a good example of a dual-class voting structure. When Google went public in 2004, the company listed class A shares (GOOGL) with one vote per share, while the founders retained class B shares with ten votes per share. In 2014, Google announced a stock split, with class A and B shareholders receiving a new non-voting C share (GOOG) for every share previously held. *See* Caley Petrucci, *Equal Treatment Agreements: Theory, Evidence & Policy*, YALE J. ON REG. (forthcoming 2023).

[29] Lucian A Bebchuk and Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VIRGINIA L. R. 591 (2017); Jill Fisch and Steven Davidoff Solomon, *The Problem of Sunset*s, 99 BUL. REV. 1060, 1065 (2019).

[30] Lucian A Bebchuk and Kobi Kastiel, *supra* note 29, at 610.

[31] Mark J Roe and Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism?*, REVUE TRIMESTRIELLE DE DROIT FINANCIER (2021), 496; P Alexander Quimby, *Addressing Corporate Short-Termism Through Loyalty Shares*, 40 FLA. ST. U.L. REV. 403 (2012).

[32] Christoph Van der Elst, *Do loyalty shares affect the engagement of shareholders? A study of the French CAC-40 companies*, REVUE INTERNATIONALE DES SERVICES FINANCIERS, no. 2 (2017), 475-476; Jill Fisch and Steven Davidoff Solomon, supra note 29, at 1077.

[33] *See One Share One Vote Rule*, NASDAQ (last visited Mar. 30, 2023), https://www.nasdaq.com/glossary/o/one-share-one-vote-rule.

[34] Alessio M Pacces, *Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance*, 9 ERASMUS L. REV. 214 (2016).

[35] *Id.*

[36] Bebchuk and Kastiel, *supra* note 29, at 602.

with the shares. It is generally understood that a transferee acquiring loyalty shares must hold them for the prescribed time period before receiving enhanced voting rights.[37] It seems undisputed that dual-class structures insulate controlling shareholders from the disciplinary force of the market for corporate control.[38] However, this does not mean that loyalty shares incentivize the market for corporate control. Since enhanced voting rights are lost on the sale of loyalty shares, the loyal shareholder cannot monetize the control premium, and is thus locked into the firm.[39]

Second, there are relevant differences regarding equal treatment of shareholders.[40] Dual-class share structures privilege shareholders with enhanced voting rights – typically insiders such as founders, initial investors, and board members.[41] This may be the result of one of three scenarios. Most commonly, it is a consequence of dual-class shares issuance before the IPO, in which the public can access only ordinary shares (or, in any case, shares with fewer votes).[42] Second, it may follow from ordinary shares and superior voting shares having different liquidity conditions – or even from the latter shares not being listed – thus incentivizing investors to convert their superior voting shares into ordinary shares to sell them in the market.[43] After a certain period, the superior voting shares will be concentrated into the hands of insiders with medium and long-term goals.[44] The final scenario is unequal conditions for issuing dual-class shares, although this is generally not allowed and tends to provoke litigation from activist shareholders.[45] Loyalty shares, by contrast, grant the same rights to all shareholders who meet the required holding period.[46] As alternatives to the "one share, one vote" rule, a dual-class share structure gives rise to far more problems than a loyalty share structure, which is one main

[37] *See* DiVittorio, *supra* note 10, at 83-86 (There are exceptions. In Italy, art. 127º-*quinquies*-3 establishes that, unless provided otherwise by the bylaws, loyalty voting rights may be transferred in the case of merger, spin-off, and *mortis causa* succession. It is argued that other transfers of shares should receive the same legal treatment, such as transfers to a trust with the same beneficial owners or between companies of the same group.); *see also* CODE DE COMMERCE (C. COM) (COMMERCIAL CODE) ART. L225-124 (FR.) (allows transfer of voting rights in *mortis causa* succession, liquidation of assets following a divorce, donation of shares, mergers, and spin-offs.).

[38] Bebchuk and Kastiel, *supra* note 29, at 602.

[39] *See* Roe and Venezze, *supra* note 31, at 478; *see also* Pereira, *supra* note 25.

[40] David J. Berger et al., *Tenure Voting and the U.S. Public Company*, 72 THE BUS. LAWYER 295, 297 (2017).

[41] *Id.* at 303.

[42] *See* Lucas Enriques et al., *The Case for an Unbiased Takeover Law (With an Application to the European Union)*, 4 HARV. BUS. L. REV. 85, 106 (2014) (This is increasingly common for IPOs in the United States, especially in technology companies); *see also* Bebchuk and Kastiel, *supra* note 29, at 594-96.

[43] Enriques et al., *supra* note 42, at 94-100.

[44] *See* Gregg A. Jarrell & Annette B. Poulsen, *Dual-Class Recapitalizations as Antitakeover Mechanisms: The Recent Evidence*, 20 J. FIN ECON. 129, 130 (1988); *see also* Valentin Dimitrov & Prem C. Jain, *Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns*, 12 J. CORP. FIN 342, 351 (2006); *see generally* Jason W. Howell, *The Survival of the U.S. Dual Class Share Structure*, 44 J. CORP. FIN 440, 449 (2006).

[45] Of the many notorious cases, the two most famous are the Facebook dual-class recapitalization of 2016 (aborted in 2017 after complex litigation), and the Google 2014 recapitalization. *See* Paul Lee, *Protecting Public Shareholders: The Case of Google's Recapitalization*, 5 HARVARD BUS. L. REV 281 (2015); Mark J. Roe & Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism?*, 76 THE BUS. LAWYER 467, 497 (2021).

[46] *See* Roe, *supra* note 31, at 497.

reason why some jurisdictions have favored loyalty shares for listed companies over the last decade.[47]

Third, there are differences regarding share value. As superior voting rights in dual-class structures are transferrable to a third party, such shares are intuitively more valuable than shares with lower voting rights *(rebus sic standibus)*.[48] There is value in enhanced voting rights. This value varies across countries and depends on several variables, such as the probability of a takeover, block-holding costs, and liquidity differences. Therefore, the extra value of enhanced voting shares will also vary.[49] On the contrary, loyalty shares will have a similar value – even amid a battle for control.[50]

Fourth, there are functional differences. Dual-class share structures allow a group of shareholders to gain or maintain enhanced influence over the conduct of a company's business.[51] Such influence is disproportionate to their shareholding and most often operates as an entrenchment device for the board, controlling shareholders, or other insiders. It is no coincidence that dual-class structures are most commonly used in tech companies whose founders are recognized by the investors as instrumental to the company's success, and whose rapid growth necessitated a number of funding rounds before an IPO.[52] By contrast, loyalty shares are intended to counter short-termism by aligning the company's and shareholders' medium- and long-term interests via enhanced voting power over time.[53] Interestingly, there are some functional overlaps in practice; liquidity is only accessible by converting superior

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[47] The adoption of a loyalty share regime is not neutral with respect to the balance of power between shareholders. Loyalty shares are uninteresting to some shareholders but precious to others. Thus, the equal treatment supposedly granted by loyalty shares may be somewhat superficial. Alessio M Pacces, *Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance*, 4 ERAMUS L. REV. 199 (2016).

[48] *Supervoters and Stocks: What Investors Should Know About Dual-Class Voting Structures*, FINRA (June 6, 2022), https://www.finra.org/investors/insights/supervoters-stocks-what-investors-should-know-dual-class-voting.

[49] Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. OF FIN. ECON. 325 (2003); Aswath Damodaran, *The Value of Control: Implications for Control Premiums, Minority Discounts and Voting Share Differentials*, 8 N.Y. UNIV. J. OF L. & BUS. 487 (2012); Paul Hanouna et al., *Value of Corporate Control: Some International Evidence*, (UNIV. OF SOUTHERN CALIF. MARSHALL SCH. OF BUS. Working Paper, Paper No. 01-4, 2001), https://deliverypdf.ssrn.com/delivery.php?ID=545088089111022075023123126118093120007012007068065003094082105107029125002005020060047049125101115115030120029106046048032093078101070029126106004081008098027015017067088115117080117126002095069083118107024031110084093015109120112092103009102&EXT=pdf&INDEX=TRUE; Luigi Zingales, *The Value of the Voting Right: A Study of the Milan Stock Exchange Experience*, 7(1) THE REV. OF FIN. STUDIES 125 (1994).

[50] A different problem is the market capitalization of dual-class firms. Most empirical literature concludes that dual-class firms trade at lower prices than single-class firms and that firm value decreases as the divergence between voting and cash flow rights increases. For this reason, when dual-class firms unify share classes, their market capitalization statistically increases. Scott B Smart et al., *What's in a Vote? The Short-and Long-Run Impact of Dual-Class Equity on IPO Firm Values*, 45(1) J. OF ACCT. AND ECON. 94 (2008) Beni Lauterbach & Anete Pajuste, *The Long-Term Valuation Effects of Voluntary Dual Class Share Unifications*, 31 J. OF CORP. FIN. 171 (2015); Fisch, *supra* note 29, at 1071; Karl V Lins, Equity Ownership and Firm Value in Emerging Markets, 38(1) J. OF FIN. AND QUANTITATIVE ANALYSIS 159, 181 (2003).

[51] Ben McClure, *The Two Sides Of Dual-Class Shares*, INVESTOPEDIA (May 25, 2022), https://www.investopedia.com/articles/fundamental/04/092204.asp

[52] *Id*.

[53] Patrick Bolton & Frédéric Samama, *Loyalty-shares: Rewarding long-term investors*, J. OF APPLIED CORP. FIN. 3 (2013); Quimby, *supra* note 31.

voting shares to listed ordinary shares,[54] while dual-class shares have a loyalty effect and strongly incentivize the shareholder to hold their shares,[55] and therefore aligning their interests with the company's in the medium to long term; loyalty shares can disrupt the balance of power[56] among shareholders. This explains why loyalty shares are interesting to some shareholders but not others.

Fifth, there are several differences concerning issuance procedures. A precondition for either multiple voting variant is an authorizing provision in the articles of association (or, in special circumstances, a legal provision). For loyalty shares, that provision suffices to allow increased voting on the conditions laid down, with no requirement for any subsequent issuance or conversion action.[57] Ordinary shares that accrue increased voting rights when held for a specified period are not special class shares.[58] By contrast, a dual-class status structure necessarily entails special class shares; beyond the relevant provision in the company bylaws, an issuance or conversion act is always required to issue special class shares.[59]

Finally, there are different effects on liquidity. Special class shares under a dual-class structure grant the privilege of gaining and maintaining control of the company with fewer shares.[60] Insiders may thus sell more shares with little to no dilution of their controlling position. Under normal circumstances, the effect will be to increase the free float. The effect of loyalty shares is intuitively different, since their intention is to incentivize longer retention and the alignment of medium- to long-term interests between the company and shareholders.[61] However, this conclusion is far from unequivocal. First, because the voting-enhancement premium of loyalty shares is not transferable, it has no economic value to some shareholders, and cannot disincentivize short-term strategies.[62] This is most typically the case for small shareholders with no effective power. Second, to effectively influence voting in the short or medium term, an activist investor will be forced to buy and hold a larger share to overcome the diluted voting power of non-enhanced shares, leading to a decrease in the free flow.[63] Third, the controlling shareholder will normally be unwilling to dispose of part of its shares because

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[54] Jason W. Howell, *The Dual Class Stock Structure in the United States: A New Dataset and an Examination of Firms Who Leave the Structure*, UNIV. OF GA., (2010), https://getd.libs.uga.edu/pdfs/howell_jason_w_201005_phd.pdf.

[55] Mark J. Rowe & Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism*, 76 BUS. LAW. 467, 474 (2021).

[56] *Id*. at 473.

[57] Paul Hodgson, *Dual Class Share Structures: The European Experience*, ISS INSIGHTS (Feb. 6, 2023), https://insights.issgovernance.com/posts/dual-class-share-structures-the-european-experience/.

[58] François Belot, Edith Ginglinger et al., *Encouraging long-term shareholders: The effects of loyalty shares with double voting rights*, UNIVERSITÉ PARIS-DAUPHINE 3475429, 3-4 (2019).

[59] That was the case for the so-called dual-class recapitalizations that were very popular in the United States in the 1980s, and is also necessary for companies that want to move from a dual-class structure to a single-class structure. Dimitrov & Jain, *supra* note 44; Jarrell & Poulsen, *supra* note 44.

[60] Rowe & Venezze, *supra* note 506.

[61] The effect of loyalty shares on liquidity remains unclear, although some empirical evidence indicates a negative impact, which may seem intuitive. Other effects have also been indicated, particularly an increase in volatility. *See* Bolton and Samama, *supra* note 53; Roe and Venezze, *supra* note 55; Belot, et al., *supra* note 58.

[62] *Loyalty Shares: Limited Use Structure or Corporate Game Changer*, ecgi (Feb. 28, 2019), https://www.ecgi.global/news/loyalty-shares-limited-use-structure-or-corporate-game-changer.

[63] Rowe *supra* note 55, at 483-84.

the voting privilege would be lost by transferring the position of control – the control premium would become a non-appropriable, non-monetizable value.[64]

3. MVS IN CONTINENTAL EUROPE IN THE EARLY 20TH CENTURY

Preferred shares were first issued in Germany in the mid-19th century.[65] Known as *Prioriäts-Aktien,* these shares were more akin to bonds than preferred stock, known as *proprio sensu*; *proprio sensu* were fixed-income securities paying interest and giving the right to capital repayment after maturity, while granting no residual right to company earnings nor any right to vote in general meetings.[66] The 1897 *Handelsgesetzbuch* regulated this matter, allowing the issuance of preferred shares and of MVS.[67] However, their popularity was quite limited until the 20th century.[68]

The massive popularization of enhanced voting shares *(*a movement also known as *Massenhafte Eifürung von Mehrstimmrechtaktien)* in Germany after the First World War is explained by similar factors to those encountered in other jurisdictions like national protectionism against foreign investors, a very difficult macroeconomic environment combining hyperinflation with currency devaluation, and the urgency to recapitalize companies in very difficult conditions for attracting investment.[69] Dual-class voting structures increased exponentially after the end of the war (albeit slowing with the 1923/24 monetary reforms). In 1925, 842 of the 1,595 companies listed in the *Berliner Börse* used MVS (almost 40% of the votes of the *Statistischen Reichsamts* sample were held by shareholders holding 2.4% of the share capital).[70] To put this impressive number in perspective, in 1935 only 332 of the 888 companies with listed shares had MVS.[71]

With no limits on the number of votes that could be granted per share, insiders were able to perpetrate abuses to control the architecture of the company's equity.[72] Such insiders included board members, families controlling the company, their friends or professionally

[64] *Id* at 47.

[65] Tilman Bezzenberger, "Vorzugsaktien ohne stimmrecht", *Aktiengesetz* (1991), 5–7.

[66] *Id.*

[67] *Id.*

[68] Some scholars even reference the *Berliner Börse* opposing the listing of shares with multiple voting rights in 1912, in a set of events somewhat similar to a later occurrence in the NYSE. Richard Passow, *Die Aktiengesellschaft: Eine Wirtschaftswissenschaftliche Studie*, vol. 5 (G. Fischer, 1922), 244.

[69] Arguably, some of these grounds worked more as *pretexts* than genuine reasons, mainly when multiple voting shares began being abused, and when family groups and banks subscribed to privileged shares with super-enhanced votes (mostly on credit) and subsequently sold ordinary shares to general investors. Bezzenberger, *supra* note 65, at 8; Julian Franks, Colin Mayer et al., "The origins of the German corporation–finance, ownership and control", *Review of Finance* 10, no. 4 (2006).

[70] Arno Aron, *Die Kapitalveränderungen deutscher Aktiengesellschaften nach dem Kriege* (Berlin: Spaeth & Linde, 1927); Felix Selgert, "Börsenzulassungsstellen, Reichsregierung und die (Selbst-) Regulierung der Mehrstimmrechtsaktie, 1919-1937", *Jahrbuch für Wirtschaftsgeschichte/Economic History Yearbook* 59, no. 1 (2018), 83–84.

[71] Bezzenberger *supra* note 65, at 8-9.

[72] Julian Franks, Colin Mayer et al., "The origins of the German corporation–finance, ownership and control", 4 *REVIEW OF FINANCE* 10, (2006), 6.

related persons, banks, and even the state.[73] There are records of companies granting thousands to tens of thousands of votes per share, resulting in unimaginable levels of distortion.[74]

In France, the Law of November 16, 1903 regulated privileged shares, also known as *actions de priorité*.[75] These were originally designed as preferred shares, representing ownership in a corporation, and conferring a priority claim on the company's assets and earnings: *actions de priorité* granted enhanced cash flow rights.[76] This legal regime even allowed privileged shares with an interest rate, a legal structure again very close to bonds but with some interesting differences; however they did not qualify as debt and dividend payments were contingent on distributable profit.[77]

Over time, the flexibility of the 1903 Law took its spirit much further than was initially intended. Article 34 defined *actions de priorité* as granting certain benefits in relation to the other shares, or granting preferred rights in relation to dividends, liquidation, or both *("jouissant de certains avantages sur les autres actions, ou conférant des droits d'antériorité, soit sur les bénéfices, soit sur l'actif social, soit sur les deux").*[78] Consequently, no express constraints on the nature of the special rights embedded in these shares, including economic rights or rights to be appointed to the board of directors, or multiple voting rights.[79] This lack of restrictions on *actions de priorité* led a few French companies to begin issuing MVS. The first recorded case involved *Société Centrale des Banques de Province* in 1911 and gave rise to some controversy.[80] However, MVS became popular only after the end of the First World War and especially in the second half of the 1920s.[81] In 1922, four years after the war ended, forty French companies with MVS were registered. By 1931, the number had increased to over one thousand.[82] After the second half of the 1920s, *actions de priorité* effectively meant MVS.

The massive popularization of MVS in France also brought associated abuse in the form of disproportionate votes (although not as disproportionate as in Germany) – in the most extreme cases, privileged shares granted twenty or twenty-five more votes than ordinary

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[73] *Id.*

[74] Karsten Heider, "Kommentierung des §12, Rn.1-5", in *Münchener Kommentar zum Aktiengesetz* (München: 2019); Franks *supra* note 69; Selgert, *supra* note 70, at 84–85.

[75] The Law of July 9, 1902, already regulated privileged shares. However, questions were raised as to whether the 1902 Law could be applied to companies already incorporated, given the principle of equal treatment of shareholders (particularly where this was expressly set out in the bylaws). The pertinence of such doubts led to approval of the Law of November 16, 1903, which was expressly applicable to companies yet to be incorporated and to companies already incorporated. Georges Ripert and René Roblot, *Traité de droit commercial: Commerçants, actes de commerce* (LGDJ, 1989), 850. It is also worth mentioning that the 1903 Law was approved in special circumstances with the intention of attracting investment in the *Compagnie des Messageries Maritimes*, whose delicate financial situation necessitated urgent capitalization.

[76] *Introduction of Preferred Shares in French Law*, Jones Day (Sept. 2004) https://www.jonesday.com.

[77] On fixed dividend/interest rate shares, *see* PAUL PIC, EMILE BOUVIER ET AL., *DES SOCIETES COMMERCIALES* 165-68 (1925); *see also* CHARLES LEON LYON-CAEN AND LOUIS RENAULT, *MANUEL DE DROIT COMMERCIAL* 174-75 (1928); *see also* HENRI DECUGIS, *TRAITE PRATIQUE DES SOCIETES PAR ACTIONS* 76-78 (1919).

[78] *See* Statuts du 27 avril 1960 de la Société d'énergie nucléaire franco-belge des Ardennes, FANC (last accessed Mar. 30, 2023).

[79] *See Introduction of Preferred Shares in French Law*, JONES DAY (Sept. 2004).

[80] *See* Dominique Plihon, *Crises et batailles boursières en France aux XX e et XXI e siècles*, 687 REVUE HISTORIQUE 755, 755 (2018).

[81] *See id*.

[82] *See* GEORGES DANOS, *LES ACTIONS A VOTE PLURAL* 143 (1922) ; *see also* Georges Lanusse, *Statistique des actions à vote plural*, 72 *JOURNAL DE LA SOCIETE FRANÇAISE DE STATISTIQUE* 217, 217-18 (1931)

shares.[83] With no legislative limits on multiple voting and with the need to recapitalize companies and create new ways to attract investors, distortions became generalized. As early as 1928, Lyon-Caen was already calling for a legislative intervention to prohibit or limit MVS.[84]

There are clear similarities between the course taken by Italian law and what happened in France. Article 164 of the 1882 *Codice Commerciale* determined that all shares were granted equivalent rights unless the articles of association provided otherwise ("*le azioni conferiscono ai loro possessori uguali diritti se non è stabilito diversamente nell'atto costitutivo").*[85] Article 157 also established that each shareholder was entitled to one vote per share (as a rough interpretation of the rule) for up to five shares; shareholders with between six and one hundred shares were entitled to one more vote for each additional five shares; and shareholders with over one hundred shares were entitled to one more vote for each additional twenty-five shares.[86] This rule distributed voting rights on the assumption that each shareholder should have proportionately less power than risk.[87] However, the final part of article 157 expressly set out that the rule was derogable (*"nell' atto costitutivo e nello statuto"*).

In the early years, there was no consensus on whether multiple voting rights were compatible with the capitalist rule of majority formation, nor on whether article 164 only targeted special cash flow rights and thus excluded special voting rights.[88] However, the general opinion was that article 164 should be read openly, such that voting rights fell within its scope.[89]

Like developments in Germany and France following the First World War, the popularity of MVS increased exponentially in Italy, also bringing abusive cases of disproportionate voting rights.[90] As early as 1924, this problem was a core concern for the commission appointed to reform the *Codice Commerciale*. This commission ultimately advocated a compromise, accepting MVS (*azioni a voto plurimo)* but limiting the overall number of votes corresponding to such shares to below the number of votes of all outstanding shares; however, this proposal was refused by the working group.[91] Several Italian companies established multiple voting in their bylaws; the number of votes per privileged share ranged from one to two hundred, although generally it was either five or ten.[92] Such shares were mainly

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[83] *See id*. at 218-19; *see also* Muriel Petit-Konczyk, *Big Changes in Ownership Structures-Multiple Voting Shares in Interwar in France*, (University of Antwerp 2006) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=944808; *see also* J.B. SIREY, *RECUEIL GENEREAL DES LOIS ET DES ARRETS*, 595 (1924); *see also* Guido Sadar, *Les privilèges de vote dans les sociétés anonymes,* 70 *GIORNALE DEGLI ECONOMISTI E RIVISTA DI STATISTICA*, 294, 295 (1930); *see also* PIC, *supra* note 77, at 168–172; *see also* RIPERT, *supra* note 75, at 854–855; *see also* Georges Ripert, *Aspects Juridiques du Capitalisme Moderne*, 6 *REVUE ECONOMIQUE* 888, 889 (1951).

[84] *See* LYON-CAEN, *supra* note 77, at 175.

[85] *See* Appunti Luis, *Dritto Commerciale*, http://www.appuntiluiss.it/wp-content/uploads/2014/07/Ante DIRITTO-COMMERCIALE-II-m-c-.pdf (last visited Mar 30, 2023).

[86] *See* Lorenzo Stanghellini, *Corporate Governance in Italy, Strong Owners, Faithful Managers. An Assessment and a Proposal for Reform*, IND. INT'L & COMP. L. REV. 121 (1995).

[87] *See* Del Regno D'Italia, Codice di Commercio pel regno d'italia, Gazzetta Ufficiale, Apr. 6, 1882; *see also* Francesco Lombardo & Giuliano Marzi, *In Brief: Liquidation and Reorganization Processes in Ital*, LEXOLOGY (Nov. 16, 2022), https://www.lexology.com/library/detail.aspx?g=842a9099-b4c5-4e65-a2ee-df5a99dfa1ce.; *see also* MICHELE LEONE, *IL VOTO PLURIMO NEL MERCATO FINANZIARIO* 24-25 (2015).

[88] *See* Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat*, ECGI, 5 (March 2015) http://ssrn.com/abstract_id=2574236.

[89] *See* Del Regno D'Italia, Codice di Commercio pel regno d'italia, Gazzetta Ufficiale, Apr. 6, 1882.

[90] *See* Ventoruzzo, *supra* note 88.

[91] *See id*. at 15.

[92] Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Reponses to the*

reserved for founders of the company or entities close to them. Like France, privileged shares became a popular device for preventing or limiting the acquisition of control by foreign investors.[93] It thus became common for bylaw provisions to allow only Italian citizens or companies to own privileged shares -- this rule has led to several complex court cases.[94]

4. REACTIONS TO ABUSIVE USE OF MVS

Limiting shareholders' capitalist powers was a dominant principle during most of the 19th century; in other words, majority voting in general meetings should reflect the collective will of several shareholders, as opposed to an imposition of the voting power of one shareholder (regardless of how much the latter had invested).[95] In *Taylor v. Griswold* (1834),[96] the New Jersey Supreme Court criticized the popularization of rules in bylaws that attributed one vote per share (at least in the absence of specific legislation):

> [T]he tendency, at least, the apparent tendency, of the by-law in question, is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company, into the hands of a few capitalists; and it may be, to the utter neglect or disregard of the public convenience and interest.[97]

This principle was usually regulated using one of two legal formulas: either scaled voting provisions that distributed voting rights such that each shareholder had proportionately less power than risk, or legal voting caps that prevented any shareholder from voting with more than a certain percentage of shares (typically 10% to 20%).[98] One of the few exceptions was the *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) in Germany in 1861, which authorized a direct proportion between the numbers of votes and shares, with no mandatory voting cap.[99]

In some countries, this limitation of voting power lasted until the late 20th century. One example is Portugal, where the combination of MVS, (Decree no. 1.645 of 15 June 1915)

Migration of Chrysler-Fiat, ECGI (Mar. 2015) http://ssrn.com/abstract_id=2574236.

[93] Francesco Lombardo & Giuliano Marzi, *In Brief: Liquidation and Reorganization Processes in Ital*, LEXOLOGY (Nov. 16, 2022), https://www.lexology.com/library/detail.aspx?g=842a9099-b4c5-4e65-a2ee-df5a99dfa1ce.

[94] *See* Vittorio, *supra* note 10; *see also* Tombari, *supra* note 10.

[95] Henry Hansman & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J.948 (2014).

[96] Taylor v. Griswold, 14 N.J.L 222 (N.J. 1834).

[97] David L Ratner, *Government Of Business Corporations: Critical Reflections on the Rule of One Share One Vote*, 56 CORNELL L. REV. 10 (1970); *see also* Colleen A Dunlavy, *Social Conceptions of the Corporation: Insights From the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1368 (2006).

[98] *See* Ratner, *supra* note 97, at 10; *see also* Dunlavy, *supra* note 97, at 1368.

[99] *See* Dunlavy, *supra* note 97, at 1368

with mandatory voting caps, (article 183 of the Commercial Code of 1888) effectively prevented abuses by the controlling shareholder.[100]

Other legal systems that did not impose mandatory voting caps or scaled voting provisions were more open to abuse and, consequently, started limiting or even prohibiting MVS. In France, for instance, the Law of April 26, 1930, banned new issuances of privileged voting shares,[101] while the Law of November 13, 1933, suppressed existing MVS by imposing the proportionality rule as a principle of public order, as well as maintaining two main exceptions (concession-holding companies outside metropolitan France and mixed-economy companies).[102]

Italy followed a similar course with the approval of a new Civil Code in 1942, which underwent several changes after the fall of the Mussolini regime, notably in matters of corporate law.[103] Voting was made subject to the proportionality principle, with derogation allowed only for non-listed companies (and in the very exceptional case of limited voting shares).[104] Even preferential non-voting shares were banned,[105] and article 2351.3 expressly prohibited MVS (*"non possono emettersi azioni a voto plurimo"*).

In Germany, after several cases of abuse, the 1937 reform agenda faced strong pressure to ban MVS. Legislators ultimately adopted a compromise solution: §12 of the 1937 *Aktiengesetz* (AktG) prohibited MVS but reserved discretion for the government to authorize MVS upon a company's request, if justified as in the company's best interests *("Wohl der Gesellschaft").*[106] In a similar course of events, the preliminary draft of the 1965 AktG proposed

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[100] Reuters, *Portugal to End Shareholder Vote Cap in Takeovers*, (Aug. 17, 2011) https://www.reuters.com/article /portugal-takeovers/portugal-to-end-shareholder-vote-cap-in takeovers-idUSLDE77G0Z320110817.

[101] Caroline Coupet, *L'attribution du droit de vote dans les sociétés* (LGDC, 2012); Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat,* EUR. CORP. GOVERNANCE INST. (Mar. 2015), https://www.ecgi.global/sites/default/files/working_papers/documents/ SSRN-id2574236.pdf. ; Muriel Petit-Konczyk, "Big Changes in Ownership Structures-Multiple Voting Shares in Interwar in France", Available at SSRN 944808 (2006).

[102] Such exceptions were subsequently preserved, notably by the 1966 reform. Georges Ripert and René Roblot, *Traité de droit commercial: Commerçants, actes de commerce*, 854 ; Henry Solus, *La réforme du droit des sociétés par les décrets-lois de 1935 et 1937: Constitution. Publicité. Nullités. Administration et contrôle. Bilans et comptes. Actionnaires. Obligataires* (Sirey, 1938), 276–277; Jean Escarra, Edouard Escarra et al., *Traité théorique et pratique de droit commercial*, vol. 2 (Sirey, 1951), 173.

[103] For an outlook on the so-called *defascization* of the Italian Civil Code, see Mario Campobasso, Pietro Abbadessa et al., *Le società per azioni: Codice civile e norme complementari*, 1, 32; Giulio Sandrelli and Marco Ventoruzzo, "Classes of shares and voting rights in the history of Italian corporate law", 6.

[104] *See* Lorenzo Stanghellini, *Corporate Governance in Italy: Strong Owners, Faithful Managers. An Assessment and a Proposal for Reform,* 6 IND. INT'L & COMP. L. REV. 91, 104 (1995) (discussing how under the Italy's Civil Code of 1942 shareholders in Italian companies enjoy a relatively high amount of power and "the law prevents a dilution of their voting rights by means of multiple voting shares and sharply limits departures from the "one share one vote" principle.").

[105] Francesco Lombardo & Giuliano Marzi, *In Brief: Liquidation and Reorganization Processes in Ital,* LEXOLOGY (Nov. 16, 2022), https://www.lexology.com/library/detail.aspx?g=842a9099-b4c5-4e65-a2ee-df5a99dfa1ce. S*ee* Stanghellini, *supra* note 104 (stating that non-voting cumulative preferred stock "gives the stockholder an absolute right to the dividend, provided that there are earnings and under Italy's Civil Code only listed companies have the authority to issue this form of stock). Damiano di Vittorio, *Le azioni a voto potenziato: dinamiche societarie e analisi d'impatto della maggiorazione del voto sui corsi azionari di società quotate*, 23–24.

[106] Julian Franks, Colin Mayer et al., "The origins of the German corporation–finance, ownership and control", *Review of Finance* 10, no. 4 (2006).

to completely ban MVS but various pressures led to the final version again allowing an exception, albeit subject to even stricter conditions.[107] In 1998, with the KonTraG *(Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*), Germany finally prohibited MVS under all circumstances.[108] This prohibition still stands.

Finally, reference should be made to Spain, where MVS were never as popular as elsewhere[109] The distortion problems caused by MVS never became as severe in Spain. Nonetheless, the 1951 *Ley de Sociedades Anónimas* expressly prohibited MVS,[110] following the general European trend. This prohibition was maintained in the 1989 Law and in the *Ley de Sociedades de Capital* of 2010.[111]

5. THE UNITED KINGDOM'S EXPERIENCE WITH MVS

The UK regulatory environment is, and has been, among the most liberal legal frameworks on the rights and obligations inherent to shares, particularly concerning MVS.[112]

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[107] After the 1965 reform, MVS were authorized in fewer than two-dozen cases. Karsten Heider, "Kommentierung des §12, Rn.1-5".

[108] *See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6. 1965, last amended by Gestez [G], Aug. 7, 2021, BGBl. I at 1142, art. 5, §12 (Ger.), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/german-stock-corporation-act.pdf (Section 12(2) of the German Stock Corporation Act states "multiple voting shares shall be prohibited."); *See also Multiple Voting Rights*, BORSE FRANKFURT, https://www.boerse-frankfurt.de/en/know-how/glossary/multiple-voting-rights (last visited Mar. 27, 2023); Julian Franks, Colin Mayer et al., "The origins of the German corporation–finance, ownership and control", *Review of Finance* 10, no. 4 (2006); *See also* Ulrich Jürgens and Joachim Rupp, *The German system of corporate governance: Characteristics and changes*, ECONSTOR (May 2002), https://www.econstor.eu/bitstream/10419/50757/1/348829639.pdf (discussing how the 1998 Control and Transparency Act, known as KonTrag, brought changes to corporate governance institutions in Germany, including a ban on multiple voting).

[109] *See generally* Aurelio Gurrea Martinez, *The Case Against the Implementation of Loyalty Shares in Spain*, UNIV. OF OXFORD: FACULTY LAW BLOGS ((July 9, 2019), https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/07/case-against-implementation-loyalty-shares-spain.

[110] *See* Benito Arruñada, *Control y Regulación de la Ley de Sociedades Anónimas de 1951*, ALIANZA ED. (1990), at 88, https://www.arrunada.org/files/research/ARRU%C3%91ADA%201990%20Control%20y%20regulaci%C3%B3n%20de%20la%20SA.pdf (discussing how under the provisions of the 1951 Ley de Sociedades Anónimas limited the percentage of votes for each shareholder within a company regardless of the number of shares held. Essentially, it limited the maximum number of votes that could be cast by a single shareholder).

[111] There were other examples of jurisdictions prohibiting MVS around this time. The Brazilian case offers an interesting parallel to what was happening in Europe: Decree no. 21.536 of June 15, 1932, banned multiple voting (§ 4 of article 1) around the same time as the introduction of preference shares in a very open manner. This prohibition was maintained even after Law no. 6.404 of 1976 extended the regime for issuing preference shares and introduced the so-called *regime de responsabilização do acionista controlador.* On the evolution of the Brazilian regime, *see Royal Legislative Decree 1/2010 of 2 July, Which Approves the Revised Text of The Companies Act of Capital*, GLOB. REGUL., https://www.global-regulation.com/translation/spain/1440016/royal-legislative-decree-1-2010-of-2-july%252c-which-approves-the-revised-text-of-the-companies-act-of-capital .html (last visited Mar. 29, 2023); *see also Lack of Proportionality Between Ownership and Control: Overview and Issues for Discussion*, OECD (Dec. 2007), at 14, 16, 20, https://www.oecd.org/daf/ca/40038351.pdf.

[112] In 1962, the Jenkins Committee on Company Law contemplated recommending the prohibition of MVS but ultimately concluded that this would constitute a non-acceptable intervention in the freedom of investors. The committee's report concludes thus: "some said that risk-bearing shares should carry votes proportionate to their interest; others that freedom of contract could not be interfered with and that there was a price for everything, including non-voting shares. The Committee had given no opinion upon the merits of those arguments. The majority were against legislation but recommended additional rights for shareholders"

There, the share capital of a company may consist of more than one class of shares. Under section 629 of the Companies Act 2006, a type of share forms a separate class if the rights attached to it are uniform and differ from those attached to other shares in the company:

> (1) For the purposes of the Companies Acts shares are of one class if the rights attached to them are in all respects uniform.
>
> (2) For this purpose, the rights attached to shares are not regarded as different from those attached to other shares by reason only that they do not carry the same rights to dividends in the twelve months immediately following their allotment.[113]

The most common classes of shares include ordinary, preference, and deferred shares.[114] Ordinary shares (or common stock) are entitled to residual cash flow rights; dividend rights subordinated to the rights of preferred shareholders.[115] If a company has a single class of shares, they will usually be classified as ordinary shares. Under part 17, chapter 3 of the Companies Act, these are "shares other than shares that as respects dividends and capital carry a right to participate only up to a specified amount in a distribution."[116] Ordinary shares usually grant homogenous voting rights: one vote per share or one vote per higher number of shares, however, nothing prevents the existence of different classes of ordinary shareholders with different voting rights.[117] Thus, under English law, voting strictly depends on the rules set out in the bylaws; in the absence of a relevant provision, one vote is granted to each shareholder with a nominal value of £10 (sections 284(1) and (3), Companies Act 2006).[118]

This freedom is mainly used in the establishment of financial dividend rights, especially by listed companies. In practice, the issuance of shares with enhanced voting rights is quite unusual.[119] One of the few exceptions is private equity transactions: investors may

(https://www.jstor.org/stable/41139654). *See* Paul Davies, *Shareholders in the United Kingdom*, EUR. CORP. GOVERNANCE INST (Jan. 2015), https://deliverypdf.ssrn.com/delivery.php?ID=323091117068089004125004127110096066042042006017051050095107119101097117126100113099022017101055107098026098005005019117023029116070036048063075099112106066113113105054065003001004095117104119067083012014029030118125120122013074087068031090011122098067&EXT=pdf&INDEX=TRUE.

[113] Companies Act 2006, UK Public General Acts 2006 c.46 Part 17 (Jan. 10, 2009), https://www.legislation.gov.uk/ukpga/2006/46/part/17/chapter/9/crossheading/introductory/2023-02-25?view=plain+extent.

[114] *See* Abby Watson, *Classes of Shares*, HARPERJAMES (Aug. 4, 2021), https://harperjames.co.uk/article/classes-of-shares/; *see also* HM Revenue & Customs, *CG50203 - Definitions: Different Classes of Share*, GOV.UIK (Mar. 13, 2023), https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg50203.

[115] *See* Aswath Damodaran, *Claims on Equity: Voting and Liquidity Differentials, Cash flow Preferences and Financing Rights*, STERN SCHOOL OF BUSINESS (Aug. 14, 2008), https://pages.stern.nyu.edu/~adamodar/pdfiles/papers/equityclaims.pdf.

[116] Companies Act 2006, UK Public General Acts 2006 c.46 Part 17, 560(1)(b).

[117] Depending on the bylaws, it is even possible (although unusual) to issue ordinary shares with no voting rights. Pennington's classic paper describes such shares as follows: "even more of a misshapen monster is the voteless ordinary share, usually labelled as a Class 'A' ordinary share to distinguish it from the real ordinary shares which do carry votes." Robert R. Pennington, *The Investor and the Law* (MacGibbon & Kee, 1968),

[118] *See* Companies Act 2006, UK Public General Acts 2006 c.46 Part 13, 284(1), 284(3); *see also* Damodaran, *supra* note 115; *see also What Voting Rights do Shares Have?*, COMPANY LAW SOLUTIONS, https://www.companylawclub.co.uk/what-voting-rights-do-shares-have (last visited Apr. 3, 2023, 7:12 AM).

[119] *See* Damodaran, *supra* note 115; *see also* Federico Cenzi Venezze, *The Costs of Control-Enhancing Mechanisms: How Regulatory Dualism Can Create Value in the Privatization of State-Owned Firms in Europe*,

subscribe for preference shares that confer enhanced voting rights in specific circumstances, such as the company being in material breach of certain agreements, or weighted voting rights if the company fails to achieve certain performance targets, enabling investors to cast sufficient votes to pass or block any resolution to wind up the company or to appoint or remove directors.[120] These step-in rights give investors the means to obtain control of the company should the management team not perform as expected.[121]

Preference shares usually confer a preferential right compared to other classes of shares.[122] The nature of such preferential rights are not clearly established, but usually relate to priority payment of dividends and/or a priority repayment of capital on the winding up of the company.[123] Preference shares commonly rank ahead of ordinary shares as to dividends/capital on a winding up event, being fixed-income (and fixed-capital) shares. If voting rights are not specifically excluded or restricted, the holders of preference shares have equal voting rights. However, that is unusual. Preference shares are typically non-voting shares or confer only limited voting rights.

However, this liberal legal environment concerning MVS did not create a landscape in which many companies adopted such provisions.[124] On the contrary, the 2007 *Report on the proportionality principle in the European Union* makes the following important observation:

> BP (Oil & Gas) is the only company in the sample featuring multiple voting rights, having issued 8% Cumulative First Preference Shares and 9% Cumulative Second Preference Share[s] alongside the ordinary shares. Ordinary share[s] are about 99.7% of the total outstanding capital. The distortion of the one share – one vote principle is extremely limited as the multiple voting shares represent less than 0.06% of outstanding share capital and each of these preference shares actually has less voting rights than the ordinary share.[125]

Similarly, the freedom to use other control enhancement mechanisms (CEMs) scarcely distorts the *one share, one vote* principle. The same report states:

> In the United Kingdom, for example, most of the CEMs discussed in this Study are not prohibited by the local legislation (in fact, ten out of the

HARVARD LAW SCHOOL (Aug. 29, 2013), https://dash.harvard.edu/bitstream/handle/1/10985156/cenzi_llmpaper.pdf?sequence=1.

[120] *See* Jason Fernando, *What Are Preference Shares and What Are the Types of Preferred Stock?*, INVESTOPEDIA (Jun. 24, 2022), https://www.investopedia.com/terms/p/preference-shares.asp#toc-what-are-the-main-types-of-preference-shares; *see also* Simon Beddow & Chris Hale, *Preference shares: In a class of their own*, TRAVERS SMITH BRAITHWAITE (Oct. 1, 1995), https://us.practicallaw.thomsonreuters.com/2-100-3412.

[121] *See* Beddow & Hale, *supra* note 120.

[122] *See* Watson, *supra* note 114; *see also* Damodaran, *supra* note 115; *see also* C Alan Dignam and John Lowry, Company Law (Oxford UP, 2020), 176.

[123] *See* Lee Beng Tat, *Corporate Recapitalizations And The Elimination Of Preferred Dividend Arrears: The American Lesson*, SING J. OF LEGAL STUDIES 435, 440, 442 (1992).

[124] *See* Marc T. Moore, *Designing Dual-Class Sunsets: The Case for a Transfer-Centered Approach*, 12 WM. & MARY BUS. L. REV. 93, 111 (2020).

[125] *Report on the Proportionality Principal in the European Union*, EUROPA (Jan. 11, 2016), https://ec.europa.eu/docsroom/documents/14881/attachments/2/translations/en/renditions/pdf.

> thirteen CEMs discussed in this Study are available for use by British companies). Nevertheless, market practice and market expectations do not encourage the use of many of the available CEMs. Out of the twenty recently listed United Kingdom companies surveyed for the purposes of this Study, none have introduced CEMs. Out of the twenty large United Kingdom companies, only one featured the use of multiple voting rights shares and none of these companies introduced non-voting shares (without preference), pyramid structures, or cross-shareholdings, although these CEMs are permitted under the United Kingdom legislation.[126]

As the report notes, several forces in the United Kingdom created a legal system that is extremely liberal regarding CEMs as well as a market in which listed companies are not encouraged to use them.

In particular, there is concurrent historical market pressure from the "superpowers" of institutional investors[127] and the weight of operating traditions on regulated markets. Institutional investors have mostly exercised influence through trade associations such as the Association of British Insurers and the National Association of Pension Funds.[128] The strength of their influence is clearly implied by the many years of self-regulation by the City or City-based statutory agencies.[129] This leads some scholars to conclude that the discouragement of listed companies using MVS (and other CEMs) is primarily market driven, with only some limited impact from regulatory options.[130] Until recently, there was no regulatory limitation on the listing of shares with unequal voting rights.[131] This only changed in 2014 with amendments to the UK Listing Rules for admission to the main market–the so-called premium market.[132] Under Premium Listing Principle 4:

> [W]here a listed company has more than one class of securities admitted to premium listing, the aggregate voting rights of the securities in each class

[126] *Id.*

[127] *See* Flora Huang, "Dual Class Shares Around the Top Global Financial Centres", *Journal of Business Law* (2017), 11.

[128] *See* Chris Vellacott, *UK investors seek common voice in dealings with boardrooms*, Reuters (Mar. 26, 2013), https://www.reuters.com/article/britain-shareholders/uk-investors-seek-common-voice-in-dealings-with-boardrooms-idUSL5N0CI2BD20130326.

[129] *See* Paul Davies, *Shareholders in the United Kingdom*, Eur. Corp. Governance Inst (Jan. 2015), https://deliverypdf.ssrn.com/delivery.php?ID=323091117068089004125004127110096066042042006017051050095107119101097117126100113099022017101055107098026098005005019117023029116070036048063075099112106066113113105054065003001004095117104119067083012014029030118125120122013074087068031090011122098067&EXT=pdf&INDEX=TRUE.

[130] *See Federico Cenzi Venezze, The Costs of Control-Enhancing Mechanisms: How Regulatory Dualism Can Create Value in the Privatization of State-Owned Firms in Europe, Harvard Law School (Aug. 29, 2013), https://dash.harvard.edu/bitstream/handle/1/10985156/cenzi_llmpaper.pdf?sequence=1*.

[131] *See* Martin Moore & Philip Gillyon, *"Loyalty Shares" And Weighted Voting Rights In Companies Formed And Registered Under The Companies Acts*, Erskine Chambers (Dec. 17, 2018), https://www.erskinechambers.com/loyalty-shares-and-weighted-voting-rights-in-companies-formed-and-registered-under-the-companies-acts/.

[132] Thomas Verlander & Ben Harber, *Going to markets*, SHAKESPEARE MARTINEAU (Feb. 1, 2023), https://www.shma.co.uk/our-thoughts/going-to-market/.

should be broadly proportionate to the relative interests of those classes in the equity of the listed company.[133]

Whether this regulation is construed as a prohibition with exceptions or as a set of admissibility criteria,[134] it does not preclude MVS from being admitted to the London Stock Exchange main market.[135] Additionally, there is no regulatory limitation on admission to trading on the Alternative Investment Market.[136] However, this market has special characteristics designed to attract SMEs with growth potential by applying less burdensome rules when compared to those of Alternext (Euronext Growth); thus, it cannot viably allow the British market to compete with the NYSE and Nasdaq in attracting large companies.[137] The standard tier of the London Stock Exchange's secondary market is generally considered the second-best option: issuers and investors are naturally more attracted to the higher liquidity of the main market.[138]

Listing requirements were a controversial matter for a long time. On March 3, 2021, the proposals of Lord Hill's UK Listing Review were finally published.[139] One main recommendation is to "allow companies with dual-class share structures to list in the premium listing segment but maintain high corporate governance standards by applying certain conditions."[140] The conditions would include: a maximum duration for enhanced rights of five years from the IPO; superior voting shares converted to ordinary shares on transfer, with limited exceptions for estate planning and charitable purposes; weighted shares being held only by directors of the listed company; and weighted voting permitted only to ensure holders of the shares remain as directors and blocking unwelcome takeover bids.[141] The listing rule for the

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[133] LISTING AND PREMIUM LISTING PRINCIPLES, § 7.2.4.G (FIN. CONDUCT AUTH. 2018) ("In assessing whether the voting rights attaching to different classes of premium listed securities are proportionate for the purposes of Premium Listing Principle 4, the FCA will have regard to the following non-exhaustive list of factors: (1) the extent to which the rights of the classes differ other than their voting rights, for example with regard to dividend rights or entitlement to any surplus capital on winding up; (2) the extent of dispersion and relative liquidity of the classes; and/or (3) the commercial rationale for the difference in the rights."); *see* Flora Huang, *Dual Class Shares Around the Top Global Financial Centres*, 2 J. OF BUS. L. (manuscript at 10–12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172787; *see also* Bobby V Reddy, *Finding the British Google: relaxing the prohibition of dual-class stock from the premium-tier of the London Stock Exchange*, 79.2 CAMBRIDGE L. J. 315, 324–325 (2020). *See generally* Fin. Conduct Auth., *LR 7.2 The Listing and Premium Listing*, FCA HANDBOOK (Jul. 7, 2018), https://www.handbook.fca.org.uk/ (detailing the numerous listing principles including, *inter alia*, Premium Listing Principle 4).

[134] Nuno Serrão Faria, *Dual-class shares: a governance battle between stock exchanges / The case of the UK*, 9 REVISTA DE DIREITO DAS SOCIEDADES 491, 501 (2019). In truth, the 2014 amendments did not significantly change the outlook on companies with different classes of shares being admitted to official listings in the UK.

[135] Reddy, *supra* note 133, at 328–330.

[136] *Id.* at 328.

[137] SRIDHAR ARCOT ET AL., LONDON SCH. OF ECON. AND POL. SCI., FROM LOCAL TO GLOBAL: THE RISE OF AIM AS A STOCK MARKET FOR GROWING COMPANIES, 59–61 (2007).

[138] James Chen, *London Stock Exchange (LSE): Definition, History, and Major Events,* INVESTOPEDIA (Aug. 10, 2022), https://www.investopedia.com/terms/l/lse.asp.

[139] Lord Jonathan Hill, U.K. LISTING REVIEW (Mar. 3, 2021)*, accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966133/UK_Listing_Review_3_March.pdf.*

[140] *Id.*

[141] Lord Jonathan Hill, U.K. LISTING REVIEW (Mar. 3, 2021), accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966133/UK_Listing_Review_3_March.pdf

premium listing segment was finally amended in December 2021, enabling an easier listing process for MVS in the main market.[142]

6. CONCLUSION

Over the past decade, several continental European countries have reinstated MVS in the form of dual-class share structures and/or loyalty shares. Both voting structures are deviations from the *one share, one vote* rule, resulting in voting power disproportionate to equity shareholdings.[143] However, there are many material differences between the two forms. In a dual-class voting structure, the company's articles of association establish different classes of shares with differentiated voting rights, which are superior for one class and inferior for at least one other.[144] Conversely, loyalty shares do not affect the company's capital architecture (as all shares remain fungible and equal) and confer an individual advantage to long-term shareholders under the company's bylaws: the reward of increased voting rights as a result of continuously holding shares for a pre-established period.[145]

The reinstatement of MVS has so far occurred in Italy, France, Belgium, Spain, and Portugal.[146] The European Commission also recently announced a proposed directive on MVS structures in companies that seek listing on an SME growth market.[147]

Various factors may explain this seemingly coordinated regulatory movement, such as regulatory competition, stock exchanges competing to attract listings, and the rapid shift in political perspective to the *one share, one vote* principle. However, the common movement toward easing limitations on MVS is more heterogeneous than coherent, with each jurisdiction adopting a different formula. There is, though, one common feature: all continental European reforms have been quite conservative and cautious towards the MVS solutions adopted.[148]

This paper contends that the most important explanation for this conservative approach is the common history of MVS in continental Europe. In countries like Germany,

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[142] Erik Lidman & Rolf Skog, *London Allowing Dual Class Premium Listings: A Swedish Comment*, 22 J. OF CORPORATE L. STUDIES 83, 87 (2021); *see also* Vincent Deluard, "A Costly Mistake for Investors, US Capital Markets, and Growth: Evidence from the Exclusion of Dual-Class Stocks from Popular Indices", *Available at SSRN: https://ssrn.com/abstract=4060296* (2022)

[143] Erik Lidman & Rolf Skog, *London Allowing Dual Class Premium Listings: A Swedish Comment*, 22 J. OF CORPORATE L. STUDIES 83, 87 (2021)

[144] *See id.*

[145] Mark J. Roe & Federico Cenzi Venezze, *Will Loyalty Shares do Much for Corporate Short-Termism?*, 76 THE BUSINESS LAWYER 467, 469 (2021)

[146] Paul Hodgson, *ISS Discusses Dual-Class Share Structures in Europe,* COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS (Feb. 13, 2023), https://clsbluesky.law.columbia.edu/2023/02/13/iss-discusses-dual-class-share-structures-in-europe/; See also David Olivera Festas & Francisco Albuquerque Reis, *A New Dawn for the Portuguese Stock Market,* Oxford Business Law Blog (Jan. 27, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/01/new-dawn-portuguese-stock-market#:~:text=Portuguese%20companies%20that%20issue%20shares,of%205%20votes%20per%20share.

[147] Commission Proposal for a Directive of the European Parliament and of the Council on Multiple-vote Share Structures in Companies that Seek the Admission to Trading of their Shares on an SME Growth Market, COM(2022) 761 final (Dec. 7, 2022).

[148] Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat,* EUROPEAN CORPORATE GOVERNANCE INSTITUTE (2015), accessed at https://www.ecgi.global/sites/default/files/working_papers/documents/SSRN-id2574236.pdf.

France, and Italy, MVS became especially popular following the end of the First World War.[149] The reasons for this massive popularization are intuitive – national protectionism. National protectionism is a very difficult macroeconomic environment, characterized by hyperinflation and currency devaluation, and the urgency to recapitalize companies in poor conditions to attract investors.[150] With no effective limit on the number of votes that could be granted per share, abuses of MVS were often perpetrated by company insiders including: board members, families controlling the company, their friends or professionally related persons, banks, and even the state. The only effective way to oppose this abusive environment was to ban the issuance of privileged voting shares.[151] Relevant prohibitions were introduced by France in 1933, Germany in 1937, Italy in 1942, and Spain in 1951.[152]

The UK companies law framework reflects a completely different historical experience and is among the most liberal legal frameworks on MVS.[153] However, this freedom is mainly used in the establishment of financial and/or dividend rights, whereas shares with enhanced voting rights are rarely issued.[154] This result is due to market pressure from institutional investors and the weight of operating traditions on regulated markets. It is, therefore, a market-driven outcome.

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[149] *See* Dominique Plihon, *Crises et batailles boursières en France aux XX e et XXI e siècles* (JSTOR, 2018), 755.

[150] *See* Julian Franks, Colin Mayer et al., *The Origins of the German Corporation–Finance, Ownership and Control*, REVIEW OF FINANCE (2006).

[151] *See Id.* at 555.

[152] *See Id.* at 9. *See also* Michele Corgatelli, *Multiple Voting Shares: Competition Among Jurisdictions in the Draft of the Italian "Decreto Rilancio"*, Fordham Journal of Corporate & Financial Law Blog (Jul. 24, 2020), https://news.law.fordham.edu/jcfl/2020/07/24/multiple-voting-shares-competition-among-jurisdictions-in-the-draft-of-the-italian-decreto-rilancio/; Benito Arruñada, "Un análisis económico de la regulación de la sociedad anónima en España", *Anales de estudios económicos y empresariales* (1988) 207–210; Muriel Petit, *Big Changes in Ownership Structures: Multiple Voting shares in Interwar France* (Oct. 19, 2006), (Thesis, University of Antwerpen, Belgium).

[153] Paul Davies, *"Shareholders in the United Kingdom", in* RESEARCH HANDBOOK ON SHAREHOLDER POWER (Edward Elgar Publishing, 2015).

[154] *See Id.*

FRENCH TORT LAW REFORM: A RAPPROCHEMENT TO OTHER LEGAL SYSTEMS?

*Dimitra Tsiaklagkanou**

ABSTRACT

The revision of French tort law is proving to be a long process, starting with a first draft by the working group directed by Pierre Catala and Geneviève Viney in 2005, and only reaching a proposed new law tabled by Senators in 2020. The need for revision arose due to the silence of the current French Civil Code on tortious liability, which was mainly developed over the last two centuries by the jurisprudence, while only five such articles can be found. The intended revision of French tort law looks beyond the codification of jurisprudential solutions and towards legal innovations. This paper will compare French tort law with the regulations of other legal systems, and will evaluate the proposed novelties adopted by French legal texts.

I. INTRODUCTION

The French tort law reform has sparked debate for nearly two decades. A preliminary draft to this reform was made in 2005 by the committee directed by Catala-Viney ("Catala-Viney draft of 2005"),[1] which was followed by a report in 2010 by the working group directed by Fr. Terré ("Terré draft of 2010").[2] A preliminary draft of the law was submitted for consultation in April 2016 ("preliminary draft law of 2016[3]") and a draft law presented on March 17, 2017 ("draft law of 2017") followed.[4] The final development in this law-making process was the proposed law filed by the Senate on July 29, 2020 ("law proposal of 2020"). The result of this legislative push is that the current five articles of tort law in the French Civil Code will be expanded to 56 articles, resulting in an eleven-fold increase in articles. To a large extent, the proposed reform codifies the case law that has been ruled on over the past two centuries since the introduction of the Napoleonic Code in 1804. This is certainly one of many

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[1] L'avant-projet de réforme du droit de la responsabilité, Actes du colloque du 12 mai 2006, Le Manuscrit (edn.), 2006; Pierre Catala, *Proposals for Reform of the Law of Obligations and the Law of Prescription* 1, (2007) (translation of the preliminary draft of 2005).

[2] Pour une réforme du droit de la responsabilité, Fr. Terré (dir.), Dalloz, 2011.

[3] *See* Alice Dejean de La Batie, *Proposals Reforming French Civil Liability Y: Translation of the proposals released by the French Government on April 29th 2016*, 2016, HAL OPEN SCI. (Oct. 28, 2016), https://hal.science/hal-01389343/document.

MINISTERE DE LA JUSTICE (Mar. 2017), http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf.[5] The Civil Code of Quebec entered into force in 1994. *See B. Moore*, Propos introductifs à deux voix: quelle(s) politique(s) juridique(s) pour réformer la responsabilité civile ?, in Vers une réforme de la responsabilité civile française, Regards croisés franco-québécois, Bl. Mallet-Bricout (dir.), Dalloz, 2018, p. 7.

benefits of the reform. However, we are more interested in another aspect of the reform: what new features does it bring? Of course, rewriting the Civil Code is not isolated to France, as civil codes have been reformed in Quebec in 1991,[5] in the Netherlands in 1992,[6] in Germany in 2002,[7] and in Romania in 2011.[8] We also add that there is ongoing reform to the Belgian Civil Code, and we emphasize that Quebec, Romanian, and Belgian[9] civil law were all based on the Napoleonic Code.

Among the innovations provided by the various law drafts, we highlight the transformation of tort liability in that its traditional function of the restoration of damage has been supplemented with preventive and punitive functions as well.[10] Therefore, a legislator no longer approaches tort liability solely in light of restoring the victim to the situation he would have been in if the harmful event had not occurred, but instead now seeks to expand the ends that can be achieved through tort liability.[11] The punitive purpose of compensation has been abandoned in the law proposal of 2020, but it seems this function of liability is now largely accepted in French law, even though it is absent in other European law systems, such as German or Greek law. In the present study, after some preliminary remarks on the structure of the revised tort liability, the tortious events in the law proposal are analyzed, including remedies provided to the victim for protection, and the possibility of invoking a contractual breach by third parties.

II. A SYSTEM OF LIABILITY BASED ON FAULT OR NOT?

In French law, liability requires the fault of the perpetrator and therefore, any behavior can be grounds for liability without considering the protected interests that are affected by this conduct.[12] At the same time, the Civil Code of 1804 contained special provisions in which either the fault of the person concerned was presumed (e.g., the parents of a child in the wrong, the keeper of an animal that destroyed something, or the artisans),[13] or there was an irrebuttable presumption of fault (e.g., of the employers ("commettants") for the actions of the employees

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[5] The Civil Code of Quebec entered into force in 1994. *See B. Moore,* Propos introductifs à deux voix: quelle(s) politique(s) juridique(s) pour réformer la responsabilité civile ?, in Vers une réforme de la responsabilité civile française, Regards croisés franco-québécois, Bl. Mallet-Bricout (dir.), Dalloz, 2018, p. 7.

[6] Goossens, Hendrik, *Dutch Civil Code,* DUTCH CIVIL LAW, http://www.dutchcivillaw.com/civilcodegeneral.htm.

[7] Reform of law of obligations of 2002: Bundesgesetzblatt (German Official Journal) 2001 I, 3138.

[8] *R. Dinca,* La recodification du droit de la responsabilité civile. La perspective du droit roumain, in La réforme du droit de la responsabilité en France et en Belgique, Bruxelles, Bruylant, 2020, p. 126.

[9] Eliaerts, et al., *Reform of the Civil Code,* LEXGO (2018), https://www.lexgo.be/en/news-and-articles/5311-reform-of-the-civil-code.

[10] *See, e.g., M. Boutonnet/C. Sintez/C. Thibierge*, Consacrons les fonctions et les effets de la responsabilité civile !, D. 2016, p. 2414; Alexander Bailly and Xavier Haranger, *Coming Soon: Punitive Damages, the French Way*, Morgan LEWIS (Nov. 5, 2018), https://www.morganlewis.com/pubs/2018/11/coming-soon-punitive-damages-the-french-way.

[11] *See id.*

[12] *Introduction to French Tort Law*, BRITISH INSTITUTE AND COMPARATIVE LAW, https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf (last visited Apr. 6, 2023).

[13] THE CODE NAPOLEON (William Benning, Law Bookseller eds., 1804).

("préposés").[14] Since the end of the 19th century, French jurisprudence[15] has established a general liability clause for things under one's custody ("garde de la chose"); which constitutes strict liability without requiring proof of fault and the possibility to absolve one of this liability by proving a lack of fault.[16] A similar development is observed in terms of responsibility for the actions of another person.[17] The intended revision maintains these jurisprudential solutions and adds important clarifications, however, an understanding in how tort liability has been structured in France compared to other countries is important to note.

1. Structural Remarks

In relation to contractual liability, the revisions partially achieve the unification of contractual and tortious liability[18] in terms of the effects of damage recovery, such as the calculation of the damage[19] and the limitation of liability clauses.[20] Moreover, the intended reform confirms the impossible choice between contractual and tortious liability when the conditions of the former are met.[21] This position is also followed by Quebec law, in which the Quebec Supreme Court's recognition of the victim's right to choose between contractual and tortious liability[22] was rejected during the revision of the Quebec Civil Code in 1991.[23] On the other hand, German and Greek law both allow the victim to choose the legal basis of his recourse.[24] Still, there are criticisms against the review method regarding double definitions, like performance *in natura* and *force majeure*,[25] found both in contract and liability law in the

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[14] *Id.*

[15] Decision Teffaine, French Supreme Court: Cour de cassation – Chambre civile ("Cass. civ."), 16.6.1896; Decision Jand'heur, Cour de cassation – Chambre réunies, 13.2.1930.

[16] *See id.*

[17] Article 1242 of the French Civil Code, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032041559; *Introduction to French Tort Law*, *supra* note 12, p. 5 note 11.

[18] *But see D. Bakouche*, De l'ordonnance du 10 février 2016 à l'avant-projet de loi portant réforme de la responsabilité civile : inconstance idéologique?, Responsabilité civile et assurances, 2016, no. 7-8, repère 7; *see also P. Le Tourneau*, Brefs propos critiques sur la « responsabilité contractuelle » dans l'avant-projet de réforme du droit de la responsabilité, Recueil Dalloz (D.) 2007, p. 2180.

[19] Art. 1235 – 1238 of the law proposal of 2020.

[20] Art. 1284 § 1 of the law proposal of 2020: "Clauses having the purpose or effect of excluding or limiting liability are valid". However, in extra-contractual liability, no one can exclude or limit his liability for fault (Art. 1286), while in contractual liability, clauses limiting or excluding liability have no effect in the event of gross negligence or fraud (Art. 1285). Therefore, limitation or exclusion of liability is possible in the case of minor faults (slight negligence).

[21] Art. 1233 § 1 of the law proposal of 2020.

[22] *See* Wabasso Ltd. v. National Drying Machinery, (1981) 1 R.C.S. 578.

[23] *B. Moore* (fn. 5), p. 7, 8.

[24] *See, e.g., O. Berg,* Les relations entre responsabilité contractuelle et extracontractuelle dans les projets français et belge (n. 8), p. 189, 191 ; *M. Stathopoulos*, Law of Obligations, 2004, p. 781, § 15, no 10.

[25] Art. 1218 of the French Civil Code. Art. 1253 of the Draft of Law 2020. In case of contract, the event should be unforeseeable and unavoidable, while in case of tort just unavoidable. However, we consider that the addition of the unforeseeability of the event in case of contractual liability is included in the condition that the event must be unavoidable, since a foreseeable event is avoidable by taking appropriate measures. Cf. *P.-H. Attonmattéi*, Ouragan sur la force majeure, La Semaine Juridique – Édition Générale (JCP G) 1996, 3907; *P. Grosser*, Force

Civil Code. In contrast, Quebec law has a uniform definition of *force majeure* in both contractual and tort liability.[26]

An innovation of the Senate law proposal is the enumeration of four cases of liability instead of the current three liability cases.[27] The three original cases of liability were tortious liability based on fault, strict liability for the actions of another, and the strict liability of the keeper of "a thing" (a thing under one's control or custody). Now, there is strict liability for unusual neighborhood disturbances, as it was already admitted in jurisprudence.[28] Notably, the law proposal successively mentions liability based on fault and cases of liability without fault, without establishing fault liability as a general principle.[29] In addition, a proposition for establishing liability for abnormally dangerous activities[30] has not been adopted, despite the fact that the Principles of European Tort Law (hereinafter "PETL") provide for this type of liability.[31]

Additionally, in the draft law of 2017, the responsibility for the acts of a third party was transferred from the damage-causing events, where the three cases of liability were listed, to a separate chapter under the title "Attribution of Damage Caused by Others."[32] It was argued that the peculiarity of this liability is that the person who committed the tortious event is not liable, but rather another person (i.e., a third party) is liable because of the connection existing between the third party and the person who caused the damage.[33] Therefore, it is not the tortious act that differentiates this case of liability from the other three cases, but instead it is the attribution of liability to a person other than the perpetrator.[34] However, including responsibility for the acts of others among the damaging events is in accordance with existing traditions in French doctrine.[35] Alternatively, the attribution of responsibility to a person is necessary, not only in the case of liability for the acts of others, but in every case of responsibility, such as liability of the parents, the keeper of a thing, and personal responsibility.[36]

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majeure - Pertinence des critères cumulés pour caractériser la force majeure en matières délictuelle et contractuelle, JCP G 2006, II 10087; *contra V. Rebeyrol*, L'appréciation de la force majeure par la Cour de cassation, D. 2018, p. 598.

[26] Art. 1470 of the Civil Code of Quebec: "Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics".

[27] Comp. Pierre Catala, *Proposals for Reform of the Law of Obligations and the Law of Prescription* 1, 174 (2007) (translation of the preliminary draft of 2005).

[28] *See* Pierre Catala, *supra* note 27 at 174, 192.

[29] Art. 1240 – 1249 of the law proposal of 2020.

[30] Art. 1362 of the Catala-Viney draft of 2005 (operator of an abnormally dangerous activity) and art. 23 of the Terré draft of 2010 (liability of an operator of a facility subject to classification).

[31] Art. 5:101 PETL ("A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it").

[32] Draft law of 2017 art. 1245-49 (Mar. 2017).

[33] *Id.*

[34] *D. Mazeaud/J.-S. Borghetti*, Imputation du dommage causé à autrui, in Pour une réforme du droit de la responsabilité civile extracontractuelle, F. Terré (dir.) (fn. 2), p. 149, 154.

[35] Draft law of 2017 art. 1245-49.

[36] *B. Waltz-Teracol*, Les responsabilités, une nouvelle présentation quadripartite, in Vers une réforme de la responsabilité civile française (fn. 5), p. 21.

2. The Hierarchy of Protected Interests

We note the easy establishment of liability in French law, as it provides a right to compensation for any damage, while there is no distinction between types of damage, other than the special treatment reserved for bodily injury.[37] Specifically, the law proposal of 2020 sets out a series of provisions that treat the victim who has suffered bodily injury more favorably than other victims.[38] In this way, physical damage is prioritized over the rest of the damages that must be remedied.[39] However, the restoration of any damage is not unique to French law, as Italian law adopts a similar approach.[40]

In a comparative overview, the French tortious liability system differs substantially from German tort law. In German law, there are three cases to establish liability: (1) when there is an infringement of certain absolute rights (e.g., life, body, health, freedom, property, or any right of a third party);[41] (2) when one violates a law protecting the interests of another person;[42] and (3) when there is an intentional infliction of damage which is contrary to public policy (*contra bonos mores*).[43] The jurisprudence added a damaging act directed against an enterprise ("Das Recht am eingerichtenstein und ausgeübten Gewerbebetrieb")[44] and an infringement to a general right to personality to the first case of liability.[45] However, protected rights do not include property or the totality of a person's economic interests.[46] Moreover, the special cases of tort liability provided for in the German Civil Code primarily established a presumption of fault and not strict liability.[47] Liability regardless of fault is provided only for companion

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[37] Art. 1262 of the law proposal of 2020.

[38] *Id.* at art. 1262, 1270.

[39] *Id.* at art. 1270.

[40] *St. Porchy-Simon*, La réparation du préjudice moral : quelles limites?, in Vers une réforme de la responsabilité civile française (fn. 5), p. 109, 117; *J. Knetsch*, Les limites de la réparation du dommage corporel, Bruxelles, Larcier, 2017, p. 175 et seq.

[41] Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823 (1) ("A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.").

[42] *Id. at* § 823 (2) ("The same duty is held by a person who commits a breach of a statute that is intended to protect another person.").

[43] *Id.* § 826 BGB ("A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.").

[44] *See* W.H. Van Boom, *Pure Economic Loss - A Comparative Perspective*, Business and Law Research Centre 1, 8 (2004) (Available at SSRN: https://ssrn.com/abstract=555809) ("A right to the undisturbed exploitation of 'established and operative business'").

[45] *Id.*

[46] *G. Mäsch*, La préparation du préjudice purement économique : la situation en droit allemand, in La réforme du droit de la responsabilité civile en France, 8e Journées franco-allemandes, G. Wicker/R. Schulze/G. Mäsch (eds.), Société de législation comparée, 2021, p. 141, 143.

[47] Johannes W. Flume, *Strict Liability in Austrian and German Law*, 12(3) JETL 205, 210 (2021).

animals, while liability is just presumed for animal custodians,[48] parents,[49] supervisors,[50] or principals (i.e., employers).[51] The cases of animals serving the economic activity or subsistence, of the keeper for the actions of minors or disabled persons are comparable to the actions of agents or employees (*culpa in vigilando* or *in eligendo*).[52] Liability for dangerous acts is only provided for in special laws and there is therefore, no general clause comparable to what exists in French law.[53] In terms of reparable damage, moral damage is remedied only in the cases listed by law,[54] to which jurisprudence has added the infringement of the general right to personality.[55] Moreover, it is not possible to restore the indirect damage reflexively suffered by third parties,[56] unless the existence of contractual liability towards the third party is accepted.[57]

Special mention should be made of pure economic loss in German law, such as a loss of present or future profit, like the loss of a person's future income or a business's future profits.[58] The distinction between pure economic loss and normal economic loss depends on whether the infringement involves a tangible or intangible asset.[59] If the economic loss is the result of physical injury or damage to a tangible asset, it is a normal economic loss and must be

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48 *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 833 ("If a human being is killed by an animal or if the body or the health of a human being is injured by an animal or a thing is damaged by an animal, then the person who keeps the animal is liable to compensate the injured person for the damage arising from this. Liability in damages does not apply if the damage is caused by a domestic animal intended to serve the occupation, economic activity or subsistence of the keeper of the animal and either the keeper of the animal in supervising the animal has exercised reasonable care or the damage would also have occurred even if this care had been exercised").

49 *Id.* at § 832 (1) ("A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision")/

50 *Id.* at § 832 (1) ("A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision. (2) The same responsibility applies to any person who assumes the task of supervision by contract").

51 *Id.* at § 831(1) ("A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised".)

52 *Id.*

53 *See* Flume, *supra* note 47.

54 *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 253 ("(1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law. (2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss".)

55 Marcus von Weiser, *The essentials of publicity rights in Germany*, LEXOLOGY (Nov. 19, 2019), https://www.lexology.com/library/detail.aspx?g=88b7beff-d158-4551-a89b-80aa4da2496b.

56 *O. Berg* (fn. 24), p. 446, 450. Exception applies to the cases of § 844 para. 2 BGB.

57 W.H. Van Boom, *Pure Economic Loss - A Comparative Perspective*, Business and Law Research Centre 1, 9 (2004) (Available at SSRN: https://ssrn.com/abstract=555809).

58 *Id.* at 10-11. *See H. Boucard*, La réparation du préjudice purement économique dans le projet de réforme français, in La réforme de la responsabilité civile en France (fn. 46), p. 128.

59 *Id.* at 5.

compensated.[60] On the other hand, pure economic loss does not fall within the scope of § 823 para. 1 BGB.[61] In the case of a violation of a law protecting one person's rights under § 823 para. In 2 BGB, pure economic loss must be restored if the violated rule aimed to avoid this damage.[62] It is possible to restore pure economic loss pursuant to § 826 BGB, however it is difficult to meet the conditions of harmful conduct contrary to public policy.[63] Additionally, pure economic loss is normally recovered in cases of contractual liability,[64] and in German law, contractual liability has an expanded scope. For example, § 311 para. 2 accepts the existence of contractual liability when an expert provides information and advice to a person who shows confidence to the expert; and upon the existence of quasi-contractual liability during the pre-contractual stage.[65] In addition, § 311 para. 3 establishes a contract with protective effect in favor of third parties when (a) the third party benefits from the contractual provision; (b) the contracting party has an interest in extending the protection of the contract in favor of the third party; (c) the liable contracting party knows that the two above conditions are met; and (d) it is necessary to broaden the subjective scope of the contract because no other protection is provided to the third party.[66]

Contrary to German law, French law makes no distinction based on the type of damage; for this reason any established loss must be compensated.[67] In French law, the limitation of the loss to be compensated is achieved by invoking the conditions of liability, such as the harmful event, the causation, and the existence of damage.[68] Therefore, while the non-compensation of pure economic loss is established as a principle in German law and its restoration is possible in the above cases,[69] the principle of restoration of any loss applies in French law.[70] We also note that in Swiss law, pure economic loss, which is related neither to physical damage nor to material damage, must be restored when its protection falls within the

[60] D. *Nolan/J. Davies*, Torts and Equitable wrongs, in Principles of the English law of obligations, A. Burrows (ed.), Oxford, 2015, para. 2.148, p. 172; *H. Koziol*, Recovery for economic loss in the European Union, Arizona Law Review, vol. 48, 2006, p. 871, 872.

[61] However, pure economic loss is recoverable in case of infringement of the 'right to business'. *W.H. Van Boom* (fn. 44), p. 7, 8; *G. Mäsch* (fn. 46), p. 143 et seq.; *M. Fromont/J. Knetsch*, Droit privé allemande, 2nd edn. 2017, Paris, LGDJ-Lextenso éd., p. 209 et seq., no 364 et seq.

[62] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823, para. 2.

[63] *Id.* at § 826.

[64] § 280, para. 1 BGB. See, e.g., *J. Traullé*, La réparation du préjudice économique « pur » en question, RTD civ. 2018, p. 285 et seq.

[65] According to this Section: "1. the commencement of contract negotiations, 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or 3. similar business contacts".

[66] According to this Section: "(3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract"; *see also G. Mäsch* (fn. 46), p. 147; *O. Berg* (fn. 24), p 195.

[67] *See* Koziol, *supra* note 60.

[68] *H. Boucard*, La réparation du préjudice purement économique dans le projet de réforme français, in La réforme de la responsabilité civile en France (fn. 58), p. 125, 136.

[69] *See* Traullé, *supra* note 64.

[70] *See* Cour de cassation [Cass.] civ. 2e, 16.12.2021, no. 19-11.294, https://www.legifrance.gouv.fr/juri/id/JURITEXT000044571127?init=true&page=1&query=19-11.294&searchField=ALL&tab_selection=all.

protective purpose of the applicable rule,[71] while a general liability clause is provided similar to French and Greek law.[72]

In Greek law, as in German law, monetary compensation is due for extra-patrimonial damage in the cases defined by law, like an insult to personality[73] and torts.[74] In cases of tort, compensation for extra-patrimonial damage applies to the person who suffered an insult to their health, honor or chastity, or who was deprived of their freedom.[75] In the event of a person being killed, compensation may be awarded to the victim's family.[76] Bodily injury falls within the scope of Articles 57 ("right to personality") and 914 ("torts") of the Greek Civil Code.[77] Article 914[78] establishes personal liability under two conditions: illegality and fault.[79] Tortious liability is also provided for inflicting damage on another person in a manner contrary to public policy ("society's morals")[80] according to the model of § 826 BGB.[81] Vicarious liability is strict,[82] and the same applies to the liability of the keeper of an animal that is not used for either a profession or guarding residence.[83] The fault of the keeper of the animal in the latter cases is presumed. Fault is also presumed for a supervisor of another person or an adult who is under judicial support.[84] The liability of the owner of a building for the damage due to its fall is strict.[85]

The system of general clauses followed by French law is completely at odds with the system of English tort law.[86] For example, English tort law provides for a list of acts that give rise to tortious liability, where each has its own conditions of application, requires the infringement of a certain interest, and provides its own remedies.[87] Compensation for harm to

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71 *P. Wessner*, Les effets de la responsabilité civile dans la perspective d'une révision du code civil français : quelques observations débridées d'un juriste suisse, in L'avant-projet de réforme du droit de la responsabilité (fn. 1), p. 301.

72 Art. 41 Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches: "Anyone who unlawfully causes damage to another, whether intentionally or through negligence, is obliged to compensate him".

73 Art. 59 of the Greek Civil Code https://www.ministryofjustice.gr/wp-content/uploads/2019/10/%CE%91%CF%83%CF%84%CE%B9%CE%BA%CF%8C%CF%82-%CE%9A%CF%8E%CE%B4%CE%B9%CE%BA%CE%B1%CF%82.pdf; PENELOPE ALLOPOULOU, BASIC CONCEPTS OF GREEK CIVIL LAW 49, 51 (2005).

74 Art. 932 of the Greek Civil Code.

75 *Id.*

76 *Id.*

77 *E.g.*, Magistrate's Court of Thessaloniki 526/2020, available at https://www.dsanet.gr/Epikairothta/Nomologia/EirThes%20526.2020.htm.

78 Art. 914 of the Greek Civil Code: "Anyone who damages another illegally and culpably (by fault) has an obligation to compensate him" (translation). *See* ALLOPOULOU, *supra* note 73 at 225.

79 *See id.*

80 Art. 919 of the Greek Civil Code.

81 *See* § 826 BGB.

82 Art. 922 of the Greek Civil Code. *See* ALLOPOULOU, *supra* note 73 at 231.

83 Art. 924 of the Greek Civil Code. *See id* at 223.

84 Art. 923 of the Greek Civil Code.

85 Art. 925 of the Greek Civil Code.

86 *See, e.g.*, Ralph Surma, *A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence*, 8 OXFORD U. COMPAR. L. F. 1 (2000).

87 *Ph. Remy*, Réflexions préliminaires sur le chapitre Des délits, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 16, 28.

pure economic interests is more widely accepted when the perpetrator has acted intentionally.[88] As a general category of acts inflicting damage, the tort of negligence exists when the unreasonable conduct of one person causes another person a foreseeable damage in breach of the former's duty to look after the latter's interests.[89] In other words, it presupposes a duty of care[90] that takes into account the nature of the damage, and that will be admitted in very limited circumstances in cases of pure economic loss,[91] mental harm, and by omission.[92] Therefore, the duty of care in English law is differentiated from the duty of diligence in French law.[93]

Moreover, cases of liability without fault ("strict liability") are minimal, and include vicarious liability, which does not exclude the employee's personal liability,[94] liability for defective products due to the incorporation of the European Directive,[95] or breach of statutory provisions.[96] On the contrary, the tort of negligence applies to a person supervising another person, and for parents, the duty of care decreases as the child's age increases.[97]

While French law treats all of these cases of liability for another's acts as strict liability, other than the case where someone undertakes the organization of another's life based on a contract, in Quebec law the keeper of a thing has no strict liability, but fault is presumed.[98] The same applies to the responsibility of the parents, who are presumed to be at fault for the custody, education, and supervision of their children.[99] Fault is required to establish liability[100] regarding neighborhood nuisances,[101] despite the original jurisprudence that did not require fault.[102]

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[88] *J. Traullé* (fn. 64), p. 285 et seq.; *D. Nolan/J. Davies* (fn. 60), para. 2.147 et seq., p. 172 et seq. and para. 2.356 et seq., p. 227; *W.H.Van Boom* (fn. 44), p. 11; *See* Mario Bussani & Vernon Valentine Palmer, *Pure Economic Loss in Europe*, CAMBRIDGE UNIVERSITY PRESS (2003) at 22 https://beckassets.blob.core.windows.net /product/readingsample/380169/9780521824644_excerpt_001.pdf.

[89] *See* Danny Watson, Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability, 2 MANCHESTER L. REV. 1, 3 (2013).

[90] *S. Taylor/M. Dyson/D. Fairgrieve*, Regards comparatifs sur les projets de réforme français et belge, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 134, 135; *J. Traullé* (fn. 64), p. 285 et seq.

[91] *Ibid.*, p. 139. See also *D. Nolan/J. Davies* (fn. 60), para. 2.148 et seq., p. 172 et seq. Particular criteria taken into account are foreseeability and proximity. *W.H. Van Boom* (fn. 44), p. 11; *J. Traullé* (fn. 64), p. 285 et seq.

[92] *Ph. Remy* (fn. 87), p. 29.

[93] *See* Danny Watson *supra* note 89 at 3.

[94] *S. Taylor/M. Dyson/D. Fairgrieve* (fn. 90), p. 142.

[95] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[96] *See* Cornell Law School, *Products Liability*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/ wex/products_liability (last visited Apr. 3, 2023).

[97] *Ph. Remy* (fn. 87), 30.

[98] *B. Moore* (fn. 5), p. 9.

[99] *Id.*, p. 9. Art. 1459 of the Civil Code of Quebec: "A person having parental authority is bound to make reparation for injury caused to another by the act, omission or fault of a minor under his authority, unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor. A person deprived of parental authority is bound in the same manner, if the act, omission or fault of the minor is related to the education he has given to him".

[100] Ciment St. Laurent v. Barette, (2008) CSC 64.

[101] Art. 976 of Civil Code of Quebec: Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage.

[102] Drysdale v. Dugas, (1896) 26 R.C.S. 64.

Furthermore, despite the advantages presented by the provision of a general clause regarding the restoration of damage, there is a risk that any non-fulfilment of a contractual obligation could be characterized as a fault that also entails tortious liability. In French law, this risk is avoided by the impossibility of concurrent contractual and tort liability.[103] Alternatively, in German law contractual and tortious liability can be concurrent. However, when there is no injury to the contracting party or his property, contractual non-performance usually results in pure economic loss that is not recoverable under tortious liability.[104] Considering that, as a principle, pure economic loss is not recoverable in German tort law, the application of tort law in cases of non-performance is not of interest.[105] As a result, both systems of law use different means to limit the application of tortious liability to contractual misconduct.

The Draft Common Frame of Reference (hereinafter "DCFR") does not provide for a general recovery clause, but instead makes damage conditional on the presence of a legally relevant damage.[106] This damage occurs when: "(a) one of the following rules of this Chapter so provides; (b) the loss or injury results from a violation of a right otherwise conferred by the law; or (c) the loss or injury results from a violation of an interest worthy of legal protection."[107] However, the interests worthy of legal protection are determined by the judge in the DCFR rather than by a closed list defined by legislators, as is the case in German law.[108] The criteria that the judge should consider for characterizing an interest as fair and reasonable are the nature and proximity of the damage, as well as the reasonable expectations of the victim.[109] The non-limiting list of legally relevant damages includes personal injury,[110] infringement of dignity, privacy,[111] property or lawful possession,[112] providing incorrect advice or inaccurate information,[113] or inducing a third party to not perform its contractual obligation.[114] Furthermore, specific cases of strict liability are set out in Articles VI. 3: 201 – 3: 208, such as the liability of employers, persons who exercise control over an immovable, persons who have an animal, persons who have dangerous substances, or an operator of an installation, while a presumption of fault is established for a parent's liability.[115]

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[103] Cour de cassation [Cass.] civ. 1[re,] 28.6.2012, no. 10-28.492.

[104] *Ph. Remy* (fn. 87), p. 42.

[105] *Ph. Remy/J.-S. Borghetti*, Présentation du projet de réforme de la responsabilité délictuelle, in Pour une réforme du droit de la responsabilité, Fr. Terré (ed.) (fn. 2), p. 61, 70.

[106] DRAFT COMMON FRAME OF REFERENCE art. III. 1: 102.

[107] Art. VI. 2: 101 (1) DCRF.

[108] DRAFT COMMON FRAME OF REF. ART. VI. 2: 101.

[109] Art. VI. 2: 101 (3) DCRF.

[110] Art. VI. 2: 201 DCRF.

[111] Art. VI. 2: 203 DCRF.

[112] Art. VI. 2: 206 DCRF.

[113] Art. VI. 2: 207 DCRF: Loss upon reliance on incorrect advice or information. Loss caused to a person as a result of making a decision in reasonable reliance on incorrect advice or information is legally relevant damage if: (a) the advice or information is provided by a person in pursuit of a profession or in the course of trade; and (b) the provider knew or could reasonably be expected to have known that the recipient would rely on the advice or information in making a decision of the kind made. Thus, in these cases compensation for pure economic damage is subject to strict conditions. See also Art. VI. 2: 208 (loss upon unlawful impairment of business). This loss reminds us of the protection of an enterprise under § 823 (I) BGB in German law. *See J. Traullé*, fn. 64.

[114] Art. VI. 2: 211 DCRF.

[115] Art. VI. 3: 104 DCRF.

The PETL refer to "material or immaterial harm to a legally protected interest,"[116] implicating an indicative ranking of the protected interests in descending order as follows: life, bodily or mental integrity, property rights, pure economic interests and contractual relationships.[117] No type of damage is excluded from the scope of reparation in the PETL.[118] In addition to the nature of the liability (e.g., intentional harm), the interests of the actor in terms of his liberty of action and exercising his rights are taken into consideration along with public interests.[119] Aside from the strict liability provided for the acts of auxiliaries[120] and for abnormally dangerous activities,[121] a presumption of fault exists for the persons in charge of a minor or a disabled person,[122] or those who engage in a simply dangerous activity that is not an abnormal activity.[123] Moreover, an additional case of liability is laid down for those who have a duty to protect others from damage.[124]

3. Fault in The Revised Law Proposal

The proposed law defines fault by adopting the definition of the Catala-Viney draft of 2005: "A fault is the violation of a legal or regulatory requirement, as well as a breach of the general duty of care or diligence."[125] Thus, the fault can result either from the violation of a legal text or from an error of conduct.[126] This definition equates fault with an illegal act as in the German and Greek law systems, but differs from those two systems in that it omits any reference to the subjective disposition of the perpetrator (i.e., whether willful or negligent). The distinction between an objective element, illegality, and a subjective element, culpability, is also followed by the European drafts.[127] Consequently, a normative role is assigned to "faute" in French law, which determines what acts establish tortious liability, a function performed by the concept of illegality in several other law systems. The deletion of the existing reference to negligence or recklessness in Article 1241 of the French Civil Code can also be justified given that the degree of gravity of fault has no consequences in terms of the restoration of damage in tort liability.[128] Moreover, the subjective attribution of fault to a person has no influence in

[116] Art. 1:101 PETL.
[117] Art. 2:102 PETL.
[118] *J. Traullé* (fn. 64), p. 285 et seq.
[119] Art. 2:102(6) PETL.
[120] Art. 6:102 PETL. See *P. Giliker*, Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective, (2011) 2 JETL 31, 38.
[121] Art. 5:101 PETL.
[122] Art. 6:101 PETL.
[123] Art. 4:201 PETL.
[124] Art. 4:103 PETL.
[125] Art. 1241 of the law proposal of 2020. See art. 1241 of the French Civil Code.
[126] *See id.*
[127] Art. 4:101 PELT ("A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct"); Art. VI. 1:101 DCFR ("(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage").
[128] Art. 1241 of the French Civil Code (notably, there is no longer a reference to "negligence" or "recklessness").

establishing liability, since even those without volition are tortiously liable.[129] For example, the requirement of a subjective attribution of fault was abandoned in 1964 for children[130] and in 1968 for the disabled.[131] However, the intent or negligence of the tortfeasor is also weighed upon in French law, as is apparent from the existing Articles 1240 and 1241 of the French Civil Code.[132]

Furthermore, a particular treatment of disabled persons also exists in German[133] and Greek law.[134] Both allow the judge to award reasonable compensation to the victim. This is imposed as a lenient solution regarding the disabled[135] in order to avoid the risk of the victim bearing the consequences of a loss not caused by himself. A similar solution based on the principle of leniency also applies to the DCFR.[136] Moreover, a rapprochement of both German and Greek law can also be observed in that when the illegality constitutes a breach of duty of care, the objective element is identified with the subjective element.[137] In other words, in this case the perpetrator did not demonstrate diligent behavior of a reasonably prudent person belonging to his trading circle; in order to define the prudent person any particular qualities of the actor should be taken into account.[138] We find that German law requires the violation of an absolutely protected good (e.g., life, body, health, etc.) or the violation of a law that protects an injured interest, and also requires culpability. Similarly, in Greek law, two conditions are required for the establishment of tortious liability: a fault and an illegal act that should fall within the protective purpose of the violated rule (according to correspondence with German law).[139] The general clause of Article 914 of the Greek Civil Code is also applied in the event of a breach of the duty of care, and in this respect, includes behaviors that are qualified in French law as "*faute*."[140] Still, in French law "*faute*" seems to be identified with the concept of illegality.[141]

Regarding causation, the law proposal of 2020 deposited by the Senators does not give any definition of this, nor does the Catala-Viney draft of 2005, although the Terré draft of

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[129] *See* Cour de cassation – Assemblée Plénière ("Cass. ass. plén."), 9.5.1984, JCP G 1984, II, 20256, commented by *P. Jourdain*; Law No. 68-5 of January 3, 1968 (Art. 489-2 of Civil Code)

[130] Cour de cassation – Assemblée Plénière ("Cass. ass. plén."), 9.5.1984, JCP G 1984, II, 20256, commented by *P. Jourdain*.

[131] Law No. 68-5 of January 3, 1968 (Art. 489-2 of Civil Code).

[132] CODE CIVIL [C. CIV.][CIVIL CODE] art. 1241 (Fr.).

[133] § 829 BGB.

[134] Art. 915-918 of the Greek Civil Code.

[135] *C. Bloch*, Définition de la faute, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 101, 109.

[136] It is provided that the child has no responsibility under the age of 7, unless the victim cannot receive compensation from another person, or liability to make reparation would be equitable taking into account the financial means of the parties or the circumstances (Art. VI. 3 :103 DCFR). See also *J.-S. Borghetti*, De la causalité, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 143, 145.

[137] *See M. Stathopoulos* (fn. 24), p. 293, § 7, no. 72; *Ap. Georgiadis*, Law of obligations, 2nd edn. 2015, p. 660, no. 23.

[138] *Id.*

[139] Art. 914 of the Greek Civil Code; *see M. Stathopoulos* (fn. 24), p. 797, § 15, no. 37.

[140] ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 914 (Greece).

[141] *See, e.g.*, Cour de cassation – Chambre criminelle ("Cass. crim."), 16.3.2022, n° 20-86.502, presented by Victor Trouttet, *The mere fact that a victim has committed a faute simple (i.e. mere negligence) reduces his right to compensation*, SOULIER AVOCATS (Apr. 15, 2022), https://www.soulier-avocats.com/en/the-mere-fact-that-a-victim-has-committed-a-faute-simple-i-e-mere-negligence-reduces-his-right-to-compensation/.

2010 did.[142] Similarly, the DCFR gives a definition of causation without providing any criteria,[143] and also refers to collaboration and alternative causation.[144] On the other hand, the PETL define *conditio sine qua non* as a necessary condition,[145] restrict the damage that may be attributed to a person on the scope of liability[146] and include provisions for concurrent, alternative, or potential causes and uncertain partial causation.[147] As for the limiting conditions of liability, although they are also allowed in tortious liability, liability cannot be excluded when there is fault on the part of the actor.[148] This arrangement differs from that of German law, where the limitation of tortious liability is possible, as this liability is not a regulation of public policy.[149]

4. Liability for Acts of Third Parties: Employers, Parents, Persons Entrusted with the Control of the Life or the Activity of Others

Regarding liability for the acts of others, an employer is strictly liable for the acts of his employee, unless the employee acted outside the functions for which he was hired without authorization and for purposes unrelated to his duties.[150] The exemption of the employer from his liability under these three conditions has already been accepted by the jurisprudence (abuse of office).[151] The law proposal of 2020 provides an additional case for exempting the employer from liability when a victim does not legitimately believe that the employee was acting on

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[142] *Dalloz*, *supra* note 2.

[143] Art. VI. 4:101 (1) DCFR: "A person causes legally relevant damage to another if the damage is to be regarded as a consequence of that person's conduct or the source of danger for which that person is responsible".

[144] Art. VI. 4:102 and art. VI. 4: 103 DCFR.

[145] Art. 3: 101 PETL: "An activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred".

[146] Art. 3: 201 PETL: "Where an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity; b) the nature and the value of the protected interest (Article 2:102); c) the basis of liability (Article 1:101); d) the extent of the ordinary risks of life; and e) the protective purpose of the rule that has been violated". See also *J.-S. Borghetti* (fn. 136), p. 143, 144.

[147] Art. 3: 102 PETL; Art. 3: 103 PETL; Art. 3: 104 PETL; Art. 3: 105 PETL.

[148] Art. 1286 of the law proposal of 2020 (« En matière extracontractuelle, nul ne peut exclure ou limiter sa responsabilité pour faute").

[149] *O. Berg* (fn. 24), p. 192.

[150] When the employee acted during work time, in the workplace, and using his work instruments, there is no abuse of duties, because the act is within the scope of his duties. Cour de cassation – Deuxième chambre civile ("Cass. civ. 2e "), 17.3.2011, no. 10-14.468, Bulletin civil ("Bull. civ.") II, no. 69.

[151] Cour de cassation [Cass.] ass. plén., 19.5.1988, no. 87-82.654, Bull. ass. plén., no. 5, Gazette du Palais (Gaz. Pal.) 1988, 2, 640, conl. Dorwing-Carter, Revue trimestrielle de droit civil (RTD civ.) 1989, p. 89 commented by *P. Jourdain*; D. 1988, p. 513 commented by *Ch. Larroumet*; Défrenois 1988, p. 1097, commented by *J.-L. Aubert*.

behalf of the employer,[152] which has been admitted by the jurisprudence[153] and takes the victim's fault into account.[154] The existence of a dependency relationship is required for liability, which is defined in the law proposal of 2020 as: "[t]he principal is the person who has the power to give the employee orders or instructions in relation to the performance of his duties."[155] The power to issue orders or instructions suffices, even if the effective exercise of this power is not necessary;[156] this provision would be in contradiction with the jurisprudence that accepts that the person in question has just to have acted in the interest of another (the principal).[157]

The law proposal of 2020 waives the immunity of the agent "in case of intentional misconduct, or when, without authorization, he acted for purposes unrelated to his attributions."[158] We consider civil or penal intentional fault to constitute intentional misconduct.[159] The agent's immunity is extended compared to the case law,[160] which admitted the agent was personally liable in cases of intentional criminal misconduct ("*faute pénale intentionnelle*"),[161] qualified criminal misconduct ("*faute pénale qualifiée*"),[162] or for any criminal offense.[163] Thus, the non-intentional fault, the qualified fault of the agent within the meaning of Article 121-3 of the Penal Code, or the commission of a criminal offense is no longer sufficient for that the agent to be held liable.[164] However, in the law proposal of 2020,

[152] Art. 1286 § 3 of the law proposal of 2020.

[153] Cour de cassation [Cass.] civ. 2e, 13.11.1992, no. 91-12.143, Bull. civ. 1992, II, no. 261; RTD civ. 1993, p. 371, commented by *P. Jourdain*. Cf. *A. Denizot*, Pour une vraie réforme du droit de la responsabilité civile, RTD civ. 2020, p. 958: The author is critical of this provision and remarks that this jurisprudence concerns only special hypotheses of embezzlement operated by an employee. On the contrary, when the employee has caused bodily injury, it should not be examined if he acted in such a way as to suggest that he was doing so on behalf of the principal.

[154] Comp. the victim is assumed to be in bad faith: footnote 24 under Art. 1359 of the Catala-Viney draft of 2005, in L'avant-projet de réforme du droit de la responsabilité (fn. 1), p. 381. However, the victim was not in bad faith in the jurisprudence concerned.

[155] Art. 1248 of the law proposal of 2020. Cf. jurisprudence is consistent with the proposed definition: Cour de cassation [Cass.] crim., 7.11.1968, no. 68-90.118, Bull. crim., no. 291.

[156] *Id.*

[157] Cour de cassation [Cass.] civ. 2e, 11.12.1996, no. 94-17.870; Cour de cassation [Cass.] civ. 2e, 15.5.2008, no. 06-22.171, Bull. civ. II, no° 108, RTD civ. 2008, p. 680, commented by *P. Jourdain*. See also *O. Sabard/J. Traullé*, Les faits générateurs de responsabilité dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 262, 291.

[158] Art. 1248 § 2 of the law proposal of 2020.

[159] *O. Sabard/J. Traullé* (fn. 157), p. 272.

[160] Agent's immunity was established as a principle in the decision Costedoat, Ass. plén., 25.2.2000, no. 97-17.378.

[161] Decision Cousin (intentional criminal offense), Cour de cassation [Cass.] ass. plén., 14.12.2001, no. 00-82.066, Bull. civ. ass. plén., no. 17; RTD civ. 2002, p. 108, commented by *P. Jourdain*; D. 2002, p. 1230, commented by *J. Julien*; *ibid*. somm. 1317, commented by *D. Mazeaud*; JCP G 2002, II, 10026, commented by *M. Billiau*; *ibid.* I, 124, nos. 22 et seq., commented by *G. Viney*.

[162] Cour de cassation [Cass.] crim., 28.4.2006, no. 05-82.975.

[163] Cour de cassation [Cass.] civ. 2e, 21.2.2008, no. 06-21.182, D. 2008, p. 2125, commented by *J.-B. Laydu*; JCP 2008, I, 186, commented by *Ph. Stoffel-Munck*.

[164] Victor Trouttet, *The Mere Fact That a Victim has Committed a Faute Simple (i.e. Mere Negligence) Reduces His Right to Compensation, Soulier Avocats* (Apr. 15, 2022), https://www.soulier-avocats.com/en/the-mere-fact-that-a-victim-has-committed-a-faute-simple-i-e-mere-negligence-reduces-his-right-tocompensation/#:~:text=Article%20121%2D3%20of%20the,it%20is%20a%20careless%20mistake.

an agent will be personally liable when he is acting without authorization and for purposes unrelated to his duties.[165] In other words, when two of three existing criteria for abuse of office are met, but not when the agent acts outside the functions for which he was hired, the victim can act against both the agent and the principal.[166]

When the victim can appeal against the principal, the insurer of the latter cannot bring an action ("*action récursoire*") against the employee, only against the employee's insurer.[167] However, if there is a contract between the victim and the employer, only contractual liability will exist, and the application of the provisions concerning tort liability will be excluded.[168] We consider that if the victim can choose to turn against the agent or principal, as in German and Greek law[169], it would grant the victim autonomy. In other words, the general principle of dealing with liability for the acts of another allows the combination of the liability of both the person who acted and the person who is liable for the acts, and should not be limited as far as the employer's liability is concerned.

Interestingly, the proposal that was formulated in the Catala-Viney draft of 2005 regards the complementarity of the liability of the employee; he should only bear responsibility if the victim cannot be satisfied by the employer.[170] The benefit of discussion relating to the guarantee in which a creditor must turn first against the principal debtor and then against the surety allows for a deeper understanding of the law.[171]

According to the law proposal of 2020, a distinction should be drawn between whether a person organizes and controls the way of life of another, or just controls the activity of another.[172] In the first case, the reform confirms the existing jurisprudence where a person is liable for the acts of another if he organizes and controls permanently the way of life of that person, by judicial or administrative decision.[173] This rule was established in 1991 by the *Blieck* decision[174] in which the liability of an institution for the acts of a disabled person was accepted, and it has been argued that liability for the acts of another has been established as a general principle.[175] However, the law proposal of 2020 rejects this general principle and seems to restrict the liability for acts of another only in cases that will be provided for in the revised Civil

165 Art. 1248 of the law proposal of 2020. *See* art. 1249, preliminary draft of 2016, *Alice Dejean de La Batie*, *supra* note 3 at 5.

166 *See O. Sabard/J. Traullé* (fn. 157), p. 272.

167 Cour de cassation – Première chambre civile ("Cass. civ. 1re"), 12.7.2007, nos. 06-12.624 and 06-13.790, Bull. civ. I, no. 270.

168 *A. Outin-Adam*, Responsabilité des employeurs et salariés, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) 187, p. 157, 158.

169 Eugenia Dacoronia, *Tort Law in Greece. The State of Art*, NAT'L AND KAPODISTRIAN UNIV. OF ATHENS 1, 15-16.

170 Art. 1359-1 of the Catala-Viney draft of 2005.

171 *See Tenets of Surety Law*, SURETY ASPECTS OF BANKRUPTCY LAW AND PRACTICE (last accessed Apr. 15, 2023), 4, https://www.americanbar.org/content/dam/aba-cmsdotorg/products/inv/book/411453539/chap1-5190564.pdf.

172 *Comp.* art. 1247 et seq. of the preliminary draft law of 2016; Alice Dejean de La Batie, *supra* note 3 at 5.

173 Art. 1246 of the law proposal of 2020.

174 Cour de cassation [Cass.] ass. plén., 29.3.1991, Bull. civ. I, no. 1; D. 1991, p. 324, commented by *Ch. Larroumet*; RTD civ. 1991, p. 312, commented by *J. Hauser*; *ibid.*, p. 541, commented by *P. Jourdain*.

175 Fr. Terré/Ph. Simler/Y. Lequette/F. Chénedé, Droit civil. Les obligations, 12e edn., Paris, Dalloz, n° 1034.

Code.[176] The same solution, strict responsibility, is also established for persons assigned to permanently organize and control the life of a minor,[177] but it does not apply to those assigned to organize the life of a major in accordance with the jurisprudence.[178]

Regarding the organization and control of the activity of another, the law proposal of 2020 establishes a presumption of fault under two conditions: (1) the person has assumed this role by contract; and (2) that he is acting as a professional.[179] In addition, a new case not existing in jurisprudence is provided for in the law proposal when a person undertakes under the above two conditions the supervision ("surveillance") of another person, and his fault is also presumed.[180] Consequently, the jurisprudence concerning cheerleading clubs[181] or amateur sports centers,[182] which are not acting as professionals, is abandoned. Clubs have no longer a strict responsibility and are only to be held liable if it is established that the victim has entered a contract with them. The case law had admitted that a person entrusted with the custody of a minor or an adult by a contract does not bear strict responsibility; this solution is also abandoned.[183] The lack of custodian's strict responsibility was justified in first case by the fact that parents are liable for the acts of a minor and cannot exclude their responsibility by contract; in the second case the personal freedom of movement is recognized for adults.[184] Furthermore, the transfer of supervision by contract is possible; thus summer camps, boarding schools, and baby-sitters, and establishments that accommodate adults with mental disabilities could all be subject to the presumption of fault.[185]

As for parents, their liability for the actions of their child is strict[186]; an important jurisprudence confirmed by the proposed reform.[187] The responsibility of parents is significantly impacted by the reform.[188] On one hand, their cohabitation with the child is no

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[176] Art. 1243 of the French Civil Code: "One is liable for damage caused by others in the cases and under the conditions laid down by articles 1244 to 1248".

[177] Art. 1245 3° of the law proposal of 2020. It is also clarified that in this case, the responsibility of the parents or employers cannot be engaged.

[178] Cour de cassation [Cass.] civ. 2e, 25.2.1998, D. 1998, p. 315, JCP G 1998, II, 10149, commented by *G. Viney*.

[179] Art. 1247 of the law proposal of 2020.

[180] *Ph. Brun*, Avant-projet de réforme du droit des obligations : le fait d'autrui, in L'avant-projet de réforme du droit de la responsabilité (fn. 1), p. 193, 197; *P. Januel*, Réforme du droit de la responsabilité civile : annonce d'une proposition de loi sénatoriale D. 2020, p. 1519.

[181] Cour de cassation [Cass.] civ. 2e, 12.12.2002, no. 00-13.553, Bull. civ. II, no° 289.

[182] Cour de cassation [Cass.] civ. 2e, 22.5.1995, no. 92-21.871, Bull. civ. II, no° 155.

[183] Cour de cassation [Cass.] civ. 1re, 15.12.2011, JCP G 2012, p. 205, commented by *D. Bakouche* and p. 530, commented by *Ph. Stoffel-Munck*; RTD civ. 2012, p. 321, commented by P. Jourdain; Cour de cassation [Cass.] civ. 2e, 24.5.2996, RTD civ. 2006, p. 779, commented by P. Jourdain.

[184] *O. Sabard/J. Traullé* (fn. 157), p. 289.

[185] *Id.*, p. 289. E.g., regarding summer camps, compare this with the existing jurisprudence that admits contractual liability (an obligation of means and not an obligation of result): Cour de cassation [Cass.] civ. 1re, 10.2.1993, no. 89-14.889, Bull. civ. I, no. 66, D. 1993, p. 605, commented by *J. Bonnard*; Cour de cassation [Cass.] civ. 1re, 10.2.1998, no. 96-14.623, Bull. civ. I, no° 57.

[186] Decision Bertrand, Cour de cassation [Cass.] civ. 2e, 19.2.1997, no. 94-21.111, Bull. civ. II, no. 56, D. 1997, 265, commented by *P. Jourdain*; D. 1997, somm. 290, commented by *D. Mazeaud*; Gaz. Pal. 1997, 2, 572, commented by *Fr. Chabas*; Dr. fam. 1997, no. 83, commented by *P. Murat*. See also B. *Waltz-Teracol* (fn. 36), p. 19, 28.

[187] *See* Catala, *supra* note 27, at 178 (stating parents are "placed at the head of the list of those persons on whom strict liability for the acts of minor children is imposed").

[188] *See id.* at 178-179 (deeming "it seemed necessary to tie this liability to the exercise of parental authority.").

longer required, as it suffices just that they exercise parental authority.[189] This is logical as the strict responsibility of parents was already widely accepted without them being able to absolve themselves of their responsibility by proving their lack of fault in supervising the child.[190] In fact, this strict responsibility of parents is explicitly provided for in the draft law of 2017.[191] On the other hand, the fault of the direct tortfeasor, the child, is required, whereas case law admits that a simple causal fact was sufficient for parents be responsible.[192] As a result, parents can be held liable for an act which their child is not responsible.[193] The law proposal of 2020 adopts this general principle for all cases where a person is responsible for the actions of another person, in that the existence of an event that can establish the responsibility of the person who acted is presupposed.[194]

5. Maintaining the Liability of the Keeper of a Thing: An Extended Liability in French Law

As for the responsibility of the keeper of a thing ("gardien de la chose"), the proposed law of 2020 establishes jurisprudential solutions where the liability of that person is strict.[195] This occurs when the "thing" was in motion and came into contact with the place where the risk occurred,[196] or if the "thing" was stationary; in both situations the victim must prove either the defectiveness, or the irregularity of the position, the condition or the conduct of the "thing".[197] On this point the Catala-Viney draft of 2005 is followed;[198] rather than the Terré draft of 2010, as the latter rejected the presumption of liability when the thing is in motion under the above-described conditions.[199] Additionally, in the proposal of the Terré draft of 2010, the responsibility of the keeper of the thing exists only in the case of an insult to the body and the mental state of a person as a manifestation of the priority of protected interests;[200] this solution was rejected by the law proposal of 2020. Furthermore, the law proposal provides that

189 *See id.* at 179.

190 Decision Bertrand (fn. 186).

191 *See* Draft law of 2017, art. 1246 *supra* note 4.

192 *See e.g.,* Decision Levert, Cour de cassation [Cass.] civ. 2e., 10.05.2001, Bull civ. II, No. 96.

193 Decision Levert: Cour de cassation [Cass.] civ. 2^{e}, 10.5.2001, no. 99-11.287, Bull. civ. II, no. 96, RTD civ. 2001, 601, commented by P. Jourdain; D. 2001, 2851, report done by *P. Guerder*, commented by *O. Tournafond*; D. 2002, somm. 1315, commented by *D. Mazeaud*; JCP 2002 I, 124, commented by *G. Viney*.

194 Art. 1244 of the law proposal of 2020.

195 Art. 1243 of the law proposal of 2020.

196 Cour de cassation [Cass.] civ. 2^{e}, 29.3.2001, Bull. civ. II, no. 68, Appeal No. 99-10.735.

197 *E.g., see* Cour de cassation [Cass.] civ. 2e, 1.11.1995, Bull civ. II, No. 18; Cour de cassation [Cass.] Civ. 2^{e}, 24.2.2005, Bull civ. II, No. 51, Appeal No. 03-13.536, RTD civ. 2005, p. 407, commented by *P. Jourdain*; Cour de cassation [Cass.] civ. 2e, 17.6.2021, Bull civ. II, Appeal No. 20-10.732.

198 Art. 1354-1 et seq. of the Catala-Viney draft of 2005. *See* Catala, *supra* note 27, at 189.

199 *See* art. 20 of Terré draft of 2010.

200 *See* Olivier Moréteau, *France: French Tort Law in the Light of European Harmonization*, 6 J. OF CIVIL L. STUDIES 759, 772 (2013) (stating that under Article 20 of the Terré draft liability for an act "is limited to physical and psychological harm.").

this responsibility only concerns tangible things rather than intangible things.[201] The doctrine already criticized imposing liability for providing information pursuant to this basis.[202]

It is noteworthy that this general clause greatly expands liability; compensation for bodily injury is subject to a special regime and use of this liability will be made mainly for pure economic loss, such as loss of profit, where there is no physical injury to a person or his property.[203] Currently, this general clause is only provided for by Italian[204] and Quebec law, however the latter requires an independent act of the "thing".[205]

Reservations have been expressed about this solution because the recovery of economic loss in no fault cases may be considered to constitute an infringement of commercial and industrial liberty. Although economic loss is restored under the general clause in French law when there is fault on the part of the tortfeasor, it does not extend it to cases that help maintain the competitiveness of French law against other national laws. Notwithstanding these reservations to reparable damage, we consider that maintaining the liability of the keeper of the "thing" as a general clause as formulated by the jurisprudence and codification of the existing solution[206] would have a positive result. In contrast to the individualism and liberalism that influenced German law,[207] French law is more protective of the victim. The same need to protect the victim from the emergence of machines and the evolution of technology should remain active, for example, regarding the application of artificial intelligence.[208]

6. Disturbance beyond normal neighborhood nuisance

Under the proposed regulation, which also codifies case law, the person who causes a disturbance beyond normal neighborhood nuisance is liable for the damage resulting from that disturbance.[209] Even if an administrative decision had authorized the harmful activity, the judge can award damages or even order reasonable measures to end the disturbance,[210] as is also provided for in the Catala-Viney draft of 2005.[211] Although this regulation concerns real property law, the jurisprudence has established this case as autonomous and based on the

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[201] Article 1242 of the law proposal of 2020.

[202] *G. Danjaune*, La responsabilité du fait de l'information, JCP G 1996, I, 3895.

[203] *See J.-S. Borghetti*, Des principaux délits spéciaux, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 163, 174.

[204] Art. 2051 of Italian Civil Code. *N. Vardi*, Les faits générateurs de responsabilité dans les projets français et belge : faute ou risque ? Point de vue de droit italien, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 310, 317.

[205] Art. 1465 of Civil Code of Quebec: "The custodian of a thing is bound to make reparation for injury resulting from the autonomous act of the thing, unless he proves that he is not at fault". We remark that only a presumption of fault is established. See *B. Moore* (fn. 5), p. 9.

[206] *See* Catala, *supra* note 27, at 189.

[207] *R. Schulze*, L'état actuel du droit allemand de la responsabilité civile, in La réforme du droit de la responsabilité civile en France (fn. 46), p. 39, 41.

[208] *Comp.* Catala, *supra* note 27, at 189.

[209] *Id.* at 192.

[210] Art. 1249 of the law proposal of 2020.

[211] Art. 1244. In contrast, the Catala-Viney draft of 2005 draft did not provide the judge with the ability to order the cessation of the injurious activity if administrative permission had been obtained.

general principle that no one should cause an unusual nuisance to the neighborhood.[212] Proof of fault is not required, only excessive nuisance,[213] assessed against the effect an activity produces,[214] even if this activity is legal or licensed. However, there is no mention of what the nuisances might be, nor are there any criteria for when or how excessive nuisance will occur.[215] For example, in Greek law, a relevant provision in the section regarding property law mentions the emission of smoke, soot, fumes, heat, noise, vibrations, or other similar effects coming from another property as neighboring nuisances.[216] According to the same provision,[217] two criteria are considered to determine if it is a nuisance or not: (1) if the disturbances do not significantly impair the use of the neighbor's property, or (2) if the disturbances come from normal use for real estate in the area of the property from which the damage is caused.[218] Similar criteria are considered in Quebec law.[219]

III. THE REMEDIES PROVIDED TO THE VICTIM

1. Performance *in natura* as a Means of Redressing the Damage

The performance in nature is an interesting point dealt with by both contract law reform and tort law reform.[220] The law proposal of 2020 acknowledges that reparation may be in kind or in the form of damages.[221] The tortfeasor-debtor of the compensation will have the choice of enforcement: performance in kind or payment of damages.[222] However, performance in kind cannot be imposed on the victim if the latter does not agree to it.[223] The judge cannot impose reparation in kind if this performance is impossible or if there is an obvious disproportion between the costs for the person responsible and the victim's interest,[224] as it can

[212] Cour de cassation [Cass.] ass. plén., 9.5.1984, no. 79-16.612, Bull. ass. plén., no. 4, RTD civ. 1984, 508, commented by *J. Huet*; JCP 1984, II, 20255, commented by *N. Dejean de la Bâtie*.

[213] *D. Mazeaud*, Synthèse Le juge et le droit de la responsabilité civile : bilan et perspectives, Revue des contrats, 7.12.2017, no. 114, p. 158.

[214] *M. Lacroix*, Regard québécois, in Vers une réforme de la responsabilité civile française (fn. 5), p. 79, 91; *B. Waltz-Teracol* (fn. 36), 19, 26.

[215] *B. Waltz-Teracol* (fn. 36), 19, 26.

[216] Art. 1003 of the Greek Civil Code.

[217] *Id.*

[218] *Id.*

[219] Art. 976 of Civil Code of Quebec: "Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage".

[220] Ordinance No. 2016-131 of February 10, 2016, reforming contract law, the general regime and proof of obligations.

[221] Art. 1260 and 1261 of the law proposal of 2020. *Comp.* Catala, *supra* note 27, at 195.

[222] *Comp.* Catala, *supra* note 27, at 201. The Catala-Viney draft of 2005 provided for rules special to the reparation of losses resulting from damage to property.

[223] Art. 1261 § 1 of the law proposal of 2020.

[224] Art. 1261 § 2 of the law proposal of 2020.

also be in the event of a contract.[225] However, in the latter case, the debtor's good faith is considered, which should motivate us to consider the perpetrator's degree of fault. In addition, monetary satisfaction and performance *in natura* may be pronounced. This differs from contractual liability solutions, where the right to choose the type of compensation belongs only to the creditor and not to the debtor so that the former can choose the instrument that best meets his legal expectations based on the contract.[226] Combining damages with execution in kind is also possible in the case of contracts.[227]

The law proposal of 2020 provides that the judge may also authorize the victim to take the reparation measures in kind.[228] This provision achieves the preventive function of tort liability. It could allow the victim and also a third party to repair the damage at the expense of the person responsible for the damage without having to consider the application of the provisions of *negotiorum gestio*, especially when the third party is a family member of the victim and provides permanent assistance to a disabled person. Under Swiss law, compensation for damage resulting from the care provided to the victim as part of the recoverable damage is also possible.[229]

Moreover, the DCFR[230] allows the judge to choose type of the compensation for damage (*in natura* or monetary compensation), while the PETL[231] provide for a prioritization of the means of redress for damage, with the payment of compensation as the principle and execution in kind as the exception.[232] The PETL also take into account the cost to the person in charge.[233] German law places performance in kind as the basic principle,[234] and the payment of

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225 Art. 1221 of the French Civil Code. See, e.g., *D. Mazeaud*, L'exécution forcée de nature dans le droit des contrats, D. 2016, p. 2477.

226 *P. Remy-Corlay*, De la réparation, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 191, 194. Philippe Hameau et al., *Reform of the French Civil Code on contract law and the general regime and proof of obligations*, NORTON ROSE FULBRIGHT LLP (Oct. 2016), https://www.nortonrosefulbright.com/en/knowledge/publications/2a563f12/reform-of-the-french-civil-code-on-contract-law-and-the-general-regime-and-proof-of-obligations.

227 Code civil [C. CIV.] [Civil Code] art. 1217 (Fr.).; *Ph. Delebecque*, L'articulation et l'aménagement des sanctions de l'inexécution du contrat, Dr. et patrimoine 2016, p. 62; *Y.-M. Laithier*, Les sanctions de l'inexécution du contrat, RDC 2016, no. hors-série, p. 39; *Présentation des articles 1217 à 1218 de la nouvelle section 5 L'inexécution du contrat*, UNIVERSITE PARIS 1 (last accessed Apr. 7, 2023), https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre3/stitre1/chap4/sect5; Raphaël Dana, et al., *Contracts, Negotiation and Enforcement in France: overview*, WESTLAW (Nov. 1, 2019) https://us.practicallaw.thomsonreuters.com/9-634-2031.

228 Art. 1261 § 3. Likewise the draft law of 2017.

229 *P. Wessner* (fn. 71), p. 303.

230 Art. VI 6: 101 (2) DCFR: "Reparation may be in money (compensation) or otherwise, as is most appropriate …".

231 Art. 10: 101: "Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm".

Art. 10: 104: "Instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party".

232 PETL, tit. VI, art. 10:101.

233 Art. 10: 104 PETL.

234 § 249 BGB: "(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred". An exception is provided: "2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration".

monetary compensation as a complementary way of enforcement when the former is not possible.[235] On the contrary, Greek law establishes monetary compensation as a principle and performance in kind as an exception, when one of the parties requests it and restoration of the previous situation does not affect the interests of the injured party.[236] French law regards these two forms of execution as equivalent, although it provides limitations on enforcement in kind so long as it is not impossible or entail disproportionate costs, and the victim agrees.

2. The Civil Fine as a Means of Preventing Acts of Particular Gravity

The most innovative point discussed in the reform of tort law is the introduction of a civil fine in the presence of a lucrative fault, a fault deliberately committed in order to obtain a profit or save an expense for an economic gain ("un gain ou une économie").[237] This has been characterized as an important point because we are moving away from the restorative function that French liability law has provided to add a sanctioning function.[238] This reminds us of the punitive damages in Anglo-Saxon law or in Quebec law, but with a notable difference.[239] In the latter, it can only be imposed in cases where a law specifically provides for it.[240] In this way, the question of the legality of the sanction is avoided, although it remains up to date in French law.[241] Since a civil fine can be compared to a criminal penalty, the principles applicable in a criminal penalty must be respected, namely; (1) the principle of legality; (2) the principle of proportionality; (3) the principle of non-retroactivity of more severe punitive law; (4) the principle of the individualization of the punitive sanction; and (5) the principle *non bis in idem*.[242]

The legality of penalties means that a sanctioned act must be sufficiently descriptive, precise, and foreseeable.[243] The French Constitutional Council has already ruled that the legislator could:

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[235] § 250 BGB: "(1) To the extent that restoration is not possible or is not sufficient to compensate the obligee, the person liable in damages must compensate the obligee in money. (2) The person liable in damages may compensate the obligee in money if restoration is only possible with disproportionate expenses".

[236] Art. 297 of the Greek Civil Code. See, e.g., *Ap. Georgiadis* (fn. 137), p. 169, § 11, no. 39.

[237] Art. 1266-1 of the draft law of 2017. See *J. Prorok*, L'amende civile dans la réforme de la responsabilité civile, RTD civ. 2018, p. 327; *F. Rousseau*, Projet de réforme de la responsabilité civile. L'amende civile face aux principes directeurs du droit pénal, JCP G 2018, p. 1177; *F. Graziani*, La généralisation de l'amende civile: entre progrès et confusion. Commentaire de l'article 1266-1 du projet de réforme de la responsabilité civile, D. 2018, p. 428; *M. A. Chardeaux*, L'amende civile, LPA, 30.1.2018, p. 6; *I. Vingiano-Viricel*, La faute lucrative : une notion en construction en droit français, RTD com. 2017, p. 19; Alexander Bailly and Xavier Haranger *supra* note 10.

[238] See Solene Rowan, *Punishment and Private Law: Some Comparative Observations*, in Punishment and Private Law 63 (2021).

[239] *See* Draft law of 2017, *supra* note 4, art. 1266-1.

[240] Article 1621 of the Civil Code of Québec ("Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose."); *see* Art. 49 § 2 Charter of Human Rights and Freedoms.

[241] *See* Charter of Human Rights and Freedoms, Art. 49 § 2.

[242] *See, e.g.*, *N. Rias*, Regard français, in Vers une réforme de la responsabilité civile française (fn. 5), p. 63, 67.

[243] *See, e.g.*, *S. Carval*, Le projet de réforme de la responsabilité civile, JCP G 2017, no. 401.

> [m]ake the violation of certain obligations subject to a civil fine on condition that he respects the requirements of Articles 8 and 9 of the Declaration of 1789, among which is the principle of the legality of offenses and penalties which imposes on him to state in sufficiently clear and precise terms the prescription of which he sanctions the breach.[244]

Thus, the question arises in whether the fact that one deliberately committed the fault to obtain an economic gain meets the foreseeability requirement. Even if the provision in the draft law of 2017 requires conscious and foreseeable behavior of the actor, the wording remains quite vague.[245] As for the principle of proportionality, the Constitutional Council considers that it is up to the judges to ensure the effectiveness of the principle of proportionality when imposing a fine.[246] Under the jurisprudence of the European Court of Human Rights (ECHR), violation of the principle *non bis in idem* will be possible when the same act has been punished criminally.[247] In this case, no civil fine shall be levied where a penalty has already been imposed by a criminal court.[248]

The draft law of 2017 also provided that the criteria for determining the fine were: the seriousness of the offense; the financial capabilities of the tortfeasor; and the profits the tortfeasor obtained from this activity.[249] Additional criteria could include whether a sentence has already been imposed by a criminal court, as well as the extent of the restorative damages awarded.[250] Quebec law considers the same criteria.[251] Moreover, in French law the attribution of the fine to the Public Treasury does not provide the victim with any motivation to make this request; therefore, measures to discourage such behavior may prove to be ineffective.[252] Nevertheless, payment to the Public Treasury prevents the undesirable result of enriching the victim.[253] Besides, Quebec law reassures us that the penalties imposed will be moderate and

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244 Conseil constitutionnel, Decision No. 2010-85 QPC, 13.1.2011, § 3.

245 *See* Art. 1266-1 of the draft law of 2017.

246 Conseil constitutionnel, Decision No. 2001-455 DC, 12.1.2002, §§ 85 and 86.

247 ECHR, Judgment of 23.10.1995 – 15963/90 (Grandinger v. Austria). Under Art. 4 of Protocol No. 7 of the European Convention on Human Rights: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence of which he or has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". Even if the French government has issued a reserve relating to article 4 of the Additional Protocol n ° 7, condemnation is possible as in the case of the Italian government, which had formulated a similar reservation: ECHR, Judgment of 18.3.2015 – 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (Grande Stevens et al. v. Italy).

As for the jurisprudence of the European Court of Justice allowing double procedures, e.g. ECJ, Judgment of 26.2.2013 – C-617/10 (Aklagaren v. Hans Åkerberg Fransson), § 34; see *D. Tsiaklagkanou/I. Morozinis/ G. Lekkas/I. Mpekas*, Market abuse regulation and market abuse directive: happy markets without happy investors?, Zeitschrift für Internationale Strafrechtswissenschaft, p. 439, 443, available at www.zfistw.de.

The French Constitutional Council also allows double procedures, Conseil constitutionnel, Decision No. 2016-546 QPC, 24.6.2016, § 24.

248 See, e.g., *Fines, Penalties, and Sanctions*, WILLKIE COMPLIANCE, https://complianceconcourse.willkie.com/resources/sanctions-enforcement-fines-penalties-and-sanctions/ (last visited Apr. 21, 2023).

249 Art. 1266-1 § 2 of draft law of 2017.

250 *P. Wessner* (fn. 71), p. 300.

251 Art. 1621 of Civil Code of Quebec.

252 *See* Art. 1266-1 § 2 of draft law of 2017.

253 *P. Wessner* (fn. 71), p. 299.

that we can avoid the sometimes excessive penalties found in other North American legal systems.[254]

While, this measure was present in all of the preliminary drafts and projects, it no longer appears in the law proposal of 2020, so it does not seem that it will be adopted.[255] The Senate preferred to avoid regulating issues that have caused reactions in theory.[256] It is worth noting that the Terré draft of 2010 provided that in cases of wrongdoing, intended for profit, the victim could be awarded the amount corresponding to this profit, and the additional amount paid in respect to restorative damages should not be covered by liability insurance.[257] The restitution of the profit could also be achieved by unjust enrichment; however in many countries, this is not allowed to be brought simultaneously with the action for compensation for tort liability.[258] In French law, the attribution of obtained profit is provided for in the event of trademark or patent infringement.[259]

The DCFR does not provide for punitive damages; but a provision does exist for the restitution of profits as a form of compensation.[260] Additionally, according to Regulation 864/2007[261] the awarding of punitive compensation and not restorative compensation may be considered contrary to the public order of a state if deemed excessive.[262] Opposition to public policy has also been accepted in Swiss law.[263] However, French and German case law have admitted that punitive damages are not contrary to international public policy.[264] Moreover, Quebec law does not limit the application of punitive damages to non-contractual liability, as it applies to contracts as well.[265]

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254 *See* Art. 1621 of Civil Code of Quebec.

255 *See* Law proposal of 2020: statement of reasons at 4.

256 *Id.*

257 Art. 54 of the Terré draft of 2010. See *R. Mésa*, L'opportune consécration d'un principe de restitution intégrale des profits illicites comme sanction des fautes lucratives, D. 2012, p. 2754.

258 *P. Remy-Corlay* (fn. 226), p. 201; (e.g., it is not allowed in France, Germany, Greece, while it is allowed in Italy, Austria, Spain).

259 *E.g.*, Art. L. 615-17, L. 521-7, L. 623-28, L. 716-14, L. 722-6, L. 331-1-3 of the French Intellectual Property Code. See also *G. Viney*, Quelques propositions de réforme du droit de la responsabilité civile, D. 2009, p. 2944.

260 Art. VI. 101 (4) DCFR: "As an alternative to reinstatement under paragraph (1), but only where this is reasonable, reparation may take the form of recovery from the person accountable for the causation of the legally relevant damage of any advantage obtained by the latter in connection with causing the damage".

261 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

262 Recital 32. See also *P. Remy-Corlay* (fn. 226), p. 200.

263 Decision of 10.10.1996, M. v. B, ATF 122 III 463, JT 1997 I 250. *P. Wessner* (fn. 71), p. 298.

264 The French and the German Supreme Court have admitted that since the principle of proportionality between the amount of the punitive damages and the loss suffered by the injured party has not been respected, the exequatur of a decision awarding damages should be refused. As a result, if the principle of proportionality was respected, no contradiction to public policy would exist. Cour de cassation [Cass.] civ. 1re, 1.12.2010, D. 2011, p. 24, commented by *I. Gallmeister/F.-X. Licari* (*ibid.*, 423); *B. Fages*, RTD civ. 2011, 122; *P. Remy-Corlay*, RTD civ. 2011, 317; *J. Juvénal*, JCP G 2011, 140; *Ph. Stoffel-Munck*, JCP G 2011, 415. German Supreme Court (Bundesgerichtshof, BGH), 4.6.1992, IX ZR 149/91; RTD civ. 1994, 457, commented by *Cl. Witz*.

265 Art. 1621 of Civil Code of Quebec.

3. An Additional Protection Provided to the Victim: To Put an End to the Illegal Act

A second function added by the reform is prevention by making it possible to order the cessation of illicit acts.[266] It is left to the judge's discretion to prevent (*ante damnum*) or terminate the tortious event (*post damnum*) and, therefore, this order differs from the compensation corresponding to the restorative nature of the tort liability by giving new functions to it.[267] This measure aims to limit the loss at the source of the damage and to conform the act in dispute with the rule of law from which it deviates.[268] The illegality of the act is required for this measure to be implemented, while neither the fault of the perpetrator nor the existence of damage is necessary.[269] It differs from compensation in that the latter is not sufficient to ensure that the existing infringement does not continue.[270] It also differs from interim measures as it does not presuppose *imminent* damage. Additionally, interim measures can be pronounced in order to put an end to a *manifestly* unlawful disturbance.[271] The cessation or prohibition of any infringement is provided for in several European directives[272] and in some articles of the French Civil Code,[273] and it is also well-known in German law.[274] Moreover, this order can be imposed not only on the perpetrator, but on anyone who is in a suitable position to put an end to the illegality, like an internet service provider for illegal infringement of intellectual property rights by a user of the services.[275] A comparison could be made with acts of unfair competition where the jurisprudence reprehends behavior that increases the risk of damage,[276] and there are decisions which accept compensation for expenses incurred for prevention purposes.[277]

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266 Art. 1268 of the law proposal of 2020.

267 *See N. Rias* (fn. 242), p. 63, 74.

268 *C. Bloch/Ph. Stoffel-Munck*, La cessation de l'illicite, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 87, 90.

269 *See* Art. 1268 of the law proposal of 2020.

270 *See* for compensatory damages Sophie Bienenstock, *The Different Effect of French Liability Law: the Example of Abusive Contract Terms*, 129 DANS REVUE D'ÉCONOMIE POLITIQUE 205, 219, 220 (2019).

271 Art. 835 of the French Code of Civil Procedure.

272 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Art. 11 § 2; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Art. 18 § 1; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Art. 11; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, Art. 2.

273 Art. 9 of the French Civil Code: invasion of privacy; Art. 16-2 of the French Civil Code: protection of the human body; disturbances exceeding the normal inconveniences of the neighbourhood. See also the law of July 29, 1881 regarding press offenses.

274 For the prevention of illegality, the following legal remedies are provided: the Vorbeugender Unterlassungsanspruch to prevent the illegality, and the Verletzung Unterlassungsanspruch to prevent it from being repeated. The Beseitigungsanspruch is provided to stop the illegality. See *C. Bloch/Ph. Stoffel-Munck* (fn. 268), p. 91; *J. Traullé* (fn. 64), p. 285 et seq.

275 *See* Art. 1268 of the law proposal of 2020.

276 Cour de cassation – Chambre commerciale et financière (Cass. com.), 29.11.1976, no. 75-12.431, Bull. civ. IV, no. 300.

277 Securing the edge of a cliff threatening to collapse: Cour de cassation [Cass.] civ. 2^{e}, 15.5.2008 – 07-13483, Bull. civ. II, no. 112, D. 2008, p. 2894, commented by Ph. Brun. The storage of straw or hay in stacks outside or stored in a barn is indeed likely to pose a risk, since it was carried out on the property line and in the immediate

However, if damage has not yet been produced, we wonder whether one can speak of liability, and whether the interim remedy which is provided for in existing law is sufficient. The cessation of the illicit act after a prejudice is already present, and avoiding its aggravation is desirable; however it remains uncertain if this objective should be considered in the context of extra-contractual liability. However, it seems effective that a judge who tries a case on the merits[278] can also order measures to prevent or terminate an illegal act. Although the existence of damages is a condition of non-contractual liability, future damages deriving from a certain and direct extension of a current situation are also recoverable.[279] The same degree of certainty can be admitted for the infliction of damage as for the presence of an illegal act.

4. Confirmation of Opportunity Loss as a Form of Compensation

Compensation for loss of an opportunity ("perte de chance") is admitted in French jurisprudence, although in principle, compensated damage must be specific and not hypothetical.[280] The theory of loss of chance provides a palliative against the uncertainty affecting the causation.[281] The law proposal of 2020 defines the loss of opportunity as: "reparable harm when it consists of the actual and certain disappearance of a favorable eventuality," as the existing jurisprudence has already determined.[282] An example is when a doctor delays the administration of a treatment, but it cannot be proven that the treatment would have prevented the patient's death.[283] While earlier treatment would have given the patient a chance to improve his health,[284] it is questionable whether the doctor's failure to inform the patient of risks should be considered as a loss of opportunity to avoid damage. It is possible that even if the patient had been informed, he still would have chosen to undergo this treatment, with the result that the treatment is causally linked to the patient's decision and not to the information provided by the doctor.[285] Nevertheless, we believe that the patient's decision is

vicinity of a dwelling building: Cour de cassation [Cass.] civ. 2e, 24.2.2005 – 04-10362, Bull. civ. II, no. 50, JCP G 2005, I, p. 149, chr. *G. Viney*.

278 *See The French Legal System*, MINSTÈRE DE LA JUSTICE (Nov. 2012), at 4-5, 8, https://www.justice.gouv.fr/art_pix/french_legal_system.pdf (discussing the role and authority of judges within the French legal system).

279 Art. 1236 of the law proposal of 2020. *See* preliminary draft law of 2016, Alice Dejean de La Batie, *supra note* 3 at 2.

280 *E.g.*, Cour de cassation [Cass.] com., 4.2.2014, no. 13-10630, Bull. civ. IV, no. 28.

281 *M. Bacache*, Les méandres du lien de causalité dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 366, 368; *Fr. Terré/Ph. Simler/Y. Lequette/Fr. Chénedé*, Droit civil – Les obligations, 12th edn. 2018, § 924, p. 1007.

282 Art. 1237 § 1 of the law proposal of 2020; Cour de cassation [Cass.] crim., 18.3.1975, no. 74-92.118, Bull. crim. no. 79; Cour de cassation [Cass.] civ. 1re, 21.11.2006, Bull. civ. I, no. 498, JCP G 2007, I, 115, no. 2, commented by *Ph. Stoffel-Munck*.

283 *See Loss of Chance Doctrine*, BORDERS L., https://www.borderslaw.com/legalnews/medical-malpractice/loss-of-chance-doctrine/index.html (last visited Apr. 4, 2023).

284 *See* Cour de cassation [Cass.] civ. 1re, 14.10.2010, no. 09-69.195, commented by *F. Patris*, L'essentiel, Droit des assurances, Nov. 2010; *Cl. Grare-Didier*, Du dommage, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 131, 137.

285 *See* Bryan Murray, *Informed Consent: What Must a Physician Disclose to a Patient?*, 14 AM. MED. ASS'N J. OF ETHICS 563 (2012).

made by considering various parameters, including the knowledge of the risks associated with treatment, which is of paramount importance. The silence of the doctor influences the patient's decision, and the patient could have refused the intervention or treatment if properly informed.[286] We highlight the restoration of the loss of a customer, even if in this case, apart from the unfair behavior of the competitor, the customer's decision intervenes.[287]

Considering that the loss of opportunity is a peculiarity of French law when determining the award of compensation, its acceptance is not favored in systems that base tort liability on a general clause.[288] For example, the DCFR does not provide a similar provision, while the PETL do not provide for the restoration of such damage outright, although this result can be achieved through the flexibility offered by causation.[289] Loss of a chance is also found in English law, where it has been admitted for pure economic loss,[290] even though it has been rejected in cases of medical negligence, such as in the presence of an error in the diagnosis of cancer and consequently a delay in applying the proper treatment to the patient.[291]

Furthermore, the law proposal of 2020 also clarifies that this damage must be measured by the chance lost and cannot be equal to the advantage that this chance would have provided if it had occurred, as it has also been judged in the case law.[292] Given the uncertainty that exists as to whether avoiding the injurious event would have been sufficient to prevent future loss, full recovery of damage must be refused.[293] When calculating damages, the innovation brought by the law proposal of 2020 should be noted: the amount of compensation corresponding to each type of damage must be stated separately, while the overall amount, without further clarifications, will not be sufficient.[294]

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[286] This solution has been accepted by the jurisprudence: Cour de cassation [Cass.] civ. 1re, 7.2.1990, Bull. civ. I, no. 39; Cour de cassation [Cass.] civ. 1re, 8.7.1997, Bull. civ. I, nos. 238 and 239, JCP G 1997, II, 22921, rapp. *P. Sargos*.

[287] It suffices that behavior under consideration increases the risk of damage. Cour de cassation [Cass.] com., 29.11.1976, no. 75-12.431, Bull. civ. IV, no. 300.

[288] *See Introduction to French Tort Law*, BRITISH INST. OF INT'L & COMPAR. L., https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

[289] Art. 3: 106 PETL: "The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere". Comp. Art. 3: 103: "(1) In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage".

[290] Allied Maples Group Ltd. v. Simmons & Simmons (1995) 1 WLR 1602.

[291] Gregg v. Scott (2005) 2 WLR 268. See *A. Burrows,* Judicial remedies, in Principles of the English law of obligations (fn. 60), para. 4.77 et seq., p. 346 et seq.: The author remarks that when an event has occurred in the past, the court decides on the balance of probabilities, whereas if the event is a future or hypothetical one, the loss of chance approach will be applied. Idem Jeremy Liang Shi Wei/Kee Yang Low, Recognising Lost Chances in Tort Law (2014) Sing. J.L.S. 98, 107.

[292] Art. 1237 § 2 of the law proposal of 2020; Cour de cassation [Cass.] civ. 1re, 9.4.2002, Bull. civ. I, no. 116.

[293] *See* Jeremy Liang Shi Wei & Kee Yang Low, *Recognising lost chances in tort law* (July 2014) Singapore Journal of Legal Studies, 98, 108.

[294] Art. 1262 § 4 of the law proposal of 2020.

5. The Specific Regulation of Physical Damage as Opposed to Other Damages

The reform also specifies that bodily injury is an additional category of damage to material and moral damages and provides for a special regime for this type of damage.[295] This harm is defined in the Senate law proposal of 2020 as an insult to a person's physical or mental integrity.[296] The term of "bodily injury" is found in two provisions of the Civil Code: Article 1404 concerning the property system applicable in conjugal relations in the absence of agreement,[297] and Article 2226 on the limitation period.[298] In contrast, the Law on Traffic Accidents of 5 July 1985 ("Badinter Act")[299] makes a distinction between damage to property and injury to a person, as does the directive 85/374/EEC concerning liability for defective products incorporated into Article 1245-1 § 1 of the French Civil Code.[300]

An innovation in cases of bodily injury is that only serious fault ("faute grave") of the victim can partially reduce the liability of the perpetrator of the damage,[301] despite the general rule that the fault of the victim partially relieves the tortfeasor of his liability.[302] This provision can be compared to the existing regulation in the Badinter Act, where the fault of the victim who is not a driver is only taken into account if it is an inexcusable fault.[303] Grave fault in the draft law of 2017 is a broader concept than inexcusable fault ("faute inexcusable").[304] Furthermore, in the presence of bodily injury, clauses limiting or excluding liability are prohibited.[305] We note that despite the fact that this principle seems to be accepted before the revision, the jurisprudence has not expressly adopted it.[306] A similar provision is found in the Civil Code of Quebec, however this also concerns moral damage.[307]

An additional modification to the existing law regards the extra-contractual liability action that the victim may exercise, even in the presence of a contract. The law proposal of 2020 has abandoned the possibility provided for in the draft law of 2017 that the victim invokes the contractual rules that are more favorable to him than the tort law rules applicable in the

295 *Comp.* preliminary draft law of 2016, art. 1267 et seq.; Alice Dejean de la Batie, *supra* note 3, at 9-10.

296 Art. 1269 of the law proposal of 2020.

297 Code Civil [C. civ.] [Civil Code] art. 1404 (Fr.).

298 There is a ten-year statute of limitations in the case of bodily injury, rather than the five-year statute of limitations applicable to claims for other damages.

299 Law No. 85-677, Art. 3; *see also D. Gardner*, La consécration des dommages spéciaux dans la réforme de la responsabilité civile en France, in Vers une réforme de la responsabilité civile française (fn. 5), p. 173, 175.

300 This article provides that: "The provisions of this chapter apply to compensation for damage resulting from personal injury".

301 Art. 1254 of the law proposal of 2020.

302 *E.g.*, regarding the liability of a keeper of a thing, Cour de cassation [Cass.] civ. 2e, 6.4.1987, Bull. civ. II, no. 86; D. 1988, 32, commented by *Ch. Mouly*.

303 Law No. 85-677, Art. 5.

304 *O. Gout*, Le dommage corporel, in Vers une réforme de la responsabilité civile française (fn. 5), p. 15.

305 Art. 1270 § 2 of the law proposal of 2020. Ozan Akyurek, *The Preliminary Draft of the Civil Liability Reform in France*, FINANCIER WORLDWIDE (Oct. 2016), https://www.financierworldwide.com/the-preliminary-draft-of-the-civil-liability-reform-in-france#.ZDIa63bMK38.

306 *O. Gout*, Le dommage corporel, in Vers une réforme de la responsabilité civile française (fn. 5), p. 150. See also D. Mazeaud, Les conventions portant sur la réparation, RDC 2007, p. 149.

307 Art. 1474 § 2 of Civil Code of Quebec: "He may not in any way exclude or limit his liability for bodily or moral injury caused to another".

case. .[308] We approve of this modification made by the Senate, as the 2017 draft seemed to allow the victim to invoke the rules of contractual liability and the rules of tortious liability simultaneously. Under the initial draft, a regime was provided that was neither contractual nor extra-contractual but a synthesis of the two for the victim's benefit.[309] It is worth noting that the preliminary draft law of 2016 did not provide for the possibility of choice between contractual or tort liability, as tort liability was mandatorily applied.[310]

It is now possible for the victim to bring an action either on the basis of contractual or tort liability.[311] The possibility of choosing between the two responsibilities was preferred because the protection of a contracting party may have been less than that of a third party, since a distinction is made between the obligation of means[312] or the obligation of result borne by the debtor for contractual liability, while the liability of the keeper of a thing is strict in tort liability, and this responsibility has a wide scope.[313] The result was that the security obligation borne by a contractor had been widened to achieve satisfactory protection of the victim in many cases.[314] However, the protection of bodily integrity escapes contractual arrangements,[315] and it is artificial to bring in contractual liability regarding broken arms and dead men.[316] It is a welcome improvement that the victim can choose between contractual and tortious liability, and that tortious liability is not mandatory, because in some cases contractual liability appears more favorable to the victim. For example, in regard to the liability of a person who uses another person to perform a task, a relationship of dependence of the agent on the principal is required, however, in the case of contractual liability, it is easy to establish that the principal has responsibility for the persons he uses in his service.

We approve of the possibility of acting in extra-contractual liability, whereas case law only recognized a security obligation resulting from the contract that could be an obligation of means or an obligation of result which could give rise to inequalities with respect to victim compensation. Moreover, causing bodily injury does not seem to come within the scope of what is expected in the context of a contract for this damage to be repaired.[317] However, we must

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[308] Art. 1233-1 § 2 of the draft law of 2017.

[309] *See H. Boucard*, Les relations entre responsabilité contractuelle et extracontractuelle dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 174, 187; *N. Vézina*, La responsabilité civile dans tous ses états, Perspective québécoise sur la nouvelle présentation des dispositions consacrées à la responsabilité et la dualité entre les régimes extracontractuel et contractuel dans le projet français, in Vers une réforme de la responsabilité civile française (fn. 5), p. 58.

[310] Art. 1233 § 2 of the preliminary draft law of 2016. Alice Dejean de La Batie, *supra* note 3 at 1. See *Cl. Kleitz*, Réforme du droit de la responsabilité civile : c'est parti!, Gaz. Pal., 10.5.2016, no. 264, p. 5.

[311] Art. 1233 § 2 of the law proposal of 2020.

[312] *E.g.*, in the event of a wheelchair accident, the safety obligation was accepted which was an obligation of means (Cour de cassation [Cass.] civ. 1re, 10.3.1998, no. 96-12.141), while in the case of tortious liability (i.e., in the absence of a contract) the tortious liability of the keeper of the thing applies (Cour de cassation [Cass.] civ. 2e, 29.3.2001, Bull. civ. II, no. 68). See also an obligation of means in case of the operator of a climbing gym, Cour de cassation [Cass.] civ. 1re, 25.1.2017, no. 16-11.953, commented by *St. Gerry-Vernières*, Gaz. Pal., 25.4.2017, no. 293, p. 21.

[313] *Introduction to French Tort Law*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (last visited Apr. 9, 2023), https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

[314] *See, e.g.*, *Ph. Remy/J.S. Borghetti* (fn. 105), p. 61, 73.

[315] *O. Gout*, Le dommage corporel, in Vers une réforme de la responsabilité civile française (fn. 5), p. 149.

[316] J. Carbonnier, Droit civil, t. 4, Les obligations, 22 edn., PUF, 2000, no. 595, p. 520.

[317] *See, e.g.*, *Introduction to French Tort Law*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (last visited Apr. 9, 2023), https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

point out the peculiarity of French law for the specific regulation on bodily damage. On one hand, a bilateral distinction between material and immaterial damage is made in the PETL,[318] while on the other hand, the DCFR[319] refers to economic or non-economic loss, which reminds us of the distinction made by the French doctrine between patrimonial damage and extra-patrimonial damage.[320]

6. Limitation of Compensation Due to the Victim: The Victim is Asked to Minimize his Damage

We are adding a new possibility available to the judge that is capable of reducing the damages awarded to the victim, except in cases of bodily injury[321] where the victims have not mitigated damage (corresponding to the Anglo-Saxon "mitigation of loss" regarding both contracts and tort law),[322] which was not possible in the case law until today.[323] Consequently, victims find themselves, by the mere fact of their status, liable for the new obligation of managing their damage.[324] However, contrary to English law,[325] there is no obligation imposed on victims to reduce the damage sustained; rather there is an obligation to avoid further aggravation of the damage.[326] In English law, this obligation concerns bodily injury as well. We consider this obligation to be a manifestation of good faith and fair behavior. Characteristically, an appellate decision of a Canadian court notes that this rule is an extension

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[318] Art. 2: 101 PETL: "Damage requires material or immaterial harm to a legally protected interest".

[319] Art. VI. 2: 101 DCFR: "Loss, whether economic or non-economic, …".

[320] *E.g*., *H. Boucard*, Répertoire de droit civil : Responsabilité contractuelle – Teneur du préjudice contractuel, July 2018 – updated on June 2022, Section 2, Art. 2 § 1, nos. 484 et seq ; Cour de cassation [Cass.] civ. 2e, 3.2.2011, no. 10-15.236.

[321] Art. 1264 of the law proposal of 2020. Regarding bodily injury, the existing jurisprudence is maintained: Cour de cassation [Cass.] civ. 2e, 19.3.1997, no. 93-10.914, Bull. civ. II, no. 86, RTD civ. 1997, 675, commented by *P. Jourdain*; *ibid*., p. 632, commented by *J. Hauser*; Cour de cassation [Cass.] civ. 2e, 19.6.2003, no. 00-22.302, Bull. civ. II, no. 203.

[322] *A. Burrows*, Judicial remedies, in Principles of the English law of obligations (fn. 60), para. 4.43 et seq., p. 337, and para. 4.84, p. 347; *M. Huir Watt*, La modération des dommages en droit anglo-américain, LPA, 20.11.202, p. 45.

[323] Cour de cassation [Cass.] civ. 1re, 2.7.2014, no. 12-17.599, D. 2014, p. 1919, commented by *C. Boisman*; RTD civ. 2014, p. 893, commented by *P. Jourdain*; JCP 2014, 1034, commented by *Y. Dagorne-Labbé*; *ibid*., 1323, commented by *M. Bacache*. See, e. g., *F. Leduc*, Les règles générales régissant la réparation du dommage, JCP G, supp. no. 30-35, 25.7.2016, p. 39.

However, in two decisions the victim's behaviour had been taken into account. Reference to a reasonable management measure: Cour de cassation [Cass.] civ. 2e, 22.1.2009, no. 07-20.878, D. 2009, p. 1114, commented by *R. Loir*, RTD civ. 2009, p. 334, commented by *P. Jourdain*. Reference to the fault of the victim: Cour de cassation [Cass.] civ. 2e, 24.11.2011, no. 10-25.635, D. 2012, p. 141, commented by *H. Adica-Canac*; RTD civ. 2012, p. 324, commented by *P. Jourdain*.

[324] *L. Clerc-Renaud*, Les effets de la responsabilité et la réparation des dommages. Unité ou diversité des formes de réparation dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 508, 528; *A.-L. Fabas-Serlooten*, L'obligation de minimiser le dommage dans le projet de réforme de la responsabilité: la victime responsable de la gestion de son dommage, RTD civ. 2018, p. 21.

[325] *S. Taylor/M. Dyson/D. Fairgrieve* (fn. 90), p. 147.

[326] Pierre-Louis Merer, *Pierre-Louis Merer: The dawn of a duty to mitigate damages in French law*, THE SHIPOWNERS' CLUB (Jul. 5, 2018), https://www.shipownersclub.com/pierre-loius-merer-the-dawn-of-a-duty-to-mitigate-damages-in-french-law/.

or application of the general principle of good faith.[327] In addition to Quebec law, we find relevant regulation in German law,[328] Greek law,[329] Italian law,[330] and Swiss law,[331] and in the Vienna Convention.[332]

In the context of tortious liability in French law, it is questionable whether good faith conduct can be clearly defined in the absence of a contract and in the absence of foreseeability of the parties' obligations.[333] However, an obligation of loyalty seems to be present even in extra-contractual liability according to Article 1241 of Civil Code.[334] French jurisprudence seeks to limit the remedied damage by resorting either to the concept of causation or to the victim's fault.[335] Therefore, the damage must be an immediate and direct consequence of the infringement and the victim must not have participated in inducing the damage.[336]

We note that in contrast to French law, Swiss law allows the judge to take into account the fact that the victim was not subjected to certain medical care, as long as it did not involve any obvious danger and did not entail particular pain when considering compensable damage.[337] Similarly, Quebec law does not provide for a limitation on the victim's obligation to avoid aggravating the injury (Civil Code 1991).[338] In 1985, the Supreme Court of Canada accepted that although one may refuse to undergo surgery, it must be assessed whether this refusal is reasonable by taking into account the seriousness of the consequences of refusing to undergo surgery, the advantages the operation presents, and the risk to which the victim is exposed.[339] The PETL do not provide for a relevant provision in tort liability, while the DCFR accepts this possibility in a wording that is unclear.[340] In Quebec law this obligation of the victim is admitted in both types of liability.[341]

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[327] Court of Appeals of Quebec, Consoltex Inc. C. 155891 Canada Inc., (2006) QCCA 1347, § 57, available at: https://www.canlii.org/fr/qc/qcca/doc/2006/2006qcca1347/2006qcca1347.html.

[328] BGB § 249 and 254 para. 2.

[329] Art. 300 of Greek Civil Code (duty to mitigate).

[330] Art. 1227 of Civil Code.

[331] Art. 44 and 99 of Swiss Code of Obligations.

[332] United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, Art. 77.

[333] *P. Remy-Corlay* (fn. 226), p. 191, 198.

[334] *A. Pelissier*, Assurances de responsabilité civile, Revue générale du droit des assurances 2012, p. 424.

[335] See *supra* note 68. Causation as a condition of tort liability, *see Introduction to French Tort Law*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE L., https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

[336] *P. Remy-Corlay* (fn. 226), p. 198, 199.

[337] Decision of Federal Tribunal, 13.12.1955, Blaser v. Ackermann, ATF 81 II, JT 1956 I 237; *P. Wessner* (fn. 71), p. 304.

[338] Art. 1479 Civil Code of Quebec: A person who is bound to make reparation for an injury is not liable for any aggravation of the injury that the victim could have avoided; *see also N. Vézina* (fn. 309), p. 39, 46. The author notes, however, that jurisprudence and theory cautiously apply this rule in the case of bodily injury.

[339] Janiak c. Ippolito, (1985) 1 R.C.S. 146, § 31.

[340] Art. VI. 6: 202 DCFR: "Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or *the means to prevent it*".

[341] Lebel v. 9067-1959 Quebec Inc., 2014 QCCA 1309, § 47; Entreprises Lacènes Inc. v. Épiciers Lacènes Inc. v. Épiciers Unis-Metro-Richelieu Inc., 1996 CanLII 4412 (QC CS), § 51. See *P. Deslauriers/S. Fernandez*, L'encadrement de la réparation du préjudice au Québec, in Vers une réforme de la responsabilité civile française (fn. 5), p. 121, 131.

However, not requiring such behavior in the event of bodily injury remains debatable.[342] Moderation of the damage can be legitimately expected if it does not concern treatment on the body, but rather concerns other measures which may be reasonable; for example, the arrangement of a person's house so that the help of a third party would be less necessary, contrary to what French jurisprudence accepts.[343] In terms of compensation, it is provided that the victim is free to dispose of the amount awarded to him at will, without being obliged to use this amount for a specific purpose;[344] this decision by the reforming groups[345] confirms the existing case law.[346]

IV. CONTRACT AND TORT LIABILITY REGARDING THIRD PARTIES

Among the innovations of the proposed reform is a provision for the liability of a contracting party towards a third party to the contract when a contractual fault causes damage to the third party. The French jurisprudence originally considered that tortious fault was required for the establishment of tort liability; not only contractual non-fulfilment,[347] but later the assimilation of contractual non-fulfilment into tortious fault was accepted.[348] This question was then taken up by the plenary session of the French Supreme Court in the Myr'ho or Boot shop decision of 2006, which held that contractual non-fulfilment was automatically equated with tort.[349] However, the relevant debate was not closed, and the French Supreme Court held otherwise in subsequent decisions.[350] With a new decision in 2020 (Sucrerie Bois rouge), the

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[342] Andrew Tetley, *Does French law recognise a duty to mitigate?*, REED SMITH (Dec. 1, 2014), https://www.reedsmith.com/en/perspectives/2014/12/does-french-law-recognise-a-duty-to-mitigate.

[343] Cour de cassation [Cass.] civ. 2e, 25.10.2012, no. 11-25.511, D. 2013, p. 416, commented by *A. Guégan-Lécuyer*.

[344] Art. 1265 of the law proposal of 2020.

[345] Art. 1377 of the Catala-Viney draft of 2005 and Art. 55 of the Terré draft of 2010.

[346] Cour de cassation [Cass.] civ. 2e, 8.7. 2004, Bull. civ. II, no. 391.

[347] Cour de cassation [Cass.] civ. 1re, 7.11.1962, Bull. civ. I, no. 465. See *Contractual and extra-contractual liability*, LGT LAW., https://www.ljt.ca/en/expertises/contractual-and-extra-contractual-liability/ (last visited Apr. 4, 2023).

[348] Cour de cassation [Cass.] civ. 1re, 15.12.1998, nos. 96-21.905 and 96-22.440, Bull. civ. I, no. 368. Contra Cour de cassation [Cass.] com., 17.6.1997, no. 95-14.535, Bull. civ. IV, no. 187.

[349] Cour de cassation [Cass.] ass. plén., 6.10.2006, no. 05-13.255, Bull. ass. plén., no. 9, D. 2006, p. 2825, commented by *I. Gallmeister*, commented by *G. Viney*; *ibid.* p. 2007, p. 1827, commented by *L. Rozès*; *ibid.* p. 2897, commented by *P. Brun*/*P. Jourdain*; *ibid.* p. 2966, commented by *S. Amrani-Mekki*/*B. Fauvarque-Cosson*; Revue de droit immobilier (RDI) 2006, p. 504, commented by *P. Malinvaud*; RTD civ. 2007, p. 61, commented by *P. Deumier*; *ibid.* p. 115, commented by *J. Mestre/B. Fages*; *ibid.* p. 123, commented by *P. Jourdain*. The owners of a property leased it to a company that entered into a "location-gérance" agreement with another company. The latter brought an action against the landlords due to non-maintenance of the property. *G. Rouzet*, La responsabilité à l'égard des tiers à raison d'une faute contractuelle. Avant-propos, in La réforme du droit de la responsabilité civile en France (fn. 46), p. 153, 154.

[350] Cour de cassation – Troisième chambre civile (Cass. civ. 3e), 18.5.2017, no. 16-11.203; Cour de cassation [Cass.] com., 18.1.2017, no. 14-16.442; *contra* Cour de cassation [Cass.] civ. 1re, 9.6.2017, no. 16-14.096.

Plenary Session of the French Supreme Court reaffirmed the decision it originally made in 2006.[351]

The law proposal of 2020 sets the conditions that must be met to establish tortious liability, and contractual non-performance itself does not automatically constitute a tortious fault.[352] In this respect, it approaches the solution that is accepted in German law, in which contractual non-performance is not sufficient to establish tort liability.[353] Greek law adopts the same position.[354] However, in the French law proposal of 2020, it is possible for a third party with a *legal interest* in the good performance of a contract, and who cannot bring another action to recover damages suffered due to the poor performance of the contract, to invoke contractual non-performance as a ground for establishing tort liability, provided he has suffered a loss as a result.[355] In this case, the conditions and limits of liability that apply between the contracting parties are also applicable to the third party.[356]

We note that the Senate law proposal of 2020, as well as the draft law of 2017 (following the Catala-Vinay draft of 2005) provides for the protection of non-contracting third parties who have suffered damage, but limits this regulation in terms of the objective and subjective scope.[357] On the one hand, contractual non-fulfilment is required, i.e., a breach of an obligation of means or an obligation of result that does not necessarily constitute a tortious fault.[358] On the other hand, the third party who has a legal interest in the performance of the contract is entitled to compensation; [359] the courts should interpret this provision to mean that not every third party will be allowed this possibility, because otherwise the legislative intervention will become useless.[360] Therefore, the French Senate is reforming the jurisprudential solution of the French Supreme Court in a way that is not favorable to the victims, since it allows them to turn against a third party who violated a contractual obligation towards his counterparty with an additional condition, the proof of a legal interest.

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[351] Two companies are engaged in the production of sugar and have entered into a mutual production assistance agreement between them. Each of them has entered into a contract with third-party companies for the provision of energy necessary for their operation. It was not possible to supply energy to one company (A) for four weeks and the other sugar company (B) had to process a large quantity of sugar belonging to its counterparty under the cooperation agreement between them. B's insurance company then sued the company that was supposed to supply A with energy. Cour de cassation [Cass.] ass. plén., 13.1.2020, no. 17-19.963, D. 2020, p. 416, and commented by *J.-S. Borghetti*; *ibid.* p. 353, commented by *M. Mekki*; *ibid.* 394, commented by *M. Bacache*; RTD civ. 2020, p. 96, commented by *H. Barbier*; AJ contrat 2020, p. 80, commented by *M. Latina*; Laura Ngoune, *Mind the Third Party Gap: Breach of Contract, Third-Party Liability*, LITIGATION COMMITTEE (Apr. 2020) (available at https://www.ibanet.org/article/F0F05246-5B40-40F8-803F-73A4C022F492)

[352] Art. 1234 para. 1.

[353] *Th. Kadner Graziano*, La responsabilité à l'égard des tiers à raison d'un manquement contractuel. Le contrat avec effet protecteur envers des tiers en droit français?, in La responsabilité du contractant défaillant à l'égard des tiers (fn. 46), p. 175, 187.

[354] Greek Supreme Court, no. 2215/2007, Nomiko Bima (Legal step) 2008, p. 988; Greek Supreme Court, no. 1210/2001, Nomiko Bima (Legal step) 2002, p. 1270.

[355] Art. 1234 para. 2. of the law proposal of 2020.

[356] *Id*.

[357] *N. Ferrier*, La responsabilité du contractant défaillant à l'égard des tiers, in La réforme du droit de la responsabilité civile en France (fn. 46), p. 159, 163 et seq.

[358] *Id*., p. 164.

[359] Laura Ngoune, *supra* note 351.

[360] *Id*., p. 168; *G. Viney*, La responsabilité du débiteur à l'égard du tiers auquel il a causé un dommage manquant à son obligation contractuelle, D. 2006, 2825.

It is worth noting the special importance the French law gives to the enforceability of a contract against third parties, as the contract is considered a social fact the third parties must respect.[361] The "radiation," or opposability, of the contract to third parties has even been expressly provided for in Article 1200 of the French Civil Code during the revision of the contract law.[362] Thus, an argument in favor of the existing jurisprudential solution, is that since third parties must respect any contract in which they are not a party, they should be able to receive compensation from a contracting party who, by violating his contractual obligation, causes them damage. Nevertheless, the partial evolution of this solution was chosen by the legislators as a way of limiting third parties who can benefit from the breach of a contract in which they are not a party; however, a rather broad formulation (like the term "legal interest") is adopted that needs further definition.

The academics who participated in creating the Catala-Viney draft of 2005 were inspired by German law, specifically by the contracts with protective effects in favor of third parties, and for this reason they decided that third parties who have a legal interest in the execution of a contract could turn against the person who breached a contractual obligation. However, the provisions on contractual liability should be applied in conjunction with the limiting terms of liability that are agreed upon by the contracting parties.[363] This way, there are protections for the interests of a contracting party who will be called upon to compensate a third party, but under the conditions that the contracting party would also have to compensate his counterparty.[364] Under the current case law, the contracting party would have to compensate all of the damages that the third party suffered, and not only those damages foreseeable under the contract,[365] without being able to object to the third party in regards to the terms that limit the liability.[366] Indeed, the law proposal of 2020 expressly provides that "[t]he conditions and limits of liability that apply in the relations between the contracting parties are opposable (to the third party)."[367]

A further approximation of French and German law could be proposed so that the third party entitled to sue a contracting party in a contract to which he is not a party is determined under the conditions laid down by German jurisprudence,[368] where the third party has suffered damage to the same extent that the counterparty could have suffered, the counterparty has a special interest in the third party's protection, and the liable contracting party knows that both of these conditions are met.[369] However, this interpretation adds to the provision conditions that do not exist, while the French jurisprudence tends to adopt solutions more favorable to the victim.[370] We consider as a more correct interpretation that the third parties who have a legal interest in the execution of the contract are those who are interested precisely in the fulfilment of the characteristic provision of the contract, which is not the

[361] *See* Laura Ngoune, *supra* note 351.

[362] Article 1200 of French Civil Code: "Third parties must respect the legal situation created by the contract".

[363] *See* Art. 1234 of the law proposal of 2020.

[364] *See id.*

[365] Provision maintained by the law proposal of 2020, art. 1251.

[366] *N. Ferrier* (fn. 357), p. 170; *M. Latina*, La fin de l'unité des fautes contractuelle et délictuelle ?, L'ESSENTIEL Droit des contrats, 1.7.2017, no. 110, p. 1.

[367] Art. 1234 para. 2.

[368] *See* KADNER GRAZIANO, *supra* note 353 at 175.

[369] *See id.* at 175, 187.

[370] *See* Art. 1234 of the law proposal of 2020.

payment of the financial consideration, or in other words not those who simply derive a financial benefit from the execution of the contract. That is, the members of a tenant's family are interested in the proper maintenance of the lease by the property owner. On the contrary, if a party fails to fulfil his contractual obligations to its counterparty, the latter's creditors who have only a financial claim will not fall within the subjective scope of this provision.[371] As a result, according to this interpretation, both the Boot shop and the Sucrerie Bois rouge case law will be preserved after the review.[372]

There are still questions that should be answered by the jurisprudence, such as whether the liable contracting party can oppose the contractual terms to third parties in any case or, at least, these terms should have been made known to the counterparty (the third party will not, as a rule, know these terms).[373] If the third party has entered into a contract with a creditor of the person liable, the third party should not claim from a non-contractor (the person liable) a higher compensation than he could receive from his own counterparty (the creditor of the person liable).[374]

V. CLOSING REMARKS

The revision of French tort law is proving to be a lengthy process, with five texts having been processed so far. It is apparent that important contested points such as a civil fines or strict liability in cases of abnormal dangerous activity have been abandoned for now, which is a choice that could be criticized. Regarding a civil fine, the example of Quebec law can be followed, and the imposition of this would be possible in the cases determined in the law.[375] Regarding liability for dangerous activities, the introduction of such liability would constitute an approach of French law to the PETL.[376] However, the maintenance of the extended liability of the keeper of a thing rendered the provision of a new case of liability rather useless. Moreover, the responsibility of the keeper of a thing has been established jurisprudentially and is part of the tradition of French tort law to take more care of the protection of the victim, rather than considering that the accidental damage should be ultimately borne by the victim (*casum sentit dominus*).[377]

As a result, the law proposal of 2020 largely constitutes a codification of the existing jurisprudence and clarifications are given for an opposite solution to certain issues (e.g., regarding the responsibility of the parents, an act is required that establishes the responsibility of the child and not just an event causally linked to the damage, and the cohabitation of parents with the child is not required).[378] However, the innovations that are intended to be introduced in relation to the existing law remain important.[379] We must point out how much emphasis is

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371 *See id.*

372 *See Cour de cassation* [Court of Cassation], *Assemblée plénière*, 6.10.2006, 05-13.255, *Bull. ass. plén., no. 9*; *see also Cour de cassation* [Court of Causation], *Assemblée plénière*, 13.1.2020, 17-19.963, *Publié au bulletin*.

373 *N. Ferrier* (fn. 357), p. 171.

374 *Id.*

375 *See* Civil Code of Québec, C.C.Q. 1991, c 64, art 1621 (Can.).

376 *See* Art. 4:103 PETL.

377 *See, e.g., J.-S. Borghetti*, La réforme du droit de la responsabilité civile en France, LPA, 13.3.2014, no. 52, p. 16.

378 Art. 1245 of the law proposal of 2020.

379 *See id.*

placed on bodily harm, in relation to Article 16-3 of the French Civil Code, which prohibits any offense to bodily integrity.[380] We also mention the obligation of the victim to ensure that his damage is not aggravated, the possibility of an order of cessation of an illicit act, or the reversal of the existing jurisprudence that equates contractual non-fulfilment with tortious fault.[381] Also of interest is how tort liability is structured, its relationship with contractual liability, and the addition of a fourth damaging event.[382]

The dialogic relationship that the intended reform develops with other legal systems is also evident, but this is done without altering the basic characteristics of the French system of tort liability. We find the general clause of fault again, while maintaining the principle of reparation of any damage, without the limitations of the reparable damage that characterize other legal systems. We can only hope that this draft will form the future legislative framework soon, and in this way fill the existing legislative gap in the regulation of tort liability in French law that has resulted in the shaping of liability by the jurisprudence.

[380] *See* 1269 et seq.; *see also* Code civil [C. civ.] [Civil Code] art. 16-3 (Fr.).
[381] *See* Art. 1264, 1268 and 1234 of the law proposal of 2020.
[382] *See id.* at art. 1249.

IRELAND'S TAX CODE MAY BE CHANGING, BUT ONE THING REMAINS: HOW CAPITAL ALLOWANCES FOR INTANGIBLE ASSETS CONTINUE TO DRAW TECH GIANTS TO THE EMERALD ISLE

By Daryl Caffarone

I. INTRODUCTION

Over the past decade, American multinational tech enterprises evaded over 100 billion dollars in taxes.[1] Inconsistent tax codes across the globe were used by corporations to offshore profits to lower tax zones, and the uncertainty of the digitized market made economic activity on the global-scale increasingly harder to track.[2] The Organization for Economic Co-operation and Development (hereinafter "OECD"), in conjunction with the Group of Twenty (hereinafter "G20"), has initiated plans to curb this international tax evasion and, for the most part, many countries have been compliant.[3]

In the shadow of the OECD's plans to prevent tax evasion, a tax system was created allowing a corporation to claim capital allowances for intangible assets purchased from their own intragroup subsidiary.[4] A company could, under this tax initiative, purchase intellectual property (hereinafter "IP") from itself and write off this purchase as a deductible capital asset.[5] Multinational enterprises (hereinafter "MNE(s)") no longer need to offshore their assets to evade high-tax areas; and can act without considering legality.[6] A MNE can take advantage of these capital allowances by relocating to the Republic of Ireland.[7]

This note proceeds in five sections. Section II analyzes the economic and sociopolitical history of Ireland. This section will give further insight into the modern advantages of the Irish tax code structure and why American MNEs continue to move groups and subsidiaries into Ireland.

Section III discusses the how international organizations have worked to prevent MNEs (in particular, MNEs with subsidiaries in Ireland) from utilizing these low-tax jurisdictions. This section scrutinizes a particular part of Ireland's tax code – Capital

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[1] *See* George Iddenden, *No Tax Please, We're (Not) British: How the 'Silicon Six' Avoid Paying Tax*, CHARGED (Jul. 13, 2022), https://www.chargedretail.co.uk/2022/07/13/silicon-six-tax-avoidance/ [https://perma.cc/ANK2-Y8J8].

[2] *See Understanding Tax Avoidance*, OECD BEPS, https://www.oecd.org/tax/beps/ [https://perma.cc/JR4S-9E2T] (last visited Aug. 30, 2022).

[3] *Id.*; *see also Compliance Ratings Following Peer Reviews Against the Standard of EOIR*, GLOB. F. ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, https://www.oecd.org/tax/transparency/documents/exchange-of-information-on-request-ratings.htm [https://perma.cc/5JKM-AD5V] (last visited Aug. 30, 2022).

[4] *See* David Chance, *Why Google Might Still Benefit From Irish Tax Breaks*, INDEPENDENT.IE (Jan. 3, 2020), https://www.independent.ie/business/why-google-might-still-benefit-from-irish-tax-breaks-38830700.html?reg=true [https://perma.cc/74LG-NRFH].

[5] *Id.*

[6] *Id.*

[7] *Id.*

Allowances for Intangible Assets (hereinafter "CAIA") – which has gone detrimentally unregulated by these aforementioned international organizations.

Section IV is an analysis of the legal challenges that have faced Apple Inc. (hereinafter "Apple") and its Irish subsidiaries; in particular, a case brought before the European General Court in 2016 and its subsequent appeal in 2020.

Lastly, Section V proposes two solutions preventing MNEs from avoiding taxes under the CAIA system. First, a recommendation in OECD steps to regulate this particular provision. Second, why Ireland must wholly reject CAIA.

II. BACKGROUND AND HISTORY

An investigation into countries with the weakest corporate tax laws, highest rates of corporate tax evasion, and a corporate income tax rate that belies the global average, has Ireland at the forefront of the analysis.[8] Negative media attention, international criticism, and lawsuits have made Ireland the poster-child for what not to do on the international economic stage.[9] Ireland's tax code and their ongoing influx of American MNEs have led to what some economists consider a "statistical cry for help" and other economists consider "suspicious at best."[10]

While this note delves into the mistakes of Ireland's past and present, it is imperative to preface the discussion of Irish tax law with a brief overview of Ireland's economic history pre-twenty-first century and colonial history that still impacts Ireland's socioeconomic zeitgeist today.[11]

After Ireland officially gained its hard-won independence from Great Britain in 1922, a contentious period of political and economic instability began for the newly freed state (known as the "Irish Free State"). From 1922-23, a violent civil war waged between those who supported and those who opposed the treaty to end the war with the United Kingdom (known as the Anglo-Irish Treaty) and the ensuing guerilla warfare led to significant loss of life and property.[12] Despite the heavy financial burdens of war, the Irish Free State remained a steady

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[8] Stephen Holland, *How Ireland Became One of the World's Biggest Tax Havens*, INDEPENDENT.IE (Dec. 4, 2021, 11:29 AM), https://www.independent.ie/regionals/sligochampion/business/how-ireland-became-one-of-the-worlds-biggest-tax-havens-41117761.html [https://perma.cc/L2KK-D9RC].

[9] *Id*.

[10] *See* Brad W. Setser, *Ireland's Statistical Cry for Help…*, COUNCIL ON FOREIGN RELS. (Nov. 1, 2019), https://www.cfr.org/blog/irelands-statistical-cry-help [https://perma.cc/2KG7-TQ75]; *see also* Cole Frank, *Tax Avoidance and the Irish Balance of Payments*, COUNCIL ON FOREIGN RELATIONS (Apr. 25, 2019, 11:36 AM), https://www.cfr.org/blog/tax-avoidance-and-irish-balance-payments [https://perma.cc/3P5N-TY77].

[11] Cormac O Grada, *The Irish Economy During the Century After Partition*, 75 THE ECON. HIST. REV. 336, 336-70 (2022), https://onlinelibrary.wiley.com/doi/full/10.1111/ehr.13106 [https://perma.cc/DFS9-C5JJ].

[12] *See* John Dorney, *The Irish Civil War – A Brief Overview*, THE IRISH STORY (July 2, 2012), https://www.theirishstory.com/2012/07/02/the-irish-civil-war-a-brief-overview/#.ZDmlp-zMK3K [https://perma.cc/2T9N-Z39J] (The Anglo-Irish treaty established and divided the independent Republic of Ireland, and the British-controlled country of Northern Ireland. This severance between the northern and southern parts of the Irish island caused a rift in the Irish independence movement. Some saw the Anglo-Irish Treaty as a victory since it officially established Irish freedom; others saw any capitulation to the British government as unacceptable and wanted to continue fighting to subsequently claim Northern Ireland as part of the Republic.).

pastoral trader, with food and drink accounting for about six-sevenths of their exports.[13] In the late 1920s, Ireland had only two dozen manufacturing firms primarily located in Dublin and aside from Guinness, produced non-tradable goods having little impact on the Irish export-import economy.[14]

The 1930s saw a trend towards 'import-substituting industrialization,' to limit international trade and motivate the domestic market with homegrown alternatives.[15] Protectionist policies were to blame for the significant decline in income and output in the European Union (hereinafter "EU").[16] While Ireland was not necessarily *more* protectionist than other European nations at the time, Irish economists feared Ireland's small geographic size and somewhat homogeneous reserve of natural resources would end up hurting, rather than helping, Irish citizens.[17] By the late 1930s, on the brink of World War II, Ireland's economic growth on the international stage (i.e. its output growth) experienced a steady decline.[18]

World War II had a detrimental effect on the Irish economy, as it did on most European countries.[19] Immediately following the war, Ireland began to see the negative impacts of the import-substituting industrialization of the decade prior.[20] Manufacturing still accounted for a small range of specialized products, but most firms employed so few people they could not produce any substantial returns.[21] Actually, most firms produced or assembled foreign goods under license – something which, in the foregoing discussion, will begin to sound very familiar.[22]

The idea of multinational subsidiaries settling in Ireland became particularly attractive to American firms.[23] American firms were a valuable commodity because the U.S. dollar was generally rare across Europe, and American investment was not seen as a threat to Irish sovereignty, the way British investment would have been.[24] In other words, the seeds for what would later be a large, fruitful market for American multinationals were planted and carefully sowed by a wariness to rely on Great Britain in response to history.[25] In 1951, Ireland introduced tax reliefs on export profits through the "Double Taxation" scheme that would prove both beneficial and controversial in the Irish and international markets.[26]

From the 1960s to the early 1970s, Ireland's economic performance greatly increased (although some speculate performance could have been better had Ireland not relied so heavily on trade with the UK).[27] This increase would be short-lived as the 1980s ushered in a

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[13] *See* O Grada, *supra* note 11 at 336-70.
[14] *See id*.
[15] *See id*.
[16] *See* Bromhead, et al., *When Britain Turned Inward: The Impact of Interwar British Protection*, 109 AM. ECON. REV. (2019), 235, 327.
[17] *See* O Grada, *supra* note 11 at 336-70.
[18] *See id*.
[19] *See id*.
[20] *See id*.
[21] *See* O Grada, *supra* note 11 at 336-70.
[22] *See id*.
[23] *See id*.
[24] *See id*.
[25] *See id*.
[26] *See id*.; *see also* Relief of Double Taxation (Taxes on Income: Ireland- U.S.A) Regulations (Act No. 87/1956) (Ir.), https://www.irishstatutebook.ie/eli/1956/si/87/made/en/print [https://perma.cc/28JC-HAZV].
[27] *See* O Grada, *supra* note 11 at 336-70.

tumultuous era of unsuccessful deficit spending, a surging national debt, and heavy borrowing from abroad.[28] Unemployment rose to its highest rate (17.1%) and the population declined as many citizens migrated from the economically unstable country.[29] Ireland became known as one of the poorest countries in all of Europe.[30]

The Irish economy in the 1990's cannot be properly analyzed without first discussing the Double Taxation Agreement (hereinafter "DTA") between Ireland and the United States (hereinafter "U.S.") in 1951.[31] The concept of corporate tax evasion has the DTA as the quintessential archetype; in other words, the DTA allowed global corporations to move their taxable revenue from an operating firm in Ireland to a separate firm somewhere abroad with a reduced corporate income tax rate.[32] Ireland's corporate income tax rate was 10% while the U.S. (upon signing the Revenue Reconciliation Act in 1993) had a rate of 15% for a corporation's first $50,000 of taxable income and 35% for corporations with taxable income over $10 million.[33] The EU took notice of this overly-competitive tax rate and, after mounting pressure, Ireland introduced a new corporate income tax rate of 12.5% in 1998.[34]

The early 1990s saw a complete shift in the Irish economy.[35] Unemployment rates dropped 10% and the debt-to-GDP ratio plummeted from 100% in 1980 to 47% in 2000.[36] The Irish GDP per capita in 1996 soared more than 50% since 1973.[37] Success could be attributed to a myriad of different positive changes such as a remarkable increase in education, investment in infrastructure, and an influx of immigration.[38] An important aspect to the analysis of the growth of the Irish economy leading into the 21st century is the rising tide of technological advancement and an influx of American investment.[39] In 1993, high tech multinational corporations' output was 43% of the total manufacturing output in all of Ireland, and this

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[28] *See id*.

[29] *See id*.

[30] *See id*.

[31] *See* Jessica J. Poyner, *Investing in Ireland: The Enticement of U.S. High-Tech Industry to the Emerald Isle*, 10 PAC MCGEORGE GLOB. BUS. & DEV. L.J. 196, 208 (1997).

[32] Henry McDonald, *Ireland to Abolish Controversial 'Double Irish' Tax Arrangement*, THE GUARDIAN (Oct. 14, 2014), https://www.theguardian.com/world/2014/oct/14/ireland-abolish-double-irish-tax-scheme-apple [https://perma.cc/5N2A-4RHY].

[33] *See* Dermot McAleese, *The Celtic Tiger: Origins and Prospects*, POL'Y OPTIONS POLITIQUES 46, 48 (Jul.-Aug. 2000); *see also* Historical *U.S. Federal Corporate Income Tax Rates & Brackets, 1909-2020*, TAX FOUND. (Aug. 24, 2021), https://taxfoundation.org/historical-corporate-tax-rates-brackets/ [https://perma.cc/CMV9-C3NH].

[34] *See* McAleese, *supra* note 33 at 48 (however, the initial 10% rate would be applicable to corporations 'grandfathered into' the program up until 2010, therefore the EU's deterrent efforts cannot be seen as wholly successful).

[35] *See id.* at 47.

[36] *See id*.

[37] *See* THE ECON. AND SOC. RSCH. INST., MEDIUM-TERM REV.: 1997-2003 34-67 (David Duffy, et al. eds., no.6 1997), https://perma.cc/4NB3-KENJ.

[38] *See generally id.*; *see also* McAleese, *supra* note 29 at 47.

[39] *See* O Grada, *supra* note 11 at 357.

number continued to rise throughout the 1990s.[40] Between 1993 and 2001, nearly 300 high-tech industrial projects arrived in Ireland, including Apple, IBM, and Microsoft.[41]

Irish growth was larger than that of its European and Asian counterparts and heavily influenced by production in information and communication technology.[42] Contradictorily, expenditure on research and development was low, which indicates much of this tech growth was not originating organically out of Ireland's domestic market.[43] These two factors indicate Ireland had a heavy reliance on American multinational tech companies, which had been leading the charge for this new, technological frontier.[44] In the 1990s, the U.S. was approximately two years ahead of all European tech; the European market was highly seductive because U.S. tech multinationals could market 'old' technology for the same price as 'new' technology in their domestic market.[45] By 1995, Ireland contained 23% of all U.S. manufacturing investments in Europe (for context, Ireland was only 1% of Europe's entire population) and employment in the software industry rose over 25% from 1987-95.[46] When asked "Why Ireland?", spokespeople for major U.S tech firms stated many of the sociological benefits such as education and an eager workforce, but the one benefit that was perhaps the most significant was Irish 'tax incentives.'[47]

III. WHAT'S HAPPENING NOW

This section will discuss international corporate taxation in Ireland in the modern era. Subsection A will discuss the international response to large international tech companies taking advantage of low-tax jurisdictions to avoid paying billions of dollars' worth of taxes. Subsection B will analyze CAIA and explain why it is utilized by the aforementioned international companies.

A. The OECD and the Silicon Six

A 2021 report by the Fair Tax Foundation found that Facebook (now known as Meta), Apple, Amazon, Netflix, Google (now under their parent company Alphabet), and Microsoft

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[40] Antoin E. Murphy, *The 'Celtic Tiger' – An Analysis of Ireland's Economic Growth Performance*, EUR. UNIV. INST. WORKING PAPERS 15-16 (2000).

[41] *See id.* at 15; *see also* Garret FitzGerald, *What Caused the Celtic Tiger Phenomenon?* THE IRISH TIMES (Jul. 21, 2007, 1:00 AM), https://www.irishtimes.com/opinion/what-caused-the-celtic-tiger-phenomenon-1.950806 [https://perma.cc/LR5A-BAN8].

[42] *See* FitzGerald, *supra* note 41.

[43] *See id.*; *see also* Róisín Ní Mháille Battel, *Ireland's "Celtic Tiger" Economy*, 28 SCI., TECH. & HUM. VALUES 93, 103 (2003).

[44] *See* O Grada, *supra* note 11 at 357.

[45] *See* Poyner, supra note 31 at 196.

[46] *See id.* at 198.

[47] *See id.* at 196; *see also* John Hendren, *High-Tech Companies in U.S. Making the Old Sod Their Turf*, CHI. TRIB. (Sep. 9, 1990), https://www.chicagotribune.com/news/ct-xpm-1990-09-09-9003150512-story.html [https://perma.cc/LN6X-XZQD] (quoting Bill Stewart, spokesman for a California-based mainframe computer-maker, when asked why Ireland offered the best deal for a European venue after an examination of other European countries).

reported a tax disparity of $100 billion over the course of a decade (2011-2020).[48] For context, these companies (dubbed the "Silicon Six") paid roughly 3.6% of taxes on their total revenue.[49] One of the ways these companies facilitated such impressive tax avoidance is through profit sharing to tax havens; given the strategic locations of many of the Silicon Six's subsidiaries, these tax avoidance strategies are largely seen as foundational to the corporations' procedures.[50]

Inspired by the public outrage that followed the outing of the Silicon Six, the G20 called upon the OECD to come up with a system that could globally protect both corporate tax laws and countries abused by these tech powerhouses.[51] The OECD is a collaborative group of countries that make up 60% of the world's GDP and work together to come up with solutions to some of the world economy's most pressing issues.[52] Following the outing of the Silicon Six, the OECD came together to try to rectify the pervasive issue of profit sharing and tax-base erosion.

The OECD's fight against base erosion and profit sharing (hereinafter "BEPS") is a collaborative international measure meant to be followed by each of the OECD's 135 countries and jurisdictions.[53] The OECD's plan outlined two pillars: reallocate taxable income to market jurisdictions (so goods are not taxed simply where the parent or subsidiary company is incorporated) and raise the global corporate income tax rate to 15%.[54] The first pillar is a direct attack on what multinationals have been doing in Ireland since the 1990s; establishing taxable income in market jurisdictions outside where subsidiaries are located means companies that enjoy Ireland's lax tax rate now have to pay taxes based on where its products are sold.[55]

In 2021, advocates for the current Irish system foresaw an end to multinational incorporation and initially fought back against the OECD's plans.[56] When the OECD pillars were first enacted, Ireland refused to sign and campaigned with other smaller nations with low corporate income tax rates against the pillars because Ireland viewed it as excessively

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[48] *The Silicon Six and Their $100bn Global Tax Gap*, FAIR TAX, https://fairtaxmark.net/silicon-six-end-the-decade-with-100-billion-tax-shortfall/ [https://perma.cc/BRR2-JGTC].

[49] *See id.* (citing to the graph 'Silicon Six: taxes expected, booked, and paid (2011-20)').

[50] *See id.*; *see also* Rupert Neate, *'Silicon Six' Tech Giants Accused of Inflating Tax Payments by Almost $100bn*, THE GUARDIAN (May 31, 2021, 3:01 AM), https://www.theguardian.com/business/2021/may/31/silicon-six-tech-giants-accused-of-inflating-tax-payments-by-almost-100bn [https://perma.cc/A7B2-9G6F].

[51] *See* Iddenden *supra* note 1.

[52] *See e.g. The Organization for Economic Cooperation and Development (OECD)*, U.S. DEPT. OF STATE, https://www.state.gov/the-organization-for-economic-co-operation-and-development-oecd/ [https://perma.cc/Q3ME-7D7C] (last visited Oct. 8, 2022).

[53] OECD BEPS, *supra* note 2.

[54] *See generally Global Tax Reform*, KPMG, https://kpmg.com/ie/en/home.html [https://perma.cc/97ER-66Y2] (last visited Aug. 13, 2022).

[55] *See e.g* OECD BEPS, *supra* note 2; *see also* Liz Alderman, *Ireland's Says As a Tax Haven May Be Ending, But Not Without a Fight*, N.Y. TIMES (Jul. 8, 2021), https://www.nytimes.com/2021/07/08/business/ireland-minimum-corporate-tax.html#:~:text=the%20main%20story-,Ireland's%20Days%20as%20a%20Tax%20Haven%20May%20Be%20Ending%2C%20but,put%20Dublin%20on%20the%20defensive. [https://perma.cc/C8AQ-KMN7].

[56] *See id.*; *see also 130 Countries and Jurisdictions Join Bold New Framework for International Tax Reform*, OECD NEWSROOM (Jan. 7, 2021) https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm [https://perma.cc/8YZ7-4ALG].

burdensome on their countries. [57] The Irish government's bleak prediction of the coming years claimed Ireland could lose 2 billion dollars annually and lose new investments due to the new reforms.[58] Bowing to the pressure from the EU, OECD, and the U.S., Ireland announced a corporate income tax rate increase to 15% to thus abide by the new global standard.[59]

Despite predictions to the contrary, multinationals continue to move assets and subsidiaries into Ireland rather than out of it.[60] Despite Ireland's push towards global compliance, their tax code still allows for a substantial tax break; CAIA (also known as depreciation allowances) for intragroup purchases of intangible assets.

B. Capital Allowances for Intangible Assets: What It Means and How It's Used

In 2021, Finance Minister Paschal Donohoe announced that Ireland would raise its corporate income tax rate to the global standard of 15% after years of staunch refusal to do so.[61] While the trend in Ireland's domestic tax policy seems to align with the OECD's anti-BEPS strategies, Ireland's treatment of CAIA's is an insidious loophole keeping these multinational corporations satisfied with their Irish residence.[62]

Capital allowances are the amount of investment that a company puts towards its long-term growth that could then, in turn, be deducted from its revenue.[63] Deductions from a company's revenue occur through depreciation; depreciation requires these deductions be taken out over time, usually years, at a percent rate that varies by country and depends on the asset being purchased.[64] Additionally, deductions for expenses can be written off to a certain extent, or a "cap"; for example: if Country A has an 80% cap on a capital allowances and Company B claims a capital allowance of $10,000, than the depreciation of this allowance will only reflect $8,000, leaving Company B with an additional $2,000 spent that did *not* count as a business cost.[65] In regards to intangible assets, this deduction is specifically referred to as an amortization deduction ("amortization").[66]

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[57] *See e.g.*, Alderman, *supra* note 55; *see also* OECD NEWSROOM, *supra* note 56.

[58] *See generally* Shawn Pogatchnik, *Ireland Seeks Tax Clarity from U.S. Before Inking Any Deal on Global Minimum Rate*, POLITICO (Sept. 21, 2021, 5:21 PM) https://www.politico.eu/article/ireland-tax-rate-us-corporate-profits/ [https://perma.cc/U2ZU-TGKM]; *see also Draft Stability Programme Update 2021*, IR.'S DEP'T OF FIN. (Apr. 14, 2021) (available at https://perma.cc/7V2M-BUKH).

[59] *See e.g.* Will James, *Ireland Bows to Pressure to Increase Its Corporate Income Tax Rate*, FORVIS (Nov. 8, 2021) https://www.forvis.com/alert-article/2021/11/ireland-bows-pressure-increase-its-corporate-income-tax-rate#:~:text=Under%20the%20new%20agreement%2C%20starting,be%20taxed%20at%2012.5%20percent [https://perma.cc/36EJ-T4GJ]; *see also* Pogatchnik, *supra* note 58.

[60] *See* Mark Paul, *Microsoft Moves $58.2bn Of Assets And Its Asian Trading Operation to Ireland*, THE IRISH TIMES (May 25, 2019), https://www.irishtimes.com/business/technology/microsoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630 [https://perma.cc/8YGZ-3R52].

[61] *See* Morwenna Coniam, *Ireland Still Sees Minimum Corporate Tax Deal Being Delivered*, BLOOMBERG BUS. (Jul. 20, 2022, 6:45 AM), https://www.bloomberg.com/news/articles/2022-07-20/ireland-still-sees-minimum-corporate-tax-deal-being-delivered?leadSource=uverify%20wall [https://perma.cc/4XJ9-MN7P].

[62] Chance, *supra* note 4.

[63] *See e.g.*, *Capital Allowance*, TAX FOUND., https://taxfoundation.org/tax-basics/capital-allowance/ [https://perma.cc/KYG9-QTWH] (last visited Oct. 6, 2022).

[64] *See e.g.*, *id*.

[65] *See e.g.*, *id*.

[66] Sean Ross, *Amortization vs. Depreciation: What's the Difference?*, INVESTOPEDIA (Sept. 14, 2022), https://www.investopedia.com/ask/answers/06/amortizationvsdepreciation.asp#:~:text=Amortization%20and%

CAIA is the amount of capital costs on intangible assets (i.e., intellectual property) a business can deduct from its revenue.[67] In the Finance Act of 2009, Ireland determined CAIA would be capped at 80%. In 2015, the cap increased to 100%; however, after backlash and a legal battle with the European Commission, Ireland reintroduced the 80% cap in 2017 but grandfathered in corporations with capital allowances that fell in the interim period (some corporations are still allowed a 100% cap).[68] While capital allowances are not uncommon, OECD countries have fluctuating rates of return available to certain assets and businesses; on average, businesses within the OECD can recover on capital allowances at about 70%.[69]

CAIA was designed on the heels of Ireland's restriction on their larger DTA model and facilitates both IP onshoring and sales profits to Ireland.[70] The aforementioned 2009 Finance Act expanded the definition of "intangible assets" for the sake of capital allowances.[71] This expansion included types of "internally developed" group intangible assets and any intangibles purchased from "connected parties."[72] Put simply, companies in Ireland with a small county subsidiary can purchase IP from the small county subsidiary and receive a tax break off this purchase for the next decade.[73] Apple can achieve the same tax breaks with a corporate tax rate reduced from 12.5% to only 2.5%.[74]

Companies are using their subsidiaries and corresponding purchases of IP to save them billions in unpaid taxes per year.[75] The next section specifically addresses CAIA between intragroup subsidiaries, which is generally uncommon throughout OECD member states, and counteracts efforts of the OECD's "arm's length principle".[76] The next section will also expand upon how tech companies utilize this feature of the Irish tax code and why the Irish CAIA system is ideal for corporations as compared to other OECD member states.[77]

20depreciation%20are%20two,to%20reflect%20its%20anticipated%20deterioration. [https://perma.cc/FP2C-DANT].

[67] Lisa Hogreve, *Capital Cost Recovery Across the OECD*, TAX FOUND. (Apr. 26, 2022), https://taxfoundation.org/publications/capital-cost-recovery-across-the-oecd/ [https://perma.cc/PT8N-PMQZ].

[68] *See* Martin Brehm Christensen & Emma Clancy, *Exposed: Apple's Golden Delicious Tax Deals*, EUR. UNITED LEFT/NORDIC GREEN LEFT OF THE EUR. PARLIAMENTARY GROUP 45 (June 2018); *see also Capital Allowances for Intangible Assets*, REVENUE (IRISH TAX AND CUSTOMS), https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-09/09-02-05.pdf [https://perma.cc/LEF7-HS72] (last visited Oct. 6, 2022).

[69] Hogreve, *supra* note 67.

[70] Emma Clancy, *Apple, Ireland and the New Green Jersey Tax Avoidance Technique*, SOCIAL EUR. (Jul. 4, 2018), https://www.socialeurope.eu/apple-ireland-and-the-new-green-jersey-tax-avoidance-technique#:~:text=Ireland%27s%20capital%20allowance%20for%20intangible,taxable%20income%20over%2015%20years [https://perma.cc/X62F-2Z7R].

[71] *See Tag: Capital Allowances For Intangibles*, TPCASES.COM, https://tpcases.com/tag/capital-allowances-for-intangibles/ [https://perma.cc/JW56-C49L] (last visited Oct. 6, 2022).

[72] *See id*.

[73] *See e.g., id*.; see *also e.g.,* Clancy, *supra* note 70.

[74] *See* Christensen, *supra* note 68 at 41.

[75] *See* Clancy, *supra* note 70.

[76] *See e.g., id.*

[77] *See e.g., id.*

IV. LEGAL ISSUE

This section will address the legal implications of Ireland's tax code and how the EU General Court has responded to Apple's relationship with the Irish government. Subsection A will discuss how the OECD has attempted to regulate the international market and prevent large MNEs from taking advantage of low-tax jurisdictions and whether Ireland abides by the OECD's principle. Subsection B will discuss the European Commission's case against Apple Ireland in 2016 and the subsequent appeal in 2020 and address the court's interpretive strategy (in particular, how it utilizes the OECD) and how the court ultimately fails to address important parts of Ireland's tax code.

A. Does Ireland's CAIA Hold Out Against The OECD?

The Taxes Consolidation Act (hereinafter "TCA") 197, Part 35A details Ireland's policy in regard to transactions occurring within and between an enterprise with one common owner, otherwise known as transfer pricing.[78] The TCA abides by the OECD's transfer pricing guidelines, which is referred to as the "arm's length principle".[79] The "arm's length principle mandates that any transaction occurring between one business (i.e. an intragroup purchase) must abide by market standards for the same purchase; in other words, Subsidiary A must sell to Subsidiary B at the same price they would sell to a wholly different company.[80]Considering Ireland has upheld this OECD standard in their tax code, it would seem their intragroup purchases do not facially violate the OECD.[81]

Action 4 of the OECD's BEPS strategy places a limitation on interest deductions that could be considered the closest Action Plan that disavows the CAIA system.[82] The issue that this plan addresses is multinational groups adjusting the amount of debt in a group entity to thus achieve more favorable tax results.[83] These multinationals use intragroup loans to generate interest deductions and/or use intragroup financing to fund tax exempt income.[84]An Irish subsidiary using a purchase from another subsidiary to claim a capital allowance would violate the OECD provision that blocks "intragroup financing to fund tax exempt income."[85] However, the language of Action 4 is not specific enough to disavow the particular CAIA system.[86]

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[78] *See Transfer Pricing (Including MAP Requests)*, REVENUE (IRISH TAX AND CUSTOMS), https://www.revenue.ie/en/companies-and-charities/international-tax/transfer-pricing/index.aspx [https://perma.cc/XM54-4V95] (last visited, Aug. 30, 2022).

[79] *See id*; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[80] *See* OECD (2022), TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTER. AND TAX ADMIN., 31 (OECD Publishing Paris, 2022) https://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2022_0e655865-en [https://perma.cc/WK69-NADU].

[81] *See generally* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 78; *see also* T-778/16, Ireland v. European Commission, ECLI:EU:T:2020:338, ¶¶ 35-36 (Jul. 15, 2020).

[82] *Action 4 Limitation on Interest Deductions*, OECD, https://www.oecd.org/tax/beps/beps-actions/action4/ [https://perma.cc/6C4T-G7QX] (last visited Oct. 9, 2022).

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*.

IRELAND'S TAX CODE MAY BE CHANGING, BUT ONE THING REMAINS: HOW CAPITAL ALLOWANCES FOR INTANGIBLE ASSETS CONTINUE TO DRAW TECH GIANTS TO THE EMERALD ISLE

A capital allowance is a tool wielded by a government's tax code to facilitate corporate growth.[87]A capital allowance system is encouraged by a government's favor of certain corporate purchases.[88] Even if the OECD suggested a lower cap on capital allowances for intangible assets (lower than Ireland's current 80% cap) or set more stringent guidelines for depreciation calendars, the OECD would not be addressing the root of the issue.[89] The root of the issue is the intragroup purchase of intangible assets that *abide by* the "arm's length principle" and allow a multinational corporation to enjoy the benefits of capital allowances for years.[90]

The OECD's mission is to "equip governments with domestic and international rules and instruments to address tax avoidance" by using a set of enumerated Action Plans[91] Additionally, the EU has agreed to limit and prevent member states from facilitating any egregiously anti-competitive economic strategies.[92] Ireland's CAIA program directly conflicts with the OECD's principles without actually violating any of the Action Plans.[93] The European General Court (hereinafter "EGC") has similarly allowed CAIA to be generally unobstructed, despite the overarching goals of anti-competitiveness that the EGC claims to strive towards.[94]

B. Apple v. European Commission: From 2016-2022

In 2016, the EGC found that two Apple Group companies incorporated in Ireland paid an effective corporate tax rate of less than 1% which constituted an unfair competitive advantage within the EU.[95] Generally, invalidating or challenging domestic tax policies is not within the EU's jurisdiction or legal framework *unless* they invoke the EU's anti-competition treaty provisions.[96] The Treaty Establishing the European Union and the Treaty Establishing the European Community (both amended by the Treaty of Lisbon in 2007) created a Common Market between EU member states and, in Article 102 (originally Article 82), introduced a

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87 *See* TAX FOUND., *supra* note 63.

88 *See e.g., id*.

89 *See id*.; *see also* Christensen, *supra* note 68.

90 *See generally* Christensen, *supra* note 68.; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

91 *BEPS Actions*, OECD, https://www.oecd.org/tax/beps/beps-actions/#:~:text=Developed%20in%20the%20context%20of,and%20where%20value%20is%20created [https://perma.cc/HL2E-UUFZ] (last visited Oct. 9, 2022).

92 COMPETITION POLICY: PROCEDURES IN ARTICLE 102 INVESTIGATIONS, EUROPEAN COMMISSION, https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en [https://perma.cc/88DK-6WXA] (last visited Oct. 9, 2022).

93 *See e.g.,* OECD, *supra* note 91; *see generally* TPCASES.COM, *supra* note 71.

94 *See e.g.,* TPCASES.COM, *supra* note 71.

95 *See e.g.,* T-778/16 at ¶¶ 316-21 (Jul. 15, 2020); *see generally* EUROPEAN COMMISSION, *supra* note 92.

96 *See EU Court Overturns Commission Decisions in Landmark Apple Tax Case*, JONES DAY (Jul. 2020), https://www.jonesday.com/en/insights/2020/07/eu-court-overturns-commission-decision-in-landmark-apple-tax-case [https://perma.cc/AHK8-9T9B]; *see also* Julia R. Blue, *The Celtic Tiger Roars Defiantly: Corporation Tax in Ireland and Competition Within the European Union*, 10 DUKE J. OF COMPARATIVE & INT'L L. 443, 443 (2000) (available at: https://perma.cc/U48D-NK3B).

potential legal basis for directly challenging a country's domestic tax policy.[97] Article 102 states:

> Any abuse by one or more undertakings of a dominant position within the international market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist of… unfair trading conditions.[98]

Article 102 is an attempt to prohibit any unfair or abusive policies by companies in conjunction with particularly advantageous domestic tax policies.[99]

In 2007, the Treaty on the Functioning of the European Union (hereinafter "TFEU") was implemented in conjunction with the Treaty of Lisbon in an effort to create an even closer union amongst the European member states.[100] Article 107 declares any aid unfairly granted shall be "incompatible with the internal market."[101] "State aid", a competitive advantage, is given by a country to a company.[102] The EU generally bans the use of state aid unless the aid can be justified in regard to a member's economic development.[103]

The two Apple Irish subsidiaries at the heart of the 2016 and 2020 legal challenges were Apple Operations Europe (hereinafter "AOE") and Apple Sales International (hereinafter "ASI").[104] In 2007, Apple summarized a new method for determining the tax base of ASI and AOE.[105] The chargeable profit of the two Irish branches (which are incorporated in Ireland as subsidiaries) was to *exclude* costs invoiced from other Apple subsidiaries, an amount which corresponds to the "IP return for the manufacturing process technology developed by that branch."[106] The initial 2016 ruling followed precedent established in *Belgium and Forum 187 v. Commission* in regard to unfair intra-group transactions held ("arm's length principle"):

> [A] reduction in the tax base resulting from a tax measure enabling a taxpayer to employ transfer pricing in intra-group transactions that did not

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[97] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 2 & 102 [hereinafter Treaty of Lisbon].; *see also* Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[98] TFEU *supra* note 97 at. Art. 102.

[99] EUROPEAN COMMISSION, *supra* note 92; *see id*.

[100] TFEU *supra* note 97 at Art. 1.

[101] *Id.* at Art. 101.

[102] *See e.g.*, *State Aid*, EUROPEAN COMMISSION: GLOSSARY, https://eur-lex.europa.eu/EN/legal-content/glossary/state-aid.html [https://perma.cc/B4JD-Y3ZW] (last visited Oct. 25, 2022).

[103] *See id*.

[104] T-778/16 at ¶ 3.

[105] T-778/16 at ¶ 17.

[106] T-778/16 at ¶ 19; *see* Stephanie Soong Johnston & Ryan Finley, *A Closer Look At Apple's Victory in EU Tax Case*, FORBES (Aug. 10, 2020, 11:37 am) https://www.forbes.com/sites/taxnotes/2020/08/10/a-closer-look-at-apples-victory-in-eu-tax-case/?sh=771deb823f8a [https://perma.cc/HH5S-LSX9].

> resemble prices that would have been charged in conditions of free competition would confer a selective advantage on that taxpayer…[107]

The dispute concerned Section 25 of the TCA 97.[108] Section 25 refers to profits taxable for multinationals settled in Ireland; 25 TCA 97 states profits derived directly or indirectly from trade by the Irish branches *and* any income made from property or rights used and held by the branch are taxable.[109] Furthermore, in *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd* it was held that profits gathered from property controlled by the *non*-resident company cannot then be attributed to the Irish branch for tax purposes.[110] Therefore, the ECG in 2020 determined that the prior ruling erred in its assessment that ASI and AOE should be taxed for profits derived from IP licenses (IP licenses that were purchased from another Apple subsidiary, Apple Jersey) that were gathered from *non*-resident branches.[111]

The Commission argued that the intra-group transfer of IP was incompatible with OECD standards.[112] The Commission argued that the methods used to evaluate the profits derived from the transferred IP were *not* a "reliable approximation of market-based" outcomes, and thus violated the OECD's transfer pricing guidelines (i.e. the arm's length approach).[113] The court examined whether the OECD's "arm's length principle" need be applied to establish whether there is a selective advantage resulting from taxes determined after transfer pricing.[114] In other words, the "arm's length principle" is used to determine a normal allocation of taxes in an intra-group purchase and if normal standards have been met.[115]

Ultimately, the court agreed with the Commission's assessment and concluded that Ireland's evaluation was inconsistent with market standards.[116] However, it was unclear whether or not this inconsistent evaluation would lead to reduced taxable profits for the AOE and ASI.[117] It should be noted that while the OECD is not a binding legal entity, the EGC *did* affirm the lower court's use of the OECD's transfer-pricing standards; noting that the "Authorized OECD Approach" was based on work carried out by a group of experts and reflects international consensus regarding profit allocation.[118] Despite the avowal of the Commission's assertion and the legitimization of the OECD's transfer-pricing standards, the EGC court sets a higher evidentiary burden for establishing a breach of the arm's length principle.[119]

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[107] T-778/16 at ¶ 34.
[108] *Id*. at ¶ 174.
[109] *Id*. at ¶ 175.
[110] *Id*. at ¶ 179-80.
[111] *See e.g. id*. at ¶ 186-88.
[112] *Id*. at ¶ 315.
[113] *Id*. at ¶ 315-17.
[114] *Id*. at ¶ 194-97 (noting also that the principle is binding on a Member State whether or not the principle is incorporated into their tax law).
[115] *Id*. at ¶ 316-21.
[116] *See* JONES DAY, *supra* note 96; *see also id*. at ¶ 505-7.
[117] *See* JONES DAY, *supra* note 96; *see also* T-778/16 at ¶ 505-7.
[118] T-778/16 at ¶ 237-40.
[119] *See* JONES DAY, *supra* note 96; *see also* T-778/16 at ¶ 330.

The EGC court admitted that although the evaluation of taxable profits following the intra-group sale of IP was not in accordance with the "arm's length principle", it did not violate the TFEU's determination of state aid; notably, the EGC made no reference as to why the evaluation was so low, in part, because AOE and ASI were able to consider the purchase a capital allowance.[120] The OECD's transfer pricing guidelines do not address the market evaluation of intragroup transactions that are used for capital allowances.[121] The EGC's court's 2020 decision, in following OECD principles, fails to address a pervasive issue underlying one of the tax loopholes that gave rise to the case.[122]

By annulling the previous ruling, the EGC legitimized Ireland's tax code by claiming the government's relationship with Apple did not render improper state aid in accordance with the TFEU.[123] Additionally, the Court set a precedent that the European Commission has a significant evidentiary burden to prove an intragroup purchase violated the "arm's length principle".[124] The implications of this ruling, unencumbered use of CAIA, and the nature of the "arm's length principle" will undermine the OECD's anti-BEPS mission if not properly curtailed.[125]

V. SOLUTION

This note proposes that for Ireland to truly prevent MNEs from utilizing BEPS strategies, CAIA for intragroup purchases should be both specifically regulated by the OECD, and Ireland should consider removing this provision in their tax code altogether.[126] Some may argue that removing the CAIA provision, or the provision that allows for CAIA to apply to intragroup purchases, is not enough to substantially deter BEPS in Ireland.[127] Some also speculate that by limiting the benefits of Ireland's corporate tax structure, MNEs will leave and move to friendlier tax jurisdictions.[128]

Therefore, Part A will discuss the impact of the OECD, and how existing Action Plans can be used to limit the ability of MNEs to utilize CAIA to undermine the anti-BEPS strategies in place. The OECD inspires both oversight from the international community and significant change in non-compliant member states, so if the OECD minorly altered its BEPS Action Plans, it could deter the nefarious use of CAIA by MNEs. Part B(1) will demonstrate how the IP-related provisions in the Irish tax code are already beneficial to tech companies (in particular, smaller tech companies who Ireland purports to support), and will incentivize companies to

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120 *See* T-778/16 at ¶ 502-4.

121 *See OECD Releases Latest Edition of the Transfer Pricing Guidelines For Multinational Enterprises and Tax Administrations*, OECD

122 *See id.*; *see also* T-778/16 at ¶ 316-21.

123 *See* JONES DAY, *supra* note 96; *see also id*. at ¶ 330**.**

124 *See* JONES DAY, *supra* note 96.

125 *See infra* Section V.

126 *See e.g.,* OECD, *supra* note 121.

127 *See e.g., id*.

128 *See* Andrew P. Kummer, *Pro-Business But Anti-Economy? Why Ireland's Staunch Protection of its Corporate Tax Regime is Preventing a Celtic Phoenix From Rising From the Ashes of the Celtic Tiger*, 9 BROOK. J. OF CORP., FIN. & COM. L. 284, 3054 (2014) ("Opponents of raising the tax believe that while doing so would generate the benefit of a minimal increase in tax revenue, the benefit would be far outweighed by the cost of… driving the MNC's to friendlier tax jurisdictions.").

remain in Ireland to avail themselves of this favorable treatment. However, with the use of CAIA in conjunction with these other tax schemes, MNEs can pay an exorbitantly low corporate income tax rate; and by removing CAIA, Ireland defends its lucrative tax code from further abuse by large MNEs. Lastly, Part B(2), will examine how Ireland's shifting political landscape may be another reason companies are unlikely to abandon the Irish market.

A. What the OECD Can Do

As a member of the OECD, Ireland has committed itself to achieving the organization's 'fundamental aims'; the Convention of the Organization for Economic Co-operation and Development (signed in 1960) outlines to what member states have committed themselves.[129]Article 1 claims member states must contribute to the growth of world trade "in a *non-discriminatory* basis in accordance with international obligations."[130] Article 5 outlines how the OECD is to achieve its aims, which is through legally binding agreements on all member states.[131] These agreements (which then become obligatory) must be made mutually, by each member state, and comply with the constitutional procedures of each country before it is binding, as outlined in Article 6.[132]

Ireland has a permanent delegation within the OECD, which consists of an ambassador (as of 2021, it has been Gerard Keown) and diplomats, as do all over members.[133] Additionally, like all others who have signed onto the OECD's convention, Ireland contributes to the OECD's annual budget: as of 2019 Ireland contributed 1.3% of the OECD's total budget of €386 million.[134]

Ireland, in compliance with all of the above listed provisions of its OECD membership, signed on to the OECD's BEPS project in an attempt to collaborate with its international peers and prevent tax abuses levied in favor of MNEs.[135] The OECD is binding upon Ireland (and all of its member states) to the extent by which they consent to be bound, although the popularity and normalization of the OECD has made it so even those who have *not* accepted the OECD are still bound by it.[136] A treaty, such as the OECD, is binding in that

[129] *See Ireland and the OECD*, OECD, https://www.oecd.org/ireland/irelandandtheoecd.htm [https://perma.cc/HKE5-MBMZ] (last visited Oct. 25, 2022); *see also* Convention on the Organization for Economic Co-Operation and Development, art. 1, Dec. 14, 1960, 12736 U.N.T.S 888 (also available at https://perma.cc/Y3NG-9FZB).

[130] *See id*. at Art. 1.

[131] *See id*. at Art. 5 (as of 2021, the Irish ambassador has been Gerard Keown).

[132] *See id.* at Art. 5-6.

[133] *See* OECD, *supra* note 129.

[134] *See id.*; *see also Member Countries' Budget Contributions for 2019*, OECD, https://www.oecd.org/about/budget/member-countries-budget-contributions.htm [https://perma.cc/6U3F-N5NJ] (last visited Oct. 25, 2022).

[135] *See generally OECD BEPS*, IRISH TAX INST., https://taxinstitute.ie/tax-insight/international-tax-policy/oecd/oecd-beps/#:~:text=Ireland%20signed%20the%20Multi%2Dlateral,treaty%2Drelated%20measures%20preventing%20BEPS [https://perma.cc/2C6K-8D8Y] (last visited Oct. 25, 2022).

[136] *See* Richard Schwartz, *Are the OECD and UNCTAD Codes Legally Binding*, 11 INTL L. 529, 531 (1977) ("[W]here a provision in a treaty sets forth a widely accepted principle of customary international law, then that

it creates a system of principles and norms that set forth a basis for a general rule of law.[137] For example, although Ireland avoided raising its corporate income tax rate from 12.5% to the OECD standard of 15%, it eventually succumbed to the international pressure – in other words, the international *norm* established by the OECD – and raised its income tax rate despite years of staunch protest.[138] In sum, the OECD is an impactful international body that wields its power to standardize the international economic market.[139]

Currently the OECD does not have any Action Plans that specifically analyze the effects of capital allowances for purchases of intangible assets with an MNE intragroup subsidiary.[140] However, there are several ways the OECD could monitor this favorable tax treatment using the Action Plans currently available to them.[141]

1. Action 5

Contained in Action 5, the OECD Forum on Harmful Tax Practices (FHTP) conducts reviews of preferential tax laws. The three main areas that the FHTP report on regard: (1) assessing tax regimes that unfairly impact tax bases in other jurisdictions, (2) monitoring a framework of transparency to exchange information regarding domestic tax rulings, and (3) reviewing of activities in 'no or nominal' tax jurisdictions.[142] The OECD published its 2022 peer reviewed results on harmful tax practices within member states.[143] Under the category 'IP regimes,' which consist of tax treatment of intellectual property between the years 2015-2022, the only Irish tax program reviewed was the Knowledge Development Box (hereinafter "KDB"), which was deemed 'not harmful' since it followed FHTP standards (an analysis of the Knowledge Development Box will be forthcoming, but for now it is useful to note the KDB is a lucrative tax incentive for companies seeking to create and own IP).[144]

The next prong of Action 5 refers to the 'transparency framework,' which compels a country to spontaneously exchange information on tax rulings.[145] The purpose of this framework is to find:

> [A] balance between ensuring that the information exchanged is relevant to other tax administrations and that it does not impose an unnecessary

provision is to be regarded as declaratory of accepted law and, as such, binding on nations that have not accepted the treaty.").

137 *See id*. at 532.

138 Lisa O'Carroll, *Ireland Ends 12.5% Tax Rate in OECD Global Pact*, THE GUARDIAN (Oct. 7, 2021, 1:30 PM), https://www.theguardian.com/world/2021/oct/07/ireland-poised-to-drop-125-tax-rate-in-oecd-global-pact [https://perma.cc/TJ2R-HDGB].

139 *See generally* OECD BEPS, *supra* note 2.

140 *See generally* OECD, *supra* note 91.

141 *See generally id*.

142 *See Action 5 Harmful Tax Practices*, OECD, https://www.oecd.org/tax/beps/beps-actions/action5/ [https://perma.cc/9CKX-JTS5] (last visited Oct. 26, 2022).

143 *See generally* OECD, HARMFUL TAX PRACTICES – 2018 PROGRESS REP. ON PREFERENTIAL REGIMES (OECD Publishing, 2018 rev. ed. 2022).

144 *See id.* at 6.

145 *See* OECD, *supra* note 142; *see also* OECD, HARMFUL TAX PRACTICES – 2020 PEER REV. RPTS. ON THE EXCH. OF INFO. ON TAX RULINGS (OECD Publishing, 2021), https://www.oecd-ilibrary.org/sites/f376127b-en/index.html?itemId=/content/publication/f376127b-en [https://perma.cc/6PET-FUU5].

> administrative burden on either the country exchanging the information or the country receiving it.[146]

As of 2022, Ireland's transparency framework required no adjustments, and there were no recommendations made to enhance their transparency.[147] Action 5 should be used to compel Ireland to produce reports on both the size of an MNE's purchase being considered a capital allowance, and where that purchase is coming from – in other words, whether the capital allowances are a result of a transaction with an intragroup subsidiary.[148] For instance, the OECD's reporting on corporate tax statistics makes substantial mention of depreciation schedules and capital allowances, *but* it fails to note how a corporation could benefit from capital allowances as a result of intragroup purchases.[149] Action 5 should be expanded in the following ways:

> (1) include disclosure regarding how much tax relief MNEs are afforded due to CAIA within Ireland (or any other country that may copy this tax program),
>
> (2) disclose how much of the CAIA is a result of purchases with other subsidiaries (whether those subsidiaries be within the same jurisdiction or not),
>
> (3) disclose the depreciation calendar for each of these CAIA purchases to gauge the rate at which the MNE will continue to benefit from the initial transaction.[150]

Transparency is important in the fight against BEPS: how can MNEs be stopped from taking advantage of low-tax jurisdictions if no one even knows about it?[151] Moreover, transparency in Irish tax law and how American MNEs make use of it will be pertinent in the future as MNEs continue to incorporate in Ireland, especially following the European Court's 2020 *Apple* ruling.[152] For instance, in 2019, Microsoft's Irish subsidiary began accumulating ownership of other international subsidiaries, and Google refused to answer whether they would be taking advantage of the CAIA system following the expansion of their Irish entity.[153]

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[146] *See* OECD, *supra* note 145.
[147] *See id.* at tbl.1.
[148] *See* OECD, *supra* note 142.
[149] *See id*.
[150] *See id*.
[151] *See generally* OECD, *Corporate Tax Statistics: Third Edition*, 16-20 (2021), https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-third-edition.pdf [https://perma.cc/C5F2-C8XQ].
[152] *See generally* OECD, *supra* note 141; *see also* Chance, *supra* note 4*; see also* Shubham Gupta, *Does Ireland Make Strategic Sense For Technology Companies?,* THE STRATEGY STORY, (Jun. 29, 2021), https://thestrategystory.com/2021/06/29/technology-companies-ireland/ [https://perma.cc/37UD-2UDW].
[153] *See* Paul, *supra* note 60.

2. Action 4

Action 4 of the OECD's BEPs strategies limits interest deductions and the financing of exempt or deferred income.[154] A MNE can achieve favorable tax treatment by determining the amount of debt in a group entity; two examples of this are when MNEs use intragroup financing to fund the "generation of tax exempt income," and when groups use intragroup loans to generate interest deductions that exceed the expense.[155] This is the root of the issue created by unfair capital allowance allocation – or as the OECD refers to it, "taxable earnings before interest income and expense, depreciation and amortization (EBITDA)."[156]

To solve this issue the OECD has initiated a three-prong approach:

> [A] fixed ratio rule based on a bench mark net interest/EBITDA ratio; a group ratio rule which may allow an entity to deduct more interest expenses depending on the relative net interest/EBITDA ratio of the worldwide group; and targeted rules to address specific risks.[157]

Part of the OECD's implementation strategy has been the publication of *Corporate Tax Statistics,* which covers interest limitation rules and how these rules can be utilized to support Action 4.[158] However, this recent report lacks information regarding Capital Allowances for Intangible Assets through intragroup purchases, nor does the Action itself contain this highly specific tax practice.[159]

As of January 1, 2021, Ireland has limited the number of deductions an MNE can take, which aligns with the EU standard.[160] This means the maximum amount of an interest deduction cannot exceed 30% of the EBITDA.[161] While this is in line with the main goals of Action 4, it fails to address the underlying issue of CAIA.[162]

The final prong of the Action 4 strategy references 'targeted rules to address specific issues,' giving the OECD opportunity to address this form of interest deduction in a specialized and direct way.[163] A potential solution could come in the form of a lower cap for capital

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[154] *See Action 4: Limitation on Interest Deductions*, OECD, https://www.oecd.org/tax/beps/beps-actions/action4/ [https://perma.cc/J9W7-S7QU] (last visited Nov. 8, 2022).

[155] *See id*.

[156] *See id*; *see generally* TAX FOUND., *supra* note 63; *see e.g., Anti-Base Erosion Profit Sharing (BEPS Measures: Interest Limitation Rule (ILR)*, https://www.revenue.ie/en/companies-and-charities/anti-beps-measures/interest-limitation-rule.aspx [https://perma.cc/4G6Z-XK2F] (last visited Jan. 19, 2023) (it may be unlikely an interest deduction will surpass an expense; however, the interest limitation rule states that the interest deduction may not exceed EBITDA, meaning it is possible the interest deduction may exceed the underlying expense which facilitated the deduction).

[157] *See* OECD, *supra* note 154.

[158] *See id*; *see also* OECD, *supra* note 151.

[159] *See* OECD, *supra* note 150; *see* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[160] *See* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[161] *See id*; *see also* OECD, *supra* note 154.

[162] *See* OECD, *supra* note 154 (while Ireland's limit on deductions align with the OECD's Action 4 recommendations, the limited deductions do not expressly include CAIA and therefore leave open an opportunity to continue to abuse this program).

[163] *See* TAX FOUND. *supra* note 63.

allowances from intragroup purchases.[164] Ireland's cap on CAIA is currently 10% higher than the OECD's average (80% compared to 70%).[165]

The OECD could explicitly set the 70% standard for all of their member states and make an explicit provision that further lowers the cap for intragroup transactions.[166] A 70% cap or lower for intragroup CAIA would be a particularized action against MNEs with a significant enough pool of revenue; in other words, the smaller tech companies that are meant to benefit from CAIA would not feel the burden of a lower cap because they do not have subsidiaries to make intragroup purchases in the first place.[167] As previously mentioned, with the use of CAIA, Apple managed to pay an effective corporate tax rate of 1%, placing it directly in the purview of what the OECD is attempting to do with its Action 4 strategy (and, for that matter, all of its BEPS strategies).[168] By limiting the interest deductions available to MNEs, the OECD would be preventing an unfair advantage only available to MNEs with subsidiaries, in turn protecting smaller companies who may still want to take advantage of CAIA though lack the size of larger corporations.[169]

3. Actions 8-10

Actions 8-10 regard transfer pricing.[170] As discussed above, transfer pricing is guided by the arm's length principle that states that transactions between 'associated enterprises' must be priced as if each enterprise were wholly independent and engaging in a transaction under similar economic conditions and circumstances.[171] The OECD admits in its Action statement that the application of the arm's length principle could be subject to manipulation, such that the outcomes of the transaction do not ultimately correspond to the value underlining the economic activity.[172] To avoid any negative outcomes, Actions 8-10, "provide guidance to determine the transfer pricing outcomes in accordance with the actual conduct of related parties in the context of the contractual terms of the transaction."[173] Action 8 specifically addresses issues regarding the transactions of intangible assets.[174]

Hard-To-Value Intangibles (hereinafter "HTVI") can be moved around through various group members as another form of BEPS; to counteract this, the HTVI approach

[164] *See* Hogreve, *supra* note 67.

[165] *See id.*

[166] *See id.*

[167] *See Ireland's SME Test: The "Think Small First" Principle*, DEPT. OF ENTERPRISE, TRADE AND EMPLOYMENT, https://enterprise.gov.ie/en/publications/publication-files/ireland-s-sme-test.pdf [https://perma.cc/5GZP-WWEF] (last visited Nov. 9, 2022) (describing the particularly limited size of micro, small and medium enterprises and their positive impact on the Irish economy).

[168] *See generally*, TAX FOUND., *supra* note 63; *see also* OECD, *supra* note 153.

[169] *See* OECD, *supra* note 153.

[170] See Action 8-10: Transfer Pricing, OECD, https://www.oecd.org/tax/beps/beps-actions/actions8-10/ [https://perma.cc/45GY-86G3] (last visited Nov. 9, 2022).

[171] *See id*.

[172] *See id*.

[173] *See id*.

[174] *See id*.

ensures that tax administrations may consider ex post outcomes of the transaction as presumptive evidence about the ex ante arrangement.[175] Additionally, a tax administrator can consider information that could or should have been known and considered between the enterprises engaging in the transaction.[176]

B. Why The Arm's Length Principle Is Hurting, Not Helping

The purpose of the arm's length principle is to maintain fair price evaluations in intragroup purchases that reflect the larger commercial market, ensuring that no intragroup purchase is too generous to the company doing the transaction.[177] However, the EU General Court has employed this principle sweepingly without actual consideration for the nuanced external factors that impact the intragroup transaction. Another way to limit, if not entirely cancel out, the use of CAIA for intragroup purchases would be for the court to expand their analysis of the arm's length principle in a way that reflects the nature of the transaction.

The OECD acknowledges that the arm's length principle is not a perfect science, as the speculated price of any transaction between unrelated entities can never be entirely exact.[178] For instance, it is nearly impossible to allocate profits to each part of a production chain; and any deviation in the arm's length principle may be due to reasonable economic considerations that a cure-all 'arm's length principle' does not account for.[179] To properly compare the intragroup purchase to market conditions, the arm's length principle should consider the attributes of both entitles involved, the transaction itself, and a functional analysis of all relevant factors, which are difficult to come by.[180] Furthermore:

> [T]he EU [arm's length principle], is merely the base conceptual idea of an [arm's length principle], without any further guidance, and without being endowed with any specific content. In this context, the identification of any objective criteria from the [European] Commission's practice of the Court's case law is practically impossible, given the former's case-by-case approach.[181]

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[175] *See* OECD (2018), GUIDANCE FOR TAX ADMINISTRATIONS ON THE APPLICATION OF THE APPROACH TO HARD-TO-VALUE INTANGIBLES – BEPS ACTIONS 8-10, 9 (OECD/G20 Base Erosion and Profit Shifting Project & OECD Paris, 2018), https://www.oecd.org/tax/beps/guidance-for-tax-administrations-on-the-application-of-the-approach-to-hard-to-value-intangibles-beps-action-8.htm [https://perma.cc/GTS4-ULLD].

[176] *See id.*

[177] *See* Josh White, *Arm's Length Pricing in an Imperfect World*, INT'L TAX REV. (Apr. 25, 2019), https://www.internationaltaxreview.com/article/2a69yvx1bb2vzxy2y6yv4/arms-length-pricing-in-an-imperfect-world [https://perma.cc/BS3F-TKBV].

[178] *See* Dionysios Pelekis, *The Burden and Standard of Proof in the Tax Ruling Cases: A Practical Limit to the EU's Arm's Length Principle*, 12 J. OF EUR. COMPETITION L. & PRAC. 669, 671 (2021).

[179] *See id.* at 671; *see also* Glen Rectenwald, *A Proposed Framework For Resolving the Transfer Pricing Problem: Allocating the Tax Base of Multi-National Entities Based on Real Economic Indicators of Benefit and Burdon*, 22 DUKE J. COMP. & INT'L L. 425, 434 (demonstrating how complicated it is for MNE's to determine the arm's length price for intra-firm transactions).

[180] *See* Pelekis, *supra* note 178 at 671.

[181] *See id.* at 672.

These limitations demonstrate that the arm's length principle, while useful in theory, is undermined by practical international tax law.[182] When the court utilized the arm's length principle in its *Apple* decision, it failed to recognize other aspects of the intragroup transaction that undermined the facially 'fair' purchase of assets.[183] In failing to acknowledge the CAIA applied to the transaction between Apple Ireland and Apple Jersey, the court's arm's length analysis also failed to factor in a key relevant component to the two enterprises' motivations.[184]

The EU General Court could apply alternative methodologies for challenging MNEs in cases regarding the abuse of intragroup transactions.[185] For MNEs located in Ireland, it would be a more thorough image of the nature of the transaction to investigate the capital allowances acquired for a given intragroup purchase. Rather than concluding the purchase abides by the arm's length principle, the court should instead evaluate additional factors embedded within the transaction itself to determine whether the MNE was taking advantage of a BEPS strategy.[186]

C. What Ireland Can Do

Ireland should fully remove the provision in their tax code that allows for capital allowances for intragroup purchases. Despite their tax code explicitly disavowing any nefarious use of the CAIA system, this is not enough to dissuade massive American MNEs such as the Silicon Six.[187] Ireland has numerous other advantages that could incentivize businesses to relocate to their island without the need for BEPS.[188] Moreover, these advantages are belied by the use of CAIA, so to abandon CAIA would ultimately further Ireland's goal of facilitating domestic IP development.

1. The R&D Tax Credit and KDB

Ireland's tax code is highly beneficial to large MNEs, even without CAIA.[189] Ireland has consistently sought to attract multinational tech and IP-based companies and has added other significant advantages to their tax code to facilitate such goals.[190] In 2015, Ireland instituted a Research and Development Tax Credit ("R&D Tax Credit"), which may be used to

[182] *See id.* at 671.
[183] *See id.* at 672.
[184] *See id.*; *see also* Pelekis, *supra* note 178 at 671.
[185] *See* Beckett Cantley & Geoffrey Dietrich, *Apple v. European Commission: Losing the War on Corporate International Transfer Pricing*, 45 LOY. L.A. INT'L COMP. L. REV. 101, 116-117 (2022).
[186] *See* Pelekis, *supra* note 178 at 671.
[187] *See* Clancy, *supra* note 70.
[188] *See* Alderman, *supra* note 55; *see also* O Grada, *supra* note 11 at 357.
[189] *See generally Ireland: Corporate – Tax Credits and Incentives*, PWC (June, 29, 2022), https://taxsummaries.pwc.com/ireland/corporate/tax-credits-and-incentives#:~:text=A%20tax%20credit%20of%2025,corporation%20tax%20benefit%20of%2037.5%25. [https://perma.cc/4JCT-786L].
[190] *See* REVENUE (IRISH TAX AND CUSTOMS), RSCH AND DEV. (R&D) TAX CREDIT, (Part 29-02-03, last updated 2021) [https://perma.cc/P9SQ-M2L5]

reduce a company's corporate tax rate.[191] Potentially, this 25% credit can be used as a refund for a tech company's research and development (hereinafter "R&D").[192] A company may receive a 25% tax credit for qualified R&D that includes 'science or technology,' basic applied or experimental research, and technological advancements.[193] Companies that seek to claim this credit need not hold IP rights over the finished product of the R&D, nor does the R&D work have to be 'successful.'[194] However, the R&D tax credit is only applicable to a company within the Irish tax system, and the qualifying R&D must be undertaken within the European Economic Area[195] or the United Kingdom (hereinafter "UK")[196]

In conjunction with the R&D Tax Credit, CAIA could lead to further tax breaks that exceed and undermine the original goal of the R&D Tax Credit, to encourage tech manufacturing in Ireland.[197] While the R&D Tax Credit is only available to companies under Irish tax law, since the company does *not* have to own the IP rights over the finished product, a corporation could move the IP through alternate subsidiaries and claim CAIA.[198] For example, Subsidiary A, which is located in Ireland, could produce the IP that is subsequently owned by Subsidiary B, located in the United States.[199] Subsidiary A takes a 25% tax credit, in accordance with the R&D Tax Credit; in turn, Subsidiary B sells the IP licenses to Subsidiary A who claims the purchase as a capital allowance and will then be excused from paying taxes for 80% of that purchase.[200]

In addition to the R&D tax credit, Ireland also has the Knowledge Development Box (hereinafter "KDB"), which is another resource created to incentivize IP production in Ireland.[201] A company that qualifies for KDB may have its qualifying profits taxed at an effective rate of 6.25%; a deduction equal to 50% of its qualifying profits.[202] To qualify for the KDB, the company must earn income from the qualifying asset that was created from R&D activities.[203] The qualifying assets include those created from R&D such as computer programs,

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[191] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190; *see also* OECD, *R&D Tax Incentives: Ireland, 2021*, DIRECTORATE FOR SCI., TECH., AND INNOVATION (last updated Dec. 2021), https://www.oecd.org/sti/rd-tax-stats-ireland.pdf [https://perma.cc/RG2R-8PAB].

[192] *See generally* Bernard Doherty & James McMahon, *Research and Development (R&D) Tax Credit*, GRANT THORNTON, https://www.grantthornton.ie/globalassets/1.-member-firms/ireland/insights/publications/grant-thornton---research-and-development-tax-credit.pdf [https://perma.cc/KL7L-9B6M] (last visited, Nov. 11, 2022).

[193] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[194] *See id*.

[195] *See Countries in the EU and EEA*, GOV.UK, https://www.gov.uk/eu-eea [https://perma.cc/4FX2-W5Q9] (last visited Nov. 11, 2022).

[196] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[197] *See id*.; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[198] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[199] *See generally* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[200] *See id*.; *see e.g.* Clancy, *supra* note 70; *see also* TPCASES.COM, *supra* note 71.

[201] *See* Damien Flanagan, *Knowledge Development Box: Best in Class?*, KPMG (2016), https://assets.kpmg.com/content/dam/kpmg/pdf/2016/04/ie-itr-issue-1-2016-damien-flanagan.pdf [https://perma.cc/H4DD-VUPB].

[202] *Knowledge Development Box*, Revenue (Irish Tax & Customs) (July 6, 2022), https://www.revenue.ie/en/companies-and-charities/reliefs-and-exemptions/knowledge-development-box-kdb/index.aspx [https://perma.cc/7N5R-HJYF] (since Ireland is now raising its corporate income tax rate to 15% in the next fiscal year, the effective tax rate will now be roughly 7.5%).

[203] *See id*.

inventions protected by a patent, and IP for companies that are not patented but are patentable.[204]

The OECD has set specific guidelines for KDBs, such as Ireland's, in an effort to prevent MNEs from shifting their profits to favorable IP tax jurisdictions.[205] The OECD has instituted the "Modified Nexus Approach," which requires a 'nexus' between whatever income receives the benefit of a KDB, and the expenditures that contributed to such income (e.g. the R&D required for the production of the IP).[206] When the Irish KDP was announced in 2015, it was hailed as the "first OECD-compliant KDB in the world," as it sought to specifically target and benefit companies that produced their IP *in* Ireland.[207] Hence, there is a close nexus between the KDPs benefit, and the expenditure towards the benefit.[208]

The KDB is advantageous because it has the ability to specifically benefit smaller companies, unlike CAIA, which is a scheme most lucrative to larger MNEs with numerous international subsidiaries.[209] Since the KDB protects IP that is certified as 'novel,' 'non-obvious,' and 'useful,' (i.e. not patented) that gives smaller companies the opportunity to utilize the KDB without having to bear the cost of formally protecting IP with a patent.[210]

The KDB as a system intends to benefit companies that invest in protecting and creating IP in Ireland, however some exceptions do exist.[211] For instance, when considering qualifying R&D expenses, one may include the cost of outsourcing their R&D if the activity is carried out within the EU and by a non-related party (so neither a subsidiary nor parent company).[212] The KDB therefore cannot also be used to augment the tax breaks available under

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204 *See id.* (not included are copyrights, design marks, and trade secrets).

205 *See* BDO, *BEPS Actions Item 5 – Modified Nexus Approach For Preferential Intellectual Property Regimes*, BDO.COM (April, 2015), https://www.bdo.com/getattachment/3f965ec6-1b7d-457c-a894-00ae693368d5/attachment.aspx [https://perma.cc/FL25-VKR6]; *see also* OECD, *Action 5: Agreement on Modified Nexus Approach for IP Regimes*, OECD/G20 BASE EROSION AND PROFIT SHARING PROJECT (2015), https://www.oecd.org/ctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf [https://perma.cc/EL64-BN3D].

206 *See* BDO, *supra* note 205; *see* OECD, *supra* note 205**.**

207 *See* Flanagan, *supra* note 201 (quoting Ireland's Finance Minister Michael Noonan announcing the 2015 Budget).

208 *See id.*

209 *See id*. (defining 'smaller companies' as those with an annual income from IP of less than €7.5 million, with fewer than 250 employees, and a turnover of less than €50 million *or* a balance sheet of less than €43 million).

210 *See id*.

211 *See* Laura Myles, *The Knowledge Development Box in Ireland – A Quick Overview*, FLYNN O'DRISCOLL, BUS. LAW., https://fod.ie/wp-content/uploads/2017/07/KDB-A-Quick-Overview.pdf [https://perma.cc/6PPF-C6FR] (last visited Nov. 16, 2022).

212 *See id.*; *see generally Non-Related Party Definition*, LAW INSIDER, https://www.lawinsider.com/dictionary/non-related-party#:~:text=owners%20or%20Affiliate.-,Non%2DRelated%20Party%20means%20a%20person%20or%20entity%20that%20is,directly%20or%20indirectly%20by%20Borrower. [https://perma.cc/UN3A-3D7Y] (last visited Nov. 16, 2022) (defining 'non-related party' as a "person or entity that is not an Affiliate of Borrower, nor an officer of, or parent or subsidiary corporation of a shareholder of Borrower, or any person or entity otherwise controlled directly or indirectly by Borrower or Borrower's shareholders, or a parent or subsidiary corporation or partnership of Borrower or its shareholders.").

CAIA within an intragroup purchase.[213] However, qualifying expenditure on R&D may include the sum of acquisition costs and group outsourcing costs called the 'uplift expenditure,' though this cannot exceed 30% of the overall qualifying expenses.[214]

The KDB works in conjunction with the R&D tax credit in that the KDB provides tax relief once successful R&D activity has resulted in qualifying IP income, while the R&D tax credit affords "cash tax savings" for those actually engaging in the R&D activities.[215] Similar to the aforementioned concern with the R&D tax credit in conjunction with CAIA, the use of all of these tax schemes with one another leads to magnified corporate tax breaks for MNEs producing qualifying IP.[216] Imagine the example above, with Subsidiary A (in Ireland) that produced IP owned by Subsidiary B (in the U.S.). The acquisition of the IP license costs 29% of their overall expenses for the produced IP; Subsidiary A's taxable profits would be reduced to 50% (due to the KDB), they would qualify for a 25% credit to refund for the R&D of the IP, and that purchase of the intangible asset between the subsidiaries, worth 29% of their overall expense, would be written off under CAIA.[217]

The R&D Tax Credit and KDB are two tax schemes that demonstrate Ireland's commitment to IP growth and are both attractive resources for tech companies looking to avail themselves of favorable tax treatment.[218] Unlike CAIA, both the R&D Tax Credit and KDB have the potential of helping smaller home-grown Irish tech companies, while CAIA is a tool wielded only for the benefit of MNEs with international subsidiaries.[219] Removing the CAIA provision of the Irish tax code, while leaving the R&D Tax Credit and KDB, is a way to continue to encourage IP-based economic growth for Ireland's domestic market and avoid any additional corporate tax evasion by large MNEs.

2. A Changing Political Landscape

Following the UK's exit from the EU, intellectual property laws for those with patents registered in the UK changed drastically.[220] This, in addition to the fact Northern Ireland's economy has grown at a faster rate than other British countries, demonstrates how the Republic of Ireland and Northern Ireland have become more promising home bases for large IP-based MNEs.[221] Additionally, a recent parliamentary election in Northern Ireland saw the

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[213] *See* Myles, *supra* note 211 ("Outsourcing costs may be included provided the qualifying R&D activity is carried on within the EU and by a non-related party").

[214] *See* Bernard Doherty, et al., *Knowledge Development Box (KDB)*, GRANT THORNTON (2018), https://www.grantthornton.ie/globalassets/1.-member-firms/ireland/insights/factsheets/grant-thornton---kdb---2018.pdf [https://perma.cc/RS6W-PHFZ].

[215] *See* Flanagan, *supra* note 201; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[216] *See* Doherty, *supra* note 192; *see also* Flanagan, *supra* note 201.

[217] *See* Doherty, *supra* note 192; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[218] *See* Doherty, *supra* note 192; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[219] *See* Myles, *supra* note 211; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190; *see also* Clancy, *supra* note 70.

[220] *See* Sally Shorthose, *Brexit: English Intellectual Property Law*, BIRD & BIRD (Jan. 12 2021), https://www.twobirds.com/en/insights/2016/uk/brexit-english-intellectual-property-law-implications [https://perma.cc/Y5QL-WNHB].

[221] *See* Shawn Pogatchnik, *Northern Ireland Economy Outpacing Post-Brexit Britain*, Politico (June 1, 2022), https://www.politico.eu/article/northern-ireland-economy-outpace-post-brexit-britain/ [https://perma.cc/7A3B-567Z].

overwhelming electoral success of the Sinn Fein party for the first time in Northern Ireland's 100-year-long-history; with a majority of seats in the Northern Irish Parliament, Sinn Fein could usher in a new era of Irish politics.[222] This is a significant development as it shows a changing tide in the sociopolitical landscape and could, potentially, begin a conversation for a referendum for Irish reunification.[223] Although at the moment unification is only speculative, the incorporation of Northern Ireland's market and citizenship is another Irish advantage that makes the country attractive to MNEs.[224]

VI. CONCLUSION

Despite efforts to meet the global standard for corporate tax compliance, Ireland has left deep loopholes in its tax code that have been taken advantage of by MNEs, such as the Silicon Six. With the overturning of *Apple v. European Commission*, the Irish tax code's Capital Allowances for Intangible Assets purchased through intragroup subsidiaries were tacitly legitimized.[225] There has been a progressive stream of MNEs incorporating in Ireland and onshoring intellectual property with the clear intention of following in Apple's footsteps and claiming capital allowances for the transfer of IP from subsidiary to subsidiary.[226] Despite the OECD's continued battle against BEPS, it has failed to properly address CAIA.[227] The OECD's long-supported arm's length principle actually does more damage to the global market than good, in that it inadvertently maximizes the capital allowances available to companies in their intragroup purchases.[228] To prevent more MNEs from taking advantage of the CAIA system, the OECD should utilize their current Action Plans to address the particular issue of capital allowances for intragroup purchases.[229] Furthermore, the European General Court must reevaluate its use of the arm's length principle when determining cases involving MNEs that avail themselves of CAIA. Tech companies will continue to move to Ireland for more than a particular CAIA program; a tax code that incentives R&D for IP and encourages smaller companies to grow and maintain a strong base in Ireland, accessibility to the European market, and a bright political future are all reasons why Ireland has no reason to fear a mass exodus of tech giants.[230]

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[222] *See* Kimberly Cowell-Meyers, *A Sinn Fein Win In Northern Ireland Could Bring Big Changes*, THE WASH. POST (May 5, 2022, 5:00 AM), https://www.washingtonpost.com/politics/2022/05/05/northern-ireland-election-sinn-fein-dup/ [https://perma.cc/2VZ3-AFKZ].

[223] *See id*.

[224] *See id*.

[225] *See* T-778/16 at ¶ 316-21; *see also* Gupta, *supra* note 152.

[226] *See e.g.* Paul, *supra* note 60.

[227] *See* OECD, *supra* note 91 (despite the OECD's strategies to prevent BEPS, they have failed to address CAIA).

[228] *See* White, *supra* note 177; *see also* T-778/16 at ¶¶ 316-21 (Jul. 15, 2020) (references the arm's length principle as a standard to judge intragroup purchases but fails to take into account the purpose of the purchase being for CAIA).

[229] *See e.g.* OECD BEPS, *supra* note 2.

[230] *See* Alderman, *supra* note 55.

THE SHOWDOWN BETWEEN LIV GOLF AND THE PGA TOUR: WHAT ARE THE ANTITRUST ISSUES INVOLVED AND IS THERE A LEGAL SOLUTION THAT CAN RETURN THE WORLD OF GOLF TO PEACE AND UNITY ONCE AGAIN?

By Joseph Foster

I. INTRODUCTION

A. The Beginnings of LIV

Greg Norman and His Deal with the Saudis

On October 27, 2021, Greg Norman hosted an interview session with golf media outlets, announcing LIV Golf Investments, and that he accepted a position as CEO, with his eyes set on the role of Commissioner as well.[1] LIV Golf Investments, which began as an idea to rival the PGA Tour by developing a global professional tour, has been backed by the Saudi Public Investment Fund ("PIF"), the sovereign wealth fund of Saudi Arabia.[2] This has been a controversial move. Because the financial arm for the Saudis has been accused of human rights violations, they are attempting to clear its reputation by investing in sports, which has been considered a form of propaganda to distract critics from their heinous acts.[3] After being founded in 2021, LIV Golf Investments named Greg Norman as CEO and announced an eight-tournament circuit, with $255 million in prize money for their inaugural season.[4] LIV has branded itself "an opportunity to reinvigorate golf" through large purse amounts, modified schedules, and a new culture for fans, using the slogan "golf but louder" as a key marketing strategy.[5]

PGA Tour Members' Reasons for Jumping Ship to Join the New League

LIV is offering the largest purses in golf with $25 million in prize money, $20 million for the individual event, and $5 million for the team aspect.[6] The individual winner of each event takes home $4 million while last place makes $120,000.[7] All of this tournament prize money is on top of appearance fees and signing bonuses that have been extremely lucrative,

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1 Sean Zak, *LIV Golf timeline: How we arrived at pro golf's civil war*, GOLF (Sept. 8, 2022), https://golf.com/news/timeline-liv-golf-how-we-arrived-pro-golf-civil-war/ [https://perma.cc/S5T8-5BDV].

2 Joel Beall, *The LIV Golf series: What we know, what we don't, and the massive ramifications of the Saudi-backed league*, GOLF DIGEST (June. 8, 2022), https://www.golfdigest.com/story/saudi-golf-league-2022-primer#:~:text=On%20Tuesday%2C%20May%2031%2C%20LIV,loyalty%20to%20the%20PGA%20Tour [https://perma.cc/ZL2U-K5FQ].

3 *See id.*

4 *See id.*

5 Tarik Panja & Andrew Das, *What is LIV Golf? It Depends Whom You Ask.*, NY TIMES (Jul. 28, 2022), https://www.nytimes.com/article/liv-golf-saudi-arabia-pga.html [https://perma.cc/YM58-YWGG].

6 *See id.*

7 *See id.*

into the nine-figure range, especially for top players such as Dustin Johnson, Phil Mickelson, Bryson Dechambeau, and Brooks Koepka.[8] Each event consists of 54-holes with no cut, ensuring each player will receive a paycheck for the week.[9] In fact, "LIV" are the Roman numerals for 54, indicating the number of holes played in their tournaments.[10] The tournaments begin with "shotgun starts", allowing for shorter rounds, and will establish a team aspect of 12 teams of four players made up from the 48 player field.[11] Well-established veteran players may favor the shorter events and shotgun starts, allowing flexibility in their schedule and, in essence, allowing them to spend less time working.[12] Professional golf newcomers will favor the no-cut format, because it ensures they will be paid. Based on performance, the PGA Tour cuts about half the field halfway through tournaments, based on performance, and does not pay the players who do not complete all four rounds of tournament play.[13]

Perhaps the greatest reason for players making the jump has to do with ensuring sufficient competition in the world of golf.[14] Phil Mickelson used this as a big part of his reasoning for making the jump, explaining that this new competition would require the PGA Tour to rethink its business strategy and perhaps make necessary improvements to keep up with the new LIV Golf Tour.[15] To be competitive, a major consideration for the PGA Tour would be to increase its compensation for their players.[16]

A recent development gaining a lot of traction is the Official World Golf Ranking system ("OWGR") refusing to allow participants in LIV events to garner ranking points.[17] Points are crucial for golfer's compensation and points enable them to play in the biggest events worldwide, including major championships.[18] The PGA Tour and DP World Tour, both entities alleged to be anticompetitive in practices against LIV Golf, make decisions on the OWGR board that determine if LIV events should allow rankings points and put the exiled golfers back on the world map.[19] This newly-developing feud is fueled by control of the game of golf, and may determine whether the PGA Tour prevails or will have to yield to the market entrance of

[8] *See id.*

[9] *See* Beall, *supra* note 2.

[10] *See* Richard R. Meneghello & Adam F. Sloustcher, *An Employer's FAQ Guide to the Antitrust Battle Between LIV Golfers and the PGA Tour*, FISHER PHILLIPS (Last Updated Sept. 9, 2022), https://www.fisherphillips.com /news-insights/employers-faq-guide-antitrust-battle-between-liv-golfers-pga-tour.html [https://perma.cc/YL3J-5YJS].

[11] *See* Beall, *supra* note 2.

[12] *See id.*

[13] *See id.*

[14] *See* James Dator, *Why professional golfers are choosing LIV Golf and Saudi propaganda, explained*, SB NATION (Jun. 8, 2022, 2:06 PM), https://www.sbnation.com/golf/2022/6/8/23159771/liv-golf-london-saudi-arabia-sportswashing [https://perma.cc/NT7W-CUX4].

[15] *See id.*

[16] *See id.*

[17] *See* Louise Radnofsky, *The Secretive Body at the Center of the Fight for Golf's Future*, WSJ (Oct. 8, 2022, 8:00 AM), https://www.wsj.com/articles/liv-golf-owgr-pga-tour-11665165563 [https://perma.cc/YS9N-DCJY].

[18] *See id.*

[19] *See id.* ("LIV, though, had a clear goal in mind: taking a backdoor approach to getting world ranking points that its players covet, but currently don't receive.").

the Saudi-breakaway tour.[20] The OWGR has made clear that the 54-hole format must meet the rigorous competitive standards set by the rankings committee to earn points.[21] This has become an issue due to LIV's marketing strategy that showcases golfers carefree while competing, playing with music blasting, and even intimate, underwhelming crowds at some events thus far.[22]

B. The Threat of Competition and the Sparks of Legal Consequences

Friendship Between the PGA and European Tours

Within the buzz of new competition rising, in November of 2020 the PGA Tour and European Tour came together and announced a strategic alliance.[23] In perhaps a logical attempt to avoid legal issue, PGA Tour commissioner Jay Monahan was careful not to call this union a modified partnership, instead referring to it as an extension of the steps the two tours have already taken.[24] The two co-mingled tours have different rules and regulations relating to the procedure for disciplinary action, however, both have in some form punished LIV Golf defectors.[25] This has sparked reports that the U.S. Department of Justice has begun an investigation into the PGA Tour to determine if they are engaging in anticompetitive practices against LIV Golf, in violation of antitrust law.[26]

This has raised significant issues and resulted in potential litigation under violations of the Sherman Act.[27] Given the PGA-DP World Tour agreement, group boycott claims will be at the center of attention throughout proceedings in the future of this dispute.[28] Most sports leagues follow a "rule of reason" approach when assessing group boycott violations.[29] However, group boycotts have the potential to be analyzed as per se violations of the Sherman

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[20] *See id.*

[21] *See id.*

[22] *See* Lanie Everett, *The Cheap Seats: Why the Saudi-Arabia-backed LIV golf tour has led to ethical concerns, rivalry with PGA tour*, THE DARTMOUTH (Aug. 5, 2022, 2:00 AM), https://www.thedartmouth.com/article/2022/08/everett-liv-golf-tour [https://perma.cc/Z2ZJ-48N2].

[23] *See* Zak, *supra* note 1 ("The European Tour and PGA Tour announced a strategic alliance intended to synthesize a global golf schedule, increase purses and improve playing opportunities within the existing men's pro-golf ecosystem.").

[24] *See* Matt Bonesteel, *PGA Tour strengthens ties with European golf to blunt LIV threat*, THE WASHINGTON POST (June 28, 2022 4:02 PM), https://www.washingtonpost.com/sports/2022/06/28/pga-tour-dp-liv/ [https://perma.cc/2ZBC-UMJW].

[25] *See id.* ("Last week, both tours announced measures intended to make their tournaments more attractive to players or to punish golfers who played in LIV's first event earlier this month in England.").

[26] Meneghello & Sloustcher, *supra* note 10.

[27] Craig Seebald & Annabelle Castleman, *Legal issues to observe in the PGA Tour-LIV Golf rivalry*, SPORTS BUSINESS JOURNAL (July 11, 2022), https://www.sportsbusinessjournal.com/SB-Blogs/COVID19-OpEds/2022/07/11-Seebald.aspx#:~:text=Unlike%20baseball%2C%20golf%20and%20other,harmful%20things%20to%20thwart%20competition. [https://perma.cc/V22N-CUE9].

[28] John Eichlin et. al., *You're Outta Here! Developing precedent on group boycotts in sports*, LINKLATERS (Nov. 3, 2022), https://www.linklaters.com/en-us/insights/blogs/sportinglinks/2022/november/developing-precedent-on-group-boycotts-in-sports [https://perma.cc/AK3Z-6CCD].

[29] *See id.*

Act if they exhibit a horizontal-competitor aspect, which is much more difficult to show.[30] This high burden for per se showings has resulted in a fading of the per se application, causing a loss of judicial certainty and consistency in decisions.[31]

This note proposes an amendment to the language of the Sherman Act that would thwart the vagueness issues missed by the Supreme Court in its failure to firmly establish any precedent regarding the application of a per se analysis through its past decisions.[32] This proposed amendment would incorporate language into the statutory text regarding "per se" and "rule of reason" standards, eliminating uncertainty left by the judicially-set precedent.[33] Language that eliminates the horizontal requirement for group boycott activity to be considered per se illegal would allow for a lower threshold of activity to be met in situations that clearly demonstrate elements of group boycott restraints.[34]

This note proceeds in four parts. Section II discusses the key actors involved, including Greg Norman, the Saudi Public Investment Fund, Jay Monahan, and of course, the professional athletes in the middle of this divide.[35] This section also discusses the harsh feelings of each side regarding one another, and the swift action taken on part of the PGA Tour to combat its LIV-defectors.[36] Section II goes on to discuss strategies being used by LIV Golf to draw players and fan attention towards their new platform as well as the response of the PGA Tour to remain on its high horse atop the world of golf.[37]

Section III examines the legal issue raised regarding the PGA Tour's alleged anticompetitive behaviors towards LIV Golf, as well as the goals that both the PGA Tour and LIV Golf seek to achieve through future litigation.[38] This section also delves into the history

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[30] *See id.* ("The federal judge in that case expressed skepticism that the PGA's actions could be considered a per se violation of the Sherman Act, since group boycott claims are usually only per se violations when they involve horizontal competitors (which the PGA Tour and the European Tour are not, as they likely serve different markets)").

[31] *See* Adam Weg, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L. J. 1535 (2009).

[32] *See* Ann Graf McCormick, *Group Boycotts – Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703 (1976).

[33] *See* Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 710 (2018).

[34] *See* McCormick, *supra* note 32; *see also* Weg, *supra* note 31.

[35] *See* Mark Cannizzaro, *Greg Norman opens up to Post about LIV Golf, 'blood money' controversy, PGA Tour fight*, NEW YORK POST (Jul.28, 2022, 2:53 PM), https://nypost.com/2022/07/28/greg-norman-opens-up-about-liv-golf-blood-money-controversy/ [https://perma.cc/P8MT-7HDE], *see also* Beall, *supra* note 2; Panja & Das, *supra* note 5.

[36] *See* Beall, *supra* note 2, *see also* Cannizzaro, *supra* note 35.

[37] *See* Dominic Chu, *Saudi-backed LIV Golf envisions franchises in its future, executive says*, CNBC (Jul. 29, 2022, 12:42 PM), https://www.cnbc.com/2022/07/29/liv-golf-backed-by-saudis-and-trump-sees-franchises-in-its-future-exec-says.html [https://perma.cc/9LJK-M34M]. *See also* Dylan Dethier, *The PGA Tour just made big-time structural changes. Here are the 10 biggest*, GOLF (Aug. 24, 2022), https://golf.com/news/pga-tour-structure-changes-10/ [https://perma.cc/AD7X-MWGB].

[38] *See* Brian Baxter, *LIV Golf's New Top Lawyer Has Experience Challenging the PGA (1)*, BLOOMBERG LAW (Aug. 10, 2022, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/liv-golfs-new-legal-chief-has-experience-challenging-the-pga [https://perma.cc/6AYH-TRU]; *see also* Zak, *supra* note 1.

of the Sherman Act; how the Act applies to the issue at hand and highlights the standards for violating the Act when there is group boycott activity in question [39]

Section IV discusses the shortcomings of the Sherman Act, especially regarding group boycotts being analyzed as a per se violation, and proposes an amendment to the Act, that will add language to eliminate uncertainty and judicial discretion.[40] This proposed amendment would likely be enough to allow for a more clear-cut application of a per se analysis of group boycott activity in cases such as the one at hand, or encourage Jay Monahan and Greg Norman to sit down with key parties and hash out an agreement before lengthy and costly litigation proceedings ensue.[41]

II. BACKGROUND / HISTORY

Parties to the controversy and their relevant histories within the world of golf, along with the actions taken on behalf of each of them throughout the early stages of the rise of LIV Golf, are key to a firm understanding of the direction of this paper. Part A provides a look into LIV Golf commissioner and CEO Greg Norman's connection with the Saudi PIF, as well as the role of PGA Tour commissioner Jay Monahan and the athletes that have remained loyal to his tour.[42] Part B then discusses the actions taken by each tour in response to one another, in their attempts to keep star-athletes playing for their platform.[43] Part B also delves into major structural changes being implemented by the PGA Tour in response to players defecting towards LIV.[44]

A. Major Players

Norman and Saudi Arabia Partnership

Greg Norman jumped on the opportunity to be a part of the new breakaway tour, as he was previously involved in a start-up tour in 1994-1995 that was swatted aside by the PGA Tour.[45] Norman's harsh feelings towards the PGA Tour stems back to that time period when they emulated exactly the strategy they are carrying forward now to disband the newly proposed

[39] *The Antitrust Laws*, FEDERAL TRADE COMMISSION, (last accessed Aug. 21, 2022, 4:35 PM), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/49TF-CGJE]; *see also* Jarod Bona, *Antitrust Group Boycotts: My Competitors are Conspiring Against Me,* THE ANTITRUST ATTORNEY (Jan. 20, 2022), https://irglobal.com/article/antitrust-group-boycotts-my-competitors-are-conspiring-against-me-3/ [htpp://perma.cc/46T2-SKK3]; *Nynex Corp. v. Discon*, 525 U.S. 128, 134 (1998); *see also Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717 (1988).

[40] 15 U.S.C. §§ 1-38; *see also* Bona, *supra* note 39; *see also Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW (last accessed Sept. 18, 2022, 8:01PM), https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests#:~:text=Antitrust%20Standards%20of%20Review%3A%20The,Reason%2C%20and%20Quick%20Look%20Tests&text=Section%201%20of%20the%20Sherman,competition%20in%20a%20relevant%20market. [https://perma.cc/QV3Q-RLFD]; *see also* SHERMAN ANTITRUST ACT, 15 U.S.C. § 1 (1890).

[41] *See* Bona, *supra* note 39; *see also* Cannizzaro, *supra* note 35.

[42] *See* Beall, *supra* note 2.

[43] *See* Chu, *supra* note 37; *see also* Beall, *supra* note 2; Dethier, *supra* note 37.

[44] *See* Dethier, *supra* note 37.

[45] *See* Cannizzaro, *supra* note 35.

breakaway tour.[46] With Norman's experience in attempting to create a breakaway world tour, the Saudi Arabian PIF named him as LIV's first CEO.[47] Norman believes that his legacy on the course during his playing career allowed him to be in a position to not only expand the game of golf on a world stage but also expand his legacy as a major player in LIV.[48] Norman insists that LIV is not politically motivated, and the sole reason for creating the new tour is to expand the good that golf can do around the world; Norman emphasizes that Saudi Arabia should not be excluded from that good.[49]

The Saudi Arabian PIF is the financial leg to the new breakaway tour.[50] Investing in LIV Golf furthers the goal of the Saudi Arabian kingdom to diversify the country's economy and change its public image.[51] This shift would also make Saudi Arabia less dependent on the oil export industry and focus on increasing wealth with entertainment and tourism.[52] This act could be considered by outsiders as "sports washing", as the Saudis hope that in promoting international sporting events with a large interest worldwide, the athletes will extol the virtues for which Saudi Arabia is infamous.[53] The Saudis believe LIV Golf will cover their reputation of decades filled with human rights violations and transform the country into a tourist destination.[54] Mohammed bin Salman, Saudi Arabia's crown prince, is currently attempting to balance the public image of the country while maintaining complete control over Saudi Arabia and its involvements.[55]

Jay Monahan and the PGA Tour Members

Jay Monahan, the commissioner of the PGA Tour has made clear from the beginning, dating back to 2020, if a rival tour arose, players would have to choose to either remain loyal to the PGA Tour or take their talents elsewhere.[56] The European Tour, now named the DP World Tour, has also taken the PGA Tour's stance by disallowing its members to participate in LIV events.[57]

Top players such as Tiger Woods, Rory Mcllroy, Justin Thomas, Jordan Spieth, Jon Rahm, Scottie Scheffler, and Colin Morikawa have passed up on the opportunity to join the

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[46] *See id.*

[47] *See* Beall, *supra* note 2.

[48] *See* Cannizzaro, *supra* note 35.

[49] *See id.*

[50] *See* Beall, *supra* note 2.

[51] *See* Dator, *supra* note 14.

[52] *See id.*

[53] *See id.* ("With each name added to LIV Golf's growing roster, more cover is provided to the group of defecting golfers who remain lockstep in their justification: They want more money, and they're going to get it — even if they have to sell their souls.").

[54] *See id.* ("The end goal is to soften the global image of Saudi Arabia, covering its decades of human rights violations, the murder of journalist Jamal Khashoggi, and ongoing atrocities against civilians in Yemen with the veneer of a sparkling utopia that provides opportunities.").

[55] *See id.*

[56] *See* Beall, *supra* note 2.

[57] *See id.*

new tour and have pledged allegiance to the PGA Tour.[58] Rory Mcllroy has stated that for top guys, there is no reason to tarnish the reputation they have built on the PGA Tour for more money.[59] Rory has since gone on to add that the feud between the two tours has already set golf on a path toward irreparable harm to the game.[60] Mcllroy followed up these comments in another interview stating, "I think they [LIV] have been misguided in how to spend the money."[61] Mcllroy has made it clear to the media that he believes the only way peace can be achieved between the new rival tours is if Norman steps down as CEO and Commissioner.[62] It appears the 33-year-old PGA Tour-star has shifted his negative-focus away from the idea of the LIV Tour and towards its CEO, Greg Norman.[63] He believes that Norman remains a negative force in the ongoing war and is using the funds provided by the Saudi PIF to continue his long-standing vendetta against the PGA Tour.[64]

Tiger Woods is perhaps the most important advocate to pledge loyalty to the PGA Tour, citing that all his wins and major championships have built him a legacy that is intertwined with the reputation and competition provided by the PGA Tour.[65] Loyal PGA Tour members have taken this opportunity to work together to better the Tour for its survival and provide a better product for the fans as well as a better work environment for members.[66] Many strategic changes to the institution of the PGA Tour in the future will come from the ideas of top players on how to better the tour in every facet including compensation, scheduling, and enhancing opportunities for sustained careers on the Tour.[67]

B. Strategies and Goals of the Opposing Tours

LIV Looking to Draw Players Away with a Modern Twist to Golf (oh yea, and tons of money)

In addition to large purses, new formatting of tournaments, and a refined schedule, LIV Golf is looking to completely change the landscape of golf from a business perspective.[68] LIV Golf and the Saudi PIF are looking towards a future where the teams will be developed into franchises that can be sold, similar to other major sports.[69] Officials have found that fans

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58 *See id.*

59 *See id.*

60 *See* Jason Burgas, *Rory Mcllroy says PGA Tour vs LIV Golf war is doing 'irreparable' damage to the sport*, SPORTSNAUT (Oct. 26, 2022), https://sportsnaut.com/rory-mcilroy-pga-tour-vs-liv-golf-damaging-sport/ [https://perma.cc/3HZQ-UZWQ].

61 *See id.*

62 *See Ian Baker-Finch backs Rory Mcllroy's claim Greg Norman needs to leave LIV Golf for the game to find peace*, ABC (Last Visited Nov. 19, 2022), https://www.abc.net.au/news/2022-11-19/ian-baker-finch-greg-norman-rory-mcilroy-liv-golf-pga-tour/101674956 [https://perma.cc/39LE-2BFS].

63 Burgas, *supra* note 60.

64 *See id.*

65 *See* Beall, *supra* note 2.

66 *See* Cameron Jourdan, *Report details PGA Tour players' meeting with Tiger Woods; 7 more players defecting to LIV Golf*, USA TODAY (Aug. 20, 2022, 6:20 PM), https://www.usatoday.com/story/sports/golf/2022/08/20/tiger-woods-meeting-pga-tour-players-liv-golf/50621273/ [https://perma.cc/E9LC-UW7F].

67 *See id.*

68 *See* Chu, *supra* note 37.

69 *See id.*

love to see golf as a team event and due to team merchandise selling out on the first day of each event thus far.[70] Saudi Arabia's PIF has invested a massive $2 billion into LIV and has lured players by offering them equity in the league, in addition to the tournament purses, signing bonuses, and appearance fees.[71] While the money is large, leaving more room for trial and error at the beginning stages of the startup, investors will expect to see returns eventually, and believe implementing these strategies for the new tour will provide just that in due time.[72]

The new breakaway tour is looking to stay competitive by achieving eligibility for their athletes to receive world golf rankings points.[73] Although several of the biggest names in the world of golf are competing at LIV events, their world ranking is continuing to slide.[74] For a new tour looking to grow and add more star-power to their roster, this is a major concern.[75] World rankings act as a "players passport", allowing them to be compared to players on opposing tours and enter some of the world's most elite tournaments.[76] Gaining world rankings points would be a huge success in LIV's pursuit to compete with the PGA Tour, as their players would no longer have to rely elsewhere to gain points and stay eligible for the most desired tournaments known in the golf world.[77] This is an urgent matter for LIV and a major goal so that players may repair their currently sliding ranking in time for the 2023 major championship season.[78]

PGA Tour Commissioner Continues to Lay Down a Heavy Hand Towards New Rival

Commissioner Monahan is standing firm on his stance that any PGA Tour members who declare that they will join and play in any LIV events will face suspension and a possible lifetime ban from the PGA Tour.[79] Monahan believes the talks of the Saudi-backed tour have distracted PGA professional golfers and maintains that loyal members are focused on building their legacies on the PGA Tour and not being dragged on the idea of financial leverage.[80] The

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[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See* Dylan Dethier, *Why can't LIV get points? Inside LIV Golf's controversial World Rankings Quest*, GOLF (Oct. 7, 2022), https://golf.com/news/liv-golf-world-ranking-controversy/ [https://perma.cc/U3X9-FGN7].

[74] *See id.* ("The fact that these pros regularly compete against each other and even the winners are plummeting in the world rankings reveals an obvious blind spot in the system.").

[75] *See id.*

[76] *See id.*

[77] *See id.* ("As a result, the OWGR's ruling — and timing — is a big deal. If LIV is awarded points, its members can more easily leave the PGA Tour in their rearview mirror, knowing they'll still be able to qualify for the majors through strong play on LIV. Until then, they're in limbo. That limbo has already contributed to lawsuits, to resentment, to dramatics. There's likely to be more of all of the above.").

[78] *See id.*

[79] *See* Beall, *supra* note 2; *see also* Eamon Lynch (@eamonlynch), TWITTER (June 9, 2022, 9:39 AM), https://twitter.com/eamonlynch/status/1534892998407950336?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1534892998407950336%7Ctwgr%5E4d6e3bf6fc8f3a0d3092b80858cc12783ba31bc3%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.sbnation.com%2Fgolf%2F2022%2F6%2F8%2F23159771%2Fliv-golf-london-saudi-arabia-sportswashing [https://perma.cc/S2DA-PTWH].

[80] *See* Beall, *supra* note 2.

PGA suspensions are based on the idea that their members are required to receive a release to play in any events that conflict with the PGA Tour schedule, and in the case of LIV tournaments, the players were not granted releases, but played regardless.[81]

The suspensions do not come as a surprise, as the world was made aware of PGA's stance towards LIV in as early as 2020.[82] These suspensions apply to all PGA Tour affiliates, including PGA Tour Champions and the Korn Ferry Tour, as well as removing breakaway players from the FedEx Cup points list and consideration for representing their countries on President's Cup teams in the future.[83] Seth Waugh, the CEO of PGA of America, stands with the Commissioner and has stated that players who leave for LIV will not be welcome at the PGA Championship (one of golf's four majors), nor will they be able to participate in Ryder Cups.[84]

PGA Tour Responding with Major Changes of Their Own

The PGA Tour has amended its Player Impact Program (PIP) to include 20 players that get paid at the end of each season, up from 10 previously, as well as changing the format so players will have to give back by playing in elevated events that will create a better product for the fans.[85] The Tour has also elevated 12 additional tournaments, raising the purse to $20 million in each and ensuring that each top player will participate in all of these events.[86] This adds up to seeing 20 events per year with a star studded field all together, rather than them spacing out their events and rarely all playing together.[87] Each fully-exempt PGA Tour member will now receive a league-minimum salary of $500,000 credited against their on-course earnings, similar to the format of other sports where players are guaranteed a salary.[88] Non-fully exempt members who still have status to play in tournaments will receive a $5,000 travel stipend if they do not make the cut to help with travel and tournament expenses.[89] Tiger Woods and Rory Mcllroy have also launched a Monday-night golf league called the TMRW Golf League (TMRW), which will feature a head-to-head team event to supplement the PGA Tour and boost the profiles and earnings for PGA members.[90]

III. ANTITRUST LAW IN THE WORLD OF GOLF

Section III provides an overview of the current lawsuits between the PGA Tour and LIV Golf, what each side hopes to gain from the litigation, and a detailed analysis into the Sherman Act, specifically group boycott violations and what it takes to be deemed a per se violation. Section A discusses the allegations brought by LIV Golf and its athletes regarding

[81] *See* Panja & Das, *supra* note 5.
[82] *See id.*
[83] *See id.*
[84] *See* Beall, *supra* note 2.
[85] *See* Dethier, *supra* note 37.
[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] *See id.*

the PGA Tour violating antitrust law, as well as the actions that have followed.[91] This section also discusses the goals of the opposing tours.[92] Section B then gets into the history of the Sherman Act and how precedent has set the application of a per se analysis to claims of group boycott activity.[93]

A. Current Lawsuits

Antitrust Suit

On August 3, 2022, LIV Golfers, led by Phil Mickelson and Bryson Dechambeau, filed an antitrust lawsuit against the PGA Tour, challenging their suspensions by accusing the PGA of anti-competitive practices.[94] Norman has stated that LIV would support players who want the freedom to play golf anywhere they want as independent contractors. On August 26, LIV Golf, in an amended complaint, joined some of their players as a party in the suit against the PGA Tour.[95]

On September 27, Mickelson and several others, including Taylor Gooch and Ian Poulter have dropped out of the suit.[96] The reason being, according to Mickelson, is he is "focused on moving forward and extremely happy being a part of LIV, while also grateful for [his] time on the Tour."[97] Mickelson believes that LIV's involvement in the case is sufficient to protect players rights, so much so that it is no longer necessary for him to stay involved as an individual party to the proceedings.[98]

The case alleges monopolistic practices on behalf of the PGA Tour by not granting leave to players to participate in LIV events, instead suspending them indefinitely when they participated.[99] When several of the players sought an injunction to play in the PGA Tour's playoff events, the court found that they did not meet the standard for injunctive relief, having not shown a likelihood to succeed on the merits and that they would not be irreparably harmed absent the injunction.[100] The lawsuit alleges violations by the PGA Tour of § 1 of the Sherman

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[91] *See* Kyle Porter, *LIV Golf joins player-led lawsuit against PGA Tour as two more golfers drop out*, CBS (Aug. 27, 2022, 3:47 PM), https://www.cbssports.com/golf/news/liv-golf-joins-player-led-lawsuit-against-pga-tour-as-two-more-golfers-drop-out/ [https://perma.cc/U4UJ-9TMY].

[92] *See* Baxter, *supra* note 38; *see also* Sean Zak, *PGA Tour Countersues LIV Golf: Here's where the lawsuit stands*, GOLF (Sept. 29, 2022), https://golf.com/news/pga-tour-countersues-liv-golf-where-lawsuit-stands/ [https://perma.cc/BAG4-YSLZ].

[93] *See The Antitrust Laws*, *supra* note 39; *see also* Bona, *supra* note 39.

[94] *See* Brian Baxter, *supra* note 38; *see also* Zak, *supra* note 1.

[95] *See* Porter, *supra* note 91; *see also* Jacob Lev, *LIV Golf joins antitrust lawsuit against PGA Tour*, CNN (Aug. 28, 2022, 6:29 AM, https://www.cnn.com/2022/08/28/sport/liv-golf-antitrust-lawsuit-pga-tour-spt-intl [https://perma.cc/JX3M-ZEKL].

[96] *See* Diane Bartz & Frank Pingue, *Mickelson and three others drop out of LIV Golf lawsuit against PGA Tour*, REUTERS (Sept. 27, 2022, 5:51 PM), https://www.reuters.com/legal/litigation/golfer-phil-mickelson-others-drops-out-lawsuit-against-pga-tour-liv-fight-2022-09-27/ [https://perma.cc/2BXZ-NS4N].

[97] *See id.*

[98] *See* Zak, *supra* note 92.

[99] *See* Porter, *supra* note 91.

[100] *See* FED. R. CIV. P. 65; *see also* Baxter, *supra* note 38.

Antitrust Act for an alleged boycott of LIV and teaming up with the DP World Tour, as well as a § 2 violation of the same act for alleged monopolistic practices by the PGA Tour trying to control where professionals play golf.[101]

The PGA Tour has since countersued, alleging tortious inducement of breaches of contract on the part of LIV Golf.[102] The PGA Tour alleges that there was no injury to the plaintiffs as a result of their suspensions from the Tour, as they lacked financial harm, and some even earned more from LIV than their PGA contract provided for, due to the exorbitant signing bonuses they received from LIV.[103] The PGA Tour argues that the breakaway tour is just a sports washing scheme by the Saudi regime and that they are enticing players to breach their PGA Tour contracts with exuberant amounts of money.[104] The PGA Tour has denied any allegations made regarding them being involved in a group boycott with the DP World Tour and other governing bodies in the world of golf, including the OWGR board of directors.[105]

Goals of the Legal Matter

LIV Golf and their players involved in the antitrust suit against the PGA Tour seek to prove that golfers should be considered independent contractors that should be free to play where they choose.[106] The Commissioner of the PGA Tour may deny any release to play elsewhere if it affects an obligation in contract between the Tour and one of its sponsors, or if it causes unreasonable harm to the PGA Tour or a sponsor involved.[107] Norman, along with others involved with LIV Golf, hope to prove the denial of releases is an example of the PGA Tour exercising a monopolistic practice in violation of the Sherman Act.[108]

The plaintiffs allege a per se violation of § 1 of the Sherman Act due to the PGA Tour entering a group boycott with the DP World Tour (formerly known as the European Tour).[109] As it currently stands, the plaintiffs must show that the PGA Tour and DP World Tours are horizontal competitors to warrant a per se violation.[110] Horizontal agreements take place between two market forces that are at the same level, or are direct competitors.[111] These horizontal agreements occur when two or more forces restrain another entity, either at their market level or a separate level.[112] In contrast, a vertical restraint involves two or more parties at different market levels; examples include restraints between a distributor and a retailer or a

[101] *See* Mickelson v. PGA Tour Inc., No. 22-cv-04486-BLF, 2022 U.S. Dist. LEXIS 142803 (N.D. Cal. Aug. 10, 2022).
[102] *See* Zak, *supra* note 92.
[103] *See id.*
[104] *See id.* ("LIV has executed a campaign to pay the LIV Players astronomical sums of money to induce them to breach their contracts with the TOUR in an effort to use the LIV Players and the game of golf to sportswash the recent history of Saudi atrocities and to further the Saudi Public Investment Fund's Vision 2030 initiatives.").
[105] *See id.*
[106] *See* Baxter, *supra* note 38.
[107] *See* Porter, *supra* note 91.
[108] *See* Baxter, *supra* note 38.
[109] *See* Mickelson, 2022 N.D. Cal. LEXIS 142803 at 3.
[110] *See id.*
[111] *See* Erin Garrity, *A New Chapter in Antitrust Law: The Second Circuit's Decision in United States v. Apple Determines Hub-And-Spoke Conspiracy Per Se Illegal*, 57 B.C. L. REV. E. SUPP. 84 (2016).
[112] *See* Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151 (1996).

retailer and a customer.[113] In some cases, distinguishing between a horizontal and vertical agreement between competitors requires an inquiry into the purpose, effect, and interests of the agreement.[114]

As previously stated, the PGA Tour's goal is not only to answer the numerous anticompetitive allegations, but also to show that LIV Golf is guilty of interfering with the PGA Tour player's contracts.[115] By doing so, the PGA Tour hopes to prove that the PIF has tortiously interfered with contracts between the PGA Tour and the former PGA Tour members, encouraging players to breach their contracts to join LIV Golf.[116] The PGA Tour alleges that LIV has advised tour members that their contracts with the PGA Tour are unenforceable, and thus have offered them enormous sums of money to breach those contracts.[117] The PGA Tour has stated in their countersuit that the LIV contracts "impose contractual restrictions on the LIV Players more onerous in scope and duration than any of the Tour regulations they challenge."[118] This countersuit looks to show that it is LIV, and not the PGA, that is competing unfairly.[119]

B. Applicable Law

The Sherman Act

The goal of antitrust law is the same since the Sherman Act was passed in 1890, to protect consumers by ensuring competition that incentivizes the efficient and productive operation of businesses.[120] The Sherman Act was passed to prevent the restraint of trade and monopolization practices, as well as attempts or conspiracies to monopolize.[121] The Sherman Act can impose a penalty of up to $100 million for violations.[122] The second section of the act makes monopolizing, as well as attempting or conspiring to monopolize a felony.[123] After proving too vague in practice, leaving loopholes that allow for easily defensible positions for corporations, the Sherman Act was supplemented.[124] Congress has supplemented the Sherman

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[113] *See 23.2 Horizontal Restraints of Trade*, SAYLOR ACADEMY (Last Visited Oct. 9, 2022, 12:14 PM), https://saylordotorg.github.io/text_legal-aspects-of-marketing-and-sales/s26-02-horizontal-restraints-of-trade.html [https://perma.cc/U5R4-E6NM].

[114] *See* Ricks and Loftis, *supra* note 112.

[115] *See* Zak, *supra* note 92.

[116] *See id.*

[117] *See* Mark Schlabach, *PGA Tour countersuit claims LIV Golf induced golfers to breach existing contracts by offering 'astronomical sums of money'*, ESPN (Sept. 29, 2022), https://www.espn.com/golf/story/_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money [https://perma.cc/FJX5-62CE].

[118] *See id.*

[119] *See id.*

[120] *See The Antitrust Laws*, *supra* note 39.

[121] *See id.*

[122] *See id.*

[123] *See* Coryanne Hicks, *The Sherman Antitrust Act is the first in a line of federal laws protecting consumers from unfair prices*, BUSINESS INSIDER (last updated Aug 2, 2022, 2:09 PM), https://www.businessinsider.com/personal-finance/sherman-antitrust-act [https://perma.cc/L6WW-HGJJ].

[124] *See id.*

Act with the passing of the Federal Trade Commission ("FTC") Act and Clayton Act, both in 1914.[125] The FTC Act deals with methods of competition that are unfair, while the Clayton Act covers specific practices not addressed by the Sherman Act, such as mergers and acquisitions that would lessen competition.[126]

The Clayton Act strengthened the Sherman Act by clarifying certain points such as mergers between businesses and situations where one person makes decisions for multiple competing corporations, called an interlocking directorate.[127] The Robinson-Patman Act amendment of 1936 again strengthened the initial Sherman Act by covering discriminatory pricing between competitors in their dealings with each other.[128] The Celler-Kefauver Act, passed by congress in 1950, was amended to provide guidance against forms of mergers between corporations that led to a substantial reduction of competition in that market space because of monopolization caused by the merger.[129] An amendment in 1976 called the Hart-Scott-Rodino Antitrust Improvements amendment, required notice to be given to the government when engaging in a large merger or acquisition.[130] These amendments have proven useful as a supplement to the Sherman Antitrust Act, making it easier to disincentivize anticompetitive business practices and to recover damages for violations.[131]

The "per se" rule under the Sherman Act applies to extreme anti-competitive restraints that damage the market so much so that they deserve to be deemed violative of the Sherman Act without further knowledge of the market or possible justifications for competitive behavior.[132] A per se analysis has traditionally been applied only in specific cases where companies teamed up to directly deny, persuade, or coerce their vertical counterparts (suppliers or customers), to impede the relationships necessary in a competitive struggle for market power.[133] In a per se violation, a plaintiff need only show that the anticompetitive behavior took place, not the unreasonableness or negative effects that the conduct has on the relevant markets.[134] Also under the per se rule, defendants are not able to provide justifications for their objective anticompetitive behavior.[135]

Per se illegal practices under antitrust law may include horizontal market allocation agreements, certain horizontal group boycotts by competitors within the market, and more.[136] A major exception to the per se application is when the restraints are necessary to the existence

[125] *See The Antitrust Laws*, *supra* note 39; *see also* Daniel Baracskay, *Federal Trade Commission*, MTSU (2009), https://www.mtsu.edu/first-amendment/article/812/federal-trade-commission [https://perma.cc/L8RB-EJZC]; *see also* CLAYTON ACT, 15 U.S.C. §§12-27 (1914).

[126] *See The Antitrust Laws*, *supra* note 39.

[127] *See* Hicks, *supra* note 123.

[128] *See id.*

[129] *See* Hicks, *supra* note 12; *see also* Jason Gordon, *Celler-Kefauver Act – Explained*, THE BUSINESS PROFESSOR (last updated Apr. 15, 2022), https://thebusinessprofessor.com/en_US/business-transactions/celler-kefauver-act-defined [https://perma.cc/W9GG-GPHV].

[130] *See* Hicks, *supra* note 123.

[131] *See id.*

[132] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40.

[133] *See* Weg, *supra* note 31; *see also* United States v. Socony Vacuum Oil Co., 310 U.S. 150, 217-224 (1940).

[134] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also United States v. Topco Associates Inc.*, 405 U.S. 596 (1972).

[135] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1940).

[136] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40.

of the venture that places them; when restraints are necessary, a court will move away from per se and apply a lower standard, such as the rule of reason.[137] This would require a full analysis into the; (i) definition of relevant products and geographic markets, (ii) defendant's market power in the market of relevance, and (iii) anticompetitive effects, along with burdening the defendant to justify.[138]

Group boycotts and concerted refusals to deal, which are components of antitrust law and the Sherman Act, cost target companies and consumers money.[139] Companies that are victims of group boycott and refusal to deal cases can recover damages.[140] Courts may issue injunctions against participants in group boycotts to prevent the illegal activity in that market space.[141] Monetary damages are also recoverable by target companies, and can triple damages, along with the payment of reasonable attorneys' fees.[142]

Standards for Violating the Sherman Act

§ 1 of the Sherman Act is violated when a contract is made that restrains trade between the states or foreign nations, therefore making it illegal.[143] Parties engaged in illegal contracts or conspiracies to restrain trade can be guilty of a felony and subject to massive fines.[144] Attempts to monopolize, conspiring to monopolize, and monopolistic practices are guilty of violating § 2 of the Sherman Act.[145] Restraining competition between states and/or foreign nations through monopolistic practices can be punishable, again, as a felony and with massive fines.[146]

A group boycott, § 1, claim arises when two or more entities work together to restrict competition.[147] Businesses are typically permitted to choose their business partners under law, however, companies with sufficient market power have this freedom restricted.[148] For § 1 of the Sherman Act to apply in these cases, there must be an agreement or concerted action by the defendant, shown by the plaintiff.[149] Violators typically use a concentrated harm towards one or few competitors that are trying to establish themselves in the space by disrupting the

[137] *See id.*
[138] *See id.*
[139] *See Group Boycotts and Refusalto Deal*, KOHNSWIFT&GRAF (last visited Oct. 28, 2022, 7:51 PM), https://www.kohnswift.com/practice/antitrust/group-boycotts-and-refusal-to-deal/ [https://perma.cc/7B3Y-P8YH].
[140] *See id.*
[141] *See id.*
[142] *See id.*
[143] *See* SHERMAN ANTITRUST ACT, *supra* note 40.
[144] *See* 15 U.S.C. §§1,2.
[145] *See id.*
[146] *See id*.
[147] *See* Bona, *supra* note 39.
[148] *See* KOHNSWIFT&GRAF *supra* note 139.
[149] *See Does the Group Boycott Violate the Antitrust Laws? Five Questions You Should Ask*, BONA LAW (last accessed Sept. 9, 2022, 8:21 PM), https://www.bonalaw.com/insights/legal-resources/does-the-group-boycott-violate-the-antitrust-laws-five-questions-you-should-ask. [https://perma.cc/2WK4-3JB5].

market.[150] This type of boycott usually occurs when a new competitor enters the market with a new and potentially better way of doing things, followed by fellow established-competitors working together to crush the new entrant.[151]

Some courts require plaintiffs to demonstrate that the alleged company possesses enough market power to eliminate or limit the victim company.[152] Plaintiffs are also required to show control by the defendant over a resource or facility necessary to the target company to survive.[153] Group boycotts have sometimes been analyzed as a per se antitrust claim, which is less burdensome to prove, with the plaintiff not needing to show each element usually required to constitute a violation.[154]

While businesses are usually free to choose business partners, refusing to deal with specific businesses may have anti-competitive effects.[155] When a company that has sufficient market power refuses to deal with another entity within that market space, with the goal in mind of maintaining monopoly power in that market, the refusal could constitute an antitrust violation.[156] Refusals to deal can substantially decrease the market shares and profits of competitors, or more severely, remove them from the market space altogether.[157] Victims of an illegal refusal to deal may bring private actions under federal or state antitrust laws, including the Sherman Act.[158]

With current U.S. Supreme Court precedent, there must be a horizontal boycott for there to be a per se violation of the Sherman Act.[159] This typically means two or more competitors will come together in some sort of agreement to exclude the victim from the market.[160] For example, the Supreme Court in *FTC v. Superior Court Trial Lawyers Ass'n* found a horizontal agreement that undoubtedly restrained price and output, therefore the lower court erred in finding an exemption against a per se violation.[161] The Supreme Court in *Nynex Corp. v. Discon* followed this precedent and confirmed that the per se rule may apply only to horizontal agreements that take place between two or more direct competitors.[162] Here, the per se rule did not apply to a telephone company because their anticompetitive motive was to prevent a supplier from obtaining a potential new customer, constituting a vertical restraint.[163] There must be a direct agreement on price or price levels for the per se rule to apply to vertical restraints.[164] Some lower courts also require there to be an exercise over shared market power

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[150] *See* Bona, *supra* note 39.
[151] *See id.*
[152] *See* KOHNSWIFT&GRAF, *supra* note 139.
[153] *See id.*
[154] *See* Bona, *supra* note 39.
[155] *See* KOHNSWIFT&GRAF, *supra* note 139.
[156] *See id.*
[157] *See id.*
[158] *See id.*
[159] *See* Bona, *supra* note 39; *see also* Nynex Corp., 525 U.S. at 135; *see generally* Business Electronics Corp., 485 U.S. at 730.
[160] *See* Bona, *supra* note 39.
[161] *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).
[162] *See Nynex Corp.*, 525 U.S. at 135.
[163] *See id.* at 138.
[164] *See id.* at 136.

or complete control of an essential resource to the market.[165] The conduct of the defendants must be commercially motivated, or it will not receive any consideration for group-boycott liability in antitrust law.[166]

IV. Solution: Amend the Sherman Act

This note proposes an amendment to the Sherman Act, incorporating language that eliminates the horizontal requirement for a group boycott claim to be analyzed under a per se analysis. This proposal is that eliminating the higher burden for being analyzed as a per se violation will create more judicial consistency and avoid costly litigation in situations where it is not necessary.[167] Critics may argue that the language of the Sherman Act is left intentionally vague due to the uncertain dynamics of economics and the marketplace.[168] This note argues that the vagueness created by the language has left a large void, resulting in a high-level of variability in regards to judicial decisions and the question of when the per se analysis applies to claims such as group boycott activity.[169]

Therefore, Part A discusses, in detail, the shortcomings of the Sherman Act, as well as the inconsistencies in group boycott violations within the act.[170] This part also discusses how precedent has slowly moved away from the per se analysis.[171] Part B then highlights the language changes of the proposed amendment to the Sherman Act, along with how the amendment will bring about benefits in the sphere of Antitrust Law, such as more judicial certainty and less financial waste by both the court systems and victims seeking judicial intervention.[172]

A. Does the Sherman Act Remain Good Law?

The Sherman Act has had a complicated history due to its loose wording and poor definition of key terms within the act itself.[173] The act was designed to restore competition to industries that had been monopolized.[174] It was deemed nearly pointless five years after its adoption in *United States v. E.C. Knight Company*,[175] where it was found that the American Sugar Refining Company's ownership of 98% of all sugar refining in the U.S. did not constitute

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[165] *See* Bona, *supra* note 39.
[166] *See id.*
[167] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also* Weg, *supra* note 31.
[168] *See* George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U.L. REV. 389, 417 (1980).
[169] *See* Weg, *supra* note 31.
[170] *See Sherman Anti-Trust Act (1890)*, *supra* note 40. *See also* Bona, *supra* note 39.
[171] *See* Weg, *supra* note 31.
[172] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40. *See also Sherman Anti-Trust Act (1890)*, *supra* note 40; *see also* Weg, *supra* note 31.
[173] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.
[174] *See id.*
[175] *See United States v. E.C. Knight Co.,* 15 S. Ct. 249 (1895).

a restraint of trade.[176] Since then, the act has been used with more success to maintain a free-market, an example being the breakthrough against Microsoft in the 1990s.[177] More recently, in 2013, the Sherman Act was used successfully in *United States v. Apple Inc.*, where it was found that Apple violated § 1 of the act by conspiring with a publisher to eliminate competition and drive up e-book prices.[178] While the Sherman Act remains a useful source of law today, its lack of definitions cannot be ignored, as they lead to inconsistency due to leaving a large amount of discretion in the hands of the judicial system.[179]

Group boycott claims, which fall under Sherman Act § 1, are a particular area of antitrust law that remains flexible and inconsistent.[180] Given that the specific language of group boycott activity is not directly in the Sherman Act itself, a major issue arises when courts decide between using the per se or rule of reason standard.[181] Due to the inconsistencies that have arisen, courts have created a standard in the grey-area of both of these approaches called the quick-look analysis.[182] This analysis has been developed due to the gaps left by ambiguities in the language of the law, and is considered an abbreviated rule of reason approach.[183] This approach is taken when the action does not constitute a per se violation but is so clearly anticompetitive that the court need not go through all the rigorous analysis laid out by the rule of reason approach.[184] This short-cut approach has only been established due to the difficulty in meeting the standard that precedent requires to be analyzed as a per se violation, which would be leaps and bounds easier to prove, especially for violations so clear that they need not go through all the formalities required by an unnecessary, in-depth analysis.[185]

Given the growing complexity of commercial and foreign markets, the per se rule has been slowly disfavored.[186] Courts have moved toward a willingness to analyze procompetitive justifications in horizontal group boycotts closer to a rule of reason approach.[187] The per se analysis for horizontal group boycotts continues to fade as it has been less useful of late, as courts look to other methods of analysis for these violations.[188] Moving away from per se approach has its downfalls, including the provided judicial certainty that stems from this analysis.[189] This will create very flexible standards that the U.S. Supreme Court will need to establish over a long period of time.[190] Although the establishment of the quick-look approach applies a partial remedy to this problem, lower federal courts will struggle to analyze causes of

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176 *See Sherman Anti-Trust Act (1890)*, *supra* note 40.
177 *See id.*
178 *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (2d Cir. 2013).
179 *See Sherman Anti-Trust Act (1890)*, *supra* note 40.
180 *See* Bona, *supra* note 39.
181 *See id.*
182 *See id.*
183 *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40.
184 *See id.*
185 *See id.*
186 *See* Weg, *supra* note 31.
187 *See id.* at 1548 ("the Court is willing to examine the procompetitive justifications for horizontal group boycotts, an analysis that is strikingly similar to a fullblown rule-of-reason analysis. Either way, the traditional per se treatment of horizontal boycotts is no longer necessary or even justifiable under the Court's current trend.").
188 *See id.* at 1539.
189 *See id.* at 1555.
190 *See id.*

action, such as group boycott claims, via the rule of reason approach that were previously analyzed by a per se analysis.[191]

Shifting away from a per se analysis would cause a significant uptick in cost of litigation.[192] The per se analysis as applied to the Sherman Act claims significantly decreases the length of the litigation process because the action allows for the hearing of evidence that only relates to certain agreements before being able to decide a case.[193] In contrast, the rule-of-reason and quick-look approaches both require an in-depth investigation into factors such as market power, market history, and competitive justifications.[194] This in turn leads to a significant uptick in the financial and judicial resources that are expended during a drawn out litigation process.[195]

B. Proposed Legal Solution

Moving back to a per se approach when analyzing antitrust claims such as group boycott activity would engender more judicial consistency and lead to an easier burden for the plaintiff to prove to the court.[196] Although products and the need for cooperation between competitors in the same market space has become more complex, not every situation requires such an in depth and expensive analysis, and there still remain some situations that the courts could consider "tap-ins", golf terminology for a no-doubter.[197]

Although the Supreme Court has made horizontal group boycotts a per se violation of § 1 of the Sherman Act, lower courts continue to find ways to dance around this principle.[198] The ambiguity of the application of per se analysis to group boycott claims is much more obvious when compared with its application to other per se relevant claims, such as price fixing.[199] Simply defining acts as group boycotts and applying the per se rule was seen as an invitation to open the possibility that some reasonable activity will be forbidden without good reason.[200] Keeping the per se rule in practice is key, as it acts as not only a deterrent, but also aids in predicting the types of conduct that will be allowed.[201] These ambiguities regarding the application of per se analysis to certain antitrust violations by the Supreme Court have been due to the Court's failure to properly define the term group boycott and inability to set a fine-line on when to apply per se or move towards a rule of reason approach.[202] With lower courts

[191] *See id.*
[192] *See id.* at 1556 ('Without per se treatment, the courts will only have the rule-of-reason and quick-look analyses to scrutinize agreements, both of which can produce a longer, more arduous litigation process.").
[193] *See id.*
[194] *See id.*
[195] *See id.*
[196] *See id.*
[197] *See id.*
[198] *See* McCormick, *supra* note 32.
[199] *See id.* at 708.
[200] *See id.* at 753.
[201] *See id.* at 765-766 ("The application of such a standard frees the courts of the burden of extensive fact-finding analysis and of the difficult economic examination inherent in the application of the rule of reason.").
[202] *See id.*

hesitant to apply the per se rule, an elimination of the ambiguity can be resolved by a proposed amendment directly to the Sherman Act, since the Supreme Court has failed to adequately fill the gaps through its own precedent.[203]

The language of the Sherman Act allows for a framework to be created judicially, establishing rules on a flexible and discretionary basis, rather than providing notice and consistency within the statutory language itself.[204] Courts now weigh many more economic and market factors than originally deemed necessary, enabling judicial determinations of "reasonableness" on a much more malleable basis.[205] This is a major problem due to the Department of Justice (DOJ) standing firm on their policy that only per se violators can be charged criminally while guilty companies are dealt with civilly.[206] With such a black-and-white approach being taken by the DOJ to differ the punishments according to the level of wrongdoing, the blurring of the line between per se and rule-of-reason violators contradicts the DOJ's purpose to separate more egregious violations from those where there may have been a legitimate business purpose.[207] The more severe penalties are for an offense, the less ambiguity will be accepted as to application.[208]

These concerns are also magnified when the issues overlap with constitutional protections, which the Sherman Act does, making it particularly suspect.[209] Courts have found similar trade regulation statutes unconstitutionally vague, but there is no sign the Sherman Act will be applied in a more definite nature in the future.[210] This gives rise for the need to interpret the criminal provisions of the Sherman Act with extreme caution due to the potentially unconstitutional level of vagueness left by the language of the statute.[211] It is clear that the issues regarding vagueness in the Sherman Act must be faced and dealt with sooner rather than later.[212]

A novel legal solution that would solve the matters between the PGA Tour and LIV Golf would be a new amendment to the Sherman Antitrust Act of 1890.[213] Amending the statute to include more precise definitions of terms such as "group boycott" and eliminating the horizontal requirement for per se group boycott violations would make it more efficient and lead to more probable and consistent outcomes in legal proceedings.[214] Also, finding a way to incorporate "group boycott" language into § 1 of the act will lessen the burden on plaintiffs to

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[203] *See id.*

[204] *See* Sipe, *supra* note 33 at 721.

[205] *See id.* at 728 ("The Sherman Act's judicially-created framework of rules, instead of providing the notice and consistency otherwise lacking in the statutory text itself, has thus single-mindedly elevated discretion and flexibility. One by one, the courts have eliminated the bright and predictable lines of per se analysis, whether explicitly and outright or implicitly through threshold rule-of-reason inquiry. Compliance in the shadow of Sherman Act jurisprudence thereby means weighing the totality of all economic factors and market effects and determining whether the activity in question will be found 'reasonable' down the line by a judge or jury.").

[206] *See id.* at 729.

[207] *See id.*

[208] *See id.*

[209] *See id.*

[210] *See* Garvey, *supra* note 168 at 418.

[211] *See id.* ("Moreover, the Sherman Act does not have the characteristics of a traditional strict liability offense. Finally, the Act is, and will continue to be, vague.").

[212] *See* Sipe, *supra* note 33.

[213] *See* 15 U.S.C §§ 1, 2.

[214] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.

prove per se violations, thus potentially allowing for a more clear and concise application of the act to cases such as the one at hand.[215]

The Supreme Court has not determined that the Sherman Act is unconstitutionally vague, however the act does not describe specific conduct but only the general harm that it seeks to prevent.[216] Including this language in the statute will assure that "conduct that is manifestly and plainly anticompetitive" will receive the per se treatment, regardless of where the flexible Court precedent lies at the time.[217] Given the current inconsistent application, the benefits brought about by the per se approach are easily overstated.[218] The reduced litigation costs and judicial certainty are defeated when additional litigation is needed solely to determine if the conduct fits the mold of a per se violation.[219] Group boycotts are capable of creating per se liability in antitrust law but not in all cases.[220] Victims can feel extremely frustrated when experiencing group boycott acts against them.[221]

Critics will point out that the Sherman Act will perpetually be vague due to inherent aspects of the act.[222] They will address and rely upon the fact that case law is able to follow and adapt to new competing economic theories, given the fluctuating dynamics of economics and the marketplace.[223] The point will be made that unpredictability on a case-by-case basis stems from the tension between antitrust law and changing political and economic climates.[224] This will all be used to show that the vagueness of the Sherman Act was intentional, with the goal of leaving discretion to courts to adapt precedent to a rapidly changing environment surrounding antitrust law.[225] However, this note takes the position that the cons created by the intentional, non-specific nature of the statutory language outweigh the benefits. Creating judicial certainty, while minimizing financial and judicial resource waste resulting from unnecessary litigation will create a more efficient path forward for antitrust law involving group boycott violations.[226]

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215 *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also Sherman Anti-Trust Act (1890)*, *supra* note 40.

216 *See* Garvey, *supra* note 168 at 390.

217 *See* Jonathan Baker, *Per Se Rules in the Antitrust Analysis of Horizontal Restraint*, THE ANTITRUST BULLETIN 733, 738 (1991).

218 *See id.*

219 *See id.* ("Similarly, the Court has remarked that the distinctions it must make in order to determine whether to use a per se rule are 'reasonably clear [in theory]' but 'often. . . difficult to apply in practice.'").

220 *See* Bona, *supra* note 39.

221 *See id.*

222 *See* Garvey, *supra* note 168 at 417.

223 *See id.* ("Dean Kadish has stated that the Sherman Act is necessarily vague for three reasons: First, the economic policy is itself unclear. . . . Second, illegality must turn on judgments that are essentially evaluative in character, rather than on purely factual determinations. . . . Third, the inevitable development of novel circumstances and arrangements in the dynamic areas under regulation would soon make precise formulations obsolete, even to the limited extent they prove feasible.").

224 *See id.*

225 *See id.*

226 *See* Weg, *supra* note 31.

Greg Norman has stated that he is willing to sit down with Jay Monahan and discuss the problems and issues with the LIV Golf business model and reach a potential solution.[227] Monahan has been less willing to do so, handing out suspensions to any defector to LIV Golf without exception.[228] Both sides have made clear that they like their chances in the courtroom, and this is arguably due to the inconsistent decisions stemming from alleged Sherman Act violations in the past.[229] Amending the lack of detail in the definitions of key terms within the Sherman Act would allow for a more predictable outcome and potentially lead to settlement before a massive lawsuit even comes to fruition.[230]

V. CONCLUSION

Today, the Sherman Act, as applied to group boycott activity, is uncertain and victims cannot feel comfortable as they head into court unsure of whether they will receive a per se, rule of reason, or a "quick-look" analysis to their problem.[231] Additionally, the precedent set by the Supreme Court has not been helpful to victims, adding unnecessary burdens by requiring a tough-to-prove horizontal requirement for a per se analysis to be used on their case.[232] The Sherman Act's lack of a clear definition for key terms within the body of the act leaves too much room for inconsistent legal decisions for alleged violations.[233]

LIV Golf and the PGA Tour are headed towards a long and costly legal battle with no end in sight, keeping top golfers separated and the world of golf at odds for both viewers and the athletes.[234] The suspensions for LIV defectors will continue unless a possible amendment clarifying key terms accelerates the legal process or perhaps encourages a settlement, avoiding all future court proceedings.[235] Defining more clearly "group boycott" within the Sherman Act itself, along with setting a standard for the application of a per se analysis, involving the removal of the horizontal requirement in group boycotts, via an amendment to the act, may help courts find more easily that competition is healthy within the world of golf and players should be free to play wherever they want as the independent contractors that they are.[236]

Applying the per se analysis to the case at hand, because of the amendment's clearly set standards, would potentially provide LIV Golf relief as a victim of group boycott activity between the PGA Tour and DP World Tour.[237] An expected result in court, rather than a flip-of-the-coin outcome, may even encourage the rival tours to sit down and come to a resolution,

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[227] *See* Cannizzaro, *supra* note 35.
[228] *See* Beall, *supra* note 2.
[229] *See* Cannizzaro, *supra* note 35.
[230] *See* 15 U.S.C §§1, 2.; *see also* Cannizzaro, *supra* note 35.
[231] *See* Bona, *supra* note 39.
[232] *See* Eichlin, *supra* note 28, *see also* Bona, *supra* note 39.
[233] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.
[234] *See* Bob Harig, *Phil Mickelson Among 11 LIV Golf Players to File Lawsuit Against PGA Tour for Antitrust Violations*, SPORTS ILLUSTRATED (Aug. 3, 2022), https://www.si.com/golf/news/phil-mickelson-liv-golf-sues-pga-tour-for-antitrust-violations [https://perma.cc/2FC9-MUJX].
[235] *See id.*
[236] *See* Cannizzaro, *supra* note 35, *see also* McCormick, *supra* note 32.
[237] *See* Porter, *supra* note 91.

avoiding litigation altogether, which would clearly exemplify the major benefits discussed of reduced costs and conserved judicial resources.[238]

[238] *See* Cannizzaro, *supra* note 35, *see also* Weg, *supra* note 31.

"THINK GLOBALLY, ACT LOCALLY": NEW YORK'S EVOLVING APPROACH TO ADDRESS FOSSIL FUEL ELECTRIC USE IN PROOF-OF-WORK BITCOIN MINING OPERATIONS CONTRIBUTING TO CLIMATE CHANGE

By Adriana Montante

I. INTRODUCTION

Since its introduction in 2008, Bitcoin has remained the most popular and expensive form of cryptocurrency.[1] The digital tender is predominately enabled by the blockchain consensus mechanism, Proof-of-Work (hereinafter "PoW").[2] PoW utilizes enormous amounts of electric energy to authenticate Bitcoin transactions and mine new tokens.[3] It is estimated that, annually, Bitcoin consumes 100.15 terawatt-hours of electricity and generates 55.86 megatonnes of carbon dioxide (hereinafter "CO_2"), which is comparable to the power consumption of Kazakhstan and the carbon footprint of Peru.[4]

As the market for Bitcoin expands, miners are buying or reopening old coal, coal waste, and natural gas power plants to generate behind-the-meter (hereinafter "BTM") power to fuel PoW mining operations.[5] This "coal-to-crypto" pipeline produces energy at an extremely low cost at the expense of reigniting the emission of greenhouse gases (hereinafter "GHGs").[6] Consequently, Bitcoin mining creates significant environmental externalities that directly conflict with societal efforts to curb the climate change crisis.[7]

1 *See generally* Sinan Kufeoglu & Mahmut Ozkuran, *Energy Consumption of Bitcoin Mining* (May 24, 2019) (unpublished working paper) (on file with Cambridge Working Papers in Economics) ("The bitcoin network is a peer-to-peer, distributed network. In this network, all nodes are treated as equal peers. The process of making bitcoins is called mining, and the participants are called miners. All transactions are carried out and stored in a distributed ledger: the blockchain. The historic transaction data are contained in the blockchain. A signature between the new block and the previous block is needed for adding a new block to the blockchain. This is done via finding a nonce value that will satisfy the cryptographic hash function, Secure Hash Algorithm 256-bit (SHA-256). The nonce starts with 0 and is incremented by 1 by the miner until the hash of the block is less than or equal to the target value. Once a node finds a hash that satisfies the required number of zero bits, it transmits the block it was working on to the rest of the network. The other nodes in the network then express their acceptance by starting to create the next block for the blockchain using the hash of the accepted block. The finder of the block is rewarded for their efforts with a special transaction.").

2 *See* Jake Frankenfield, *What is Proof of Work (PoW) in Blockchain?*, INVESTOPEDIA (May 2, 2022), https://www.investopedia.com/terms/p/proof-work.asp#:~:text=Key%20Takeaways,transactions%20and%20mining%20new%20tokens [https://perma.cc/SGE6-T6UR].

3 *See id.*

4 *Bitcoin Energy Consumption Index*, DIGICONOMIST, https://digiconomist.net/bitcoin-energy-consumption [https://perma.cc/7UM8-828W] (last visited Apr. 3, 2023).

5 *See* Jessica McKenzie, *How Bitcoin Makes Burning Fossil Fuels More Profitable Than Ever*, 78 BULL. OF THE ATOMIC SCIENTISTS 203 (July 11, 2022); *see also infra* text accompanying note 62.

6 Jacob Elkin, *A Pause on Proof-of-Work: The New York State Executive's Branch's Authority to Enact a Moratorium on the Permitting of Consolidated Proof-of-Work Cryptocurrency Mining Facilities*, SABIN CTR. FOR CLIMATE CHANGE, Mar. 2022, at 3-4.

7 *See* Jael Holzman, *EPA Tackles Coal-to-Crypto Industry Trend*, GREENWIRE, (Jan. 18, 2022, 1:48 PM), https://www.eenews.net/articles/epa-tackles-coal-to-crypto-industry-trend/ [https://perma.cc/4Z66-Y47T].

"THINK GLOBALLY, ACT LOCALLY": NEW YORK'S EVOLVING APPROACH TO ADDRESS FOSSIL FUEL ELECTRIC USE IN PROOF-OF-WORK BITCOIN MINING OPERATIONS CONTRIBUTIONS TO CLIMATE CHANGE

Recently, New York State (hereinafter "NYS") has taken an emerging two-prong legislative and administrative approach to mitigate the environmental impact of Bitcoin mining.[8] On November 22, 2022, Governor Hochul signed a statewide, two-year moratorium on new cryptocurrency mining permits at fossil fuel plants that utilize BTM PoW operations.[9] The law is aimed at addressing environmental concerns over the energy-intensive industry.[10]

While the moratorium will not suspend all crypto-mining activities,[11] state administrative agencies can intervene in individual cases to preserve climate change objectives.[12] The NYS Department of Environmental Conservation (hereinafter "DEC") continues to take a case-by-case approach in denying or renewing Clean Air Act (hereinafter "CAA") Title V operating permits, depending upon whether GHG emission limits are upheld.[13] The New York Public Service Commission (hereinafter "PSC") may, in the future, reject the transfer of ownership of power plants to crypto miners if climate concerns are not considered.[14] The purpose of this Note is to propose that other states join a multistate cooperative agreement that follows the NYS framework to mitigate Bitcoin mining's environmental footprint.[15]

This Note proceeds in five parts.[16] Section II describes the prominence of cryptocurrency as a global economic sector and emphasizes its continued growth.[17] This section also explains how PoW operates and why its extraordinary energy consumption is relevant to

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[8] *See* S. 6486, 2021 Leg., Reg. Sess. (N.Y. 2021) (establishing a moratorium on cryptocurrency mining operations that use proof-of-work authentication methods); *see also* Letter from Daniel Whitehead, Dir., Div. of Env't. Permits to Dale Irwin, Greenidge Generation, LLC (Jun. 30, 2022) (on file with author) (denying a Clean Air Act Title V operating permit renewal to a cryptocurrency enterprise utilizing proof-of-work mechanisms); *see generally* Lauren Aratani, *Environmental Group Sues New York for Approving Crypto Mining Facility*, THE GUARDIAN (Jan. 13, 2023), https://www.theguardian.com/us-news/2023/jan/13/environmental-group-sues-new-york-crypto-mining#:~:text=Environmental%20group%20sues%20New%20York%20for%20approving%20crypto%20mining%20facility,-Lawsuit%20argues%20move&text=Environmental%20activists%20filed%20a%20lawsuit,of%20an%20upstate%20power%20plant [https://perma.cc/LZT2-CFM4] ("environmental activists filed a lawsuit against a New York state agency on Friday for approving a cryptocurrency mining company's takeover of an upstate power plant.").

[9] *See* N.Y.S. 6486.

[10] *See* Luis Ferre-Sadurni and Grace Ashford, *New York Enacts 2-Year Ban on Some Crypto-Mining Operations*, N.Y. TIMES (Nov. 22, 2022), https://perma.cc/CZ9V-6MGF.

[11] *Id.* ("The bill's supporters have stressed that the legislation will not impact existing mining facilities or stop all crypto-mining activities in the state, just those seeking permits to re-power fossil fuel plants, leaving those that connect directly into the power grid or use renewable energy sources unaffected.").

[12] *See generally* Letter from Daniel Whitehead to Dale Irwin, *supra* note 8; *see also* Aratani, *supra* note 8.

[13] *See* Letter from Daniel Whitehead to Dale Irwin, *supra* note 8.

[14] *See generally* Aratani, *supra* note 8.

[15] *See generally* Jon Truby, *Decarbonizing Bitcoin: Law and Policy Choices for Reducing the Energy Consumption of Blockchain Technologies and Digital Currencies*, 44 ELSEVIER 399 (2018), https://www.sciencedirect.com/science/article/pii/S2214629618301750?fr=RR-2&ref=pdf_download&rr=7b8f23741ef742dc [https://perma.cc/J2YT-ZWK7] ("[T]he design of Bitcoin's mining and trading system requires such a vast consumption of electricity that it is equivalent to powering Denmark. This threatens the planet to the extent that intervention is necessary to prevent similar models emerging. Even the processes involved in a single Bitcoin transaction could provide electricity to a British home for a month, with environmental costs socialized for private benefits.").

[16] *See infra* Section I-V.

[17] *See infra* Section II, A.

today's environmental status.[18] The section concludes that crypto miners are relocating to geographic areas with vacant properties and cheap energy access, such as NYS.[19]

Section III establishes the ineffectiveness of international and U.S. federal law in enforcing climate change GHG curtailment goals.[20] This section highlights the Paris Climate Accord, the Clean Power Plan (hereinafter "CPP"), and Executive Order 14607: "Ensuring Responsible Development of Digital Assets" as examples of ineffective attempts at curbing climate change.[21]

Section IV analyzes NYS's evolving two-prong approach to address GHG emissions from cryptocurrency mining facilities.[22] The section lays out the fundaments of NYS's temporary cryptocurrency moratorium.[23] Complementary, the DEC and the PSC may take a case-by-case approach to suspend operation of cryptocurrency power plants that fall outside the scope of the moratorium.[24]

The final section calls for the creation and implementation of a multi-state cooperative agreement that mirrors NYS's two-prong approach.[25] The proposed agreement will include guiding predicates to be fashioned by each state according to its specific policies and legislation.[26] The section highlights The Regional Greenhouse Gas Initiative (hereinafter "RGGI") and the Interstate Gas and Oil Compact (hereinafter "The Compact") as precedent of earlier multi-state agreements that saw success.[27]

II. BACKGROUND

One must understand the prominent presence of Bitcoin in the global economy to understand the scope of its environmental influence. Therefore, Subsection A provides an overview of the rise of cryptocurrency, and specifically focuses on Bitcoin as the most lucrative type.[28] Subsections B and C concisely review the significance of the climate change crisis and explains how BTM PoW operations are a major contributor. Subsection D describes the growing trend of coal-fired power plants closing throughout the U.S. This subsection highlights how retrofitting dirty fossil fuel plants conflicts with state efforts to transition to renewable or clean energy sources. It also establishes NYS as a "hotbed" destination for crypto miners that are fleeing restrictive crypto laws and in search of cheap energy.[29]

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[18] *See infra* Section II, B-C.
[19] *See infra* Section II, D.
[20] *See infra* Section III.
[21] *See id.*
[22] *See infra* Section IV.
[23] *See id.* at A; *see also* N.Y.S. 6486.
[24] *See infra* Section IV, B; *see also* Letter from Daniel Whitehead to Dale Irwin, *supra* note 8; *see generally* Aratani, *supra* note 8.
[25] *See infra* Section V.
[26] *See id.* at B.
[27] *See id.* at A.
[28] *See infra* Section II, A; *see also Today's Cryptocurrency Prices by Market Cap*, COINMARKETCAP, https://coinmarketcap.com/ [https://perma.cc/8VV4-VE3D] (last visited Apr. 3, 2023) (as of April 3, 2023, Bitcoin's market capitalization was over $544 billion, followed by Ethereum at approximately $220 billion).
[29] *See infra* Section II, D; see *also* Marie J. French, *Upstate New York Becomes Hotbed for Cryptocurrency Mining. It Might Not Last*, POLITICO (May 19, 2022, 4:00 PM), https://www.politico.com/news/2022/05/19/

A. The Rise of Bitcoin

Cryptocurrency is a global, digital, encrypted, and decentralized medium of exchange that is used to buy goods and services.[30] Unlike other currencies, cryptocurrency has no central governmental authority to manage and maintain its value.[31] Rather, this task is broadly distributed among users via the internet.[32] Presently, cryptocurrency is the size of the 22nd largest economy, with a global market capitalization of over $1.17 trillion.[33]

In 2009, Bitcoin was introduced as the first decentralized, peer-to-peer network and has remained the largest out of nearly 23,148 other cryptocurrencies.[34] As of April 2023, each Bitcoin is valued at $28,161 and has reached a market capitalization of over $544 billion.[35] Its exponential growth can largely be attributed to its high level of security, lack of fees, payment freedom, transparency, and perceived minimal risks for merchants.[36]

Notably, in November 2022, cryptocurrency suffered a major setback with the collapse of FTX.[37] The meltdown, apparently due to fraud activity, has caused the price of

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cryptocurrency-mining-blossoms-in-upstate-new-york-but-it-hasnt-been-well-received-00033354 [https://perma.cc/W9PQ-QZXV].

[30] *See* Kate Ashford, *What is Cryptocurrency?*, FORBES ADVISOR (June 6, 2022), https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/ [https://perma.cc/4VBC-APJR].

[31] *See id.*

[32] *See id.*

[33] Riley Adams, *75 Cryptocurrency Statistics Show Crypto's Gone Mainstream*, YOUNG AND THE INVESTED, https://youngandtheinvested.com/cryptocurrency-statistics/ [https://perma.cc/JBD6-G2DR] (last updated Mar. 31, 2023); *Today's Cryptocurrency Prices by Market Cap*, *supra* note 28.

[34] *Frequently Asked Questions*, BITCOIN, https://bitcoin.org/en/faq#what-is-bitcoin [https://perma.cc/PPQ2-HYZP] (last visited Apr. 3, 2023) ("Bitcoin, the most well-known cryptocurrency, has paved the way for the growing cryptocurrency asset class, surging to an all-time high of US$68,649.05 on November 10, 2021. Benefiting from excess cash in the market and investor interest, the price of bitcoin rose more than 1,200 percent between March 2020 and November 2021. While bitcoin's bullish ascent crashed in 2022 and it started 2023 around the US$16,000 mark, its price spiked toward the end of Q1, moving up to US$28,161 as of March 21."); *Today's Cryptocurrency Prices by Market Cap*, *supra* note 28.

[35] Lauren Kelly, *Bitcoin: A Brief Price History of the First Cryptocurrency*, BLOCKCHAIN INVESTING NEWS (Mar. 22, 2023), https://investingnews.com/daily/tech-investing/blockchain-investing/bitcoin-price-history/ [https://perma.cc/5YBX-QFX6]; *Today's Cryptocurrency Prices by Market Cap*, *supra* note 28.

[36] *Frequently Asked Questions*, *supra* note 26; *see generally* SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM, https://bitcoin.org/bitcoin.pdf [https://perma.cc/TWB8-6H7E] (last visited Nov. 18, 2022) ("We have proposed a system [Bitcoin] for electronic transactions without relying on trust. We started with the usual framework of coins made from digital signatures, which provides strong control of ownership, but is incomplete without a way to prevent double-spending. To solve this, we proposed a peer-to-peer network using proof-of-work to record a public history of transactions that quickly becomes computationally impractical for an attacker to change if honest nodes control a majority of CPU [central processing unit] power. The network is robust in its unstructured simplicity. Nodes work all at once with little coordination. They do not need to be identified, since messages are not routed to any particular place and only need to be delivered on a best effort basis. Nodes can leave and rejoin the network at will, accepting the proof-of-work chain as proof of what happened while they were gone. They vote with their CPU power, expressing their acceptance of valid blocks by working on extending them and rejecting invalid blocks by refusing to work on them. Any needed rules and incentives can be enforced with this consensus mechanism.").

[37] David Yaffe, *How Sam Bankman-Fried's Crypto Empire Collapsed*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/technology/ftx-sam-bankman-fried-crypto-bankruptcy.html

Bitcoin and other cryptocurrencies to fall over 60 percent.[38] However, Bitcoin still hovers at reasonably high price compared to 2020, indicating that people are still using crypto and trying to protect their assets.[39] Cryptocurrency has suffered meltdowns in the past and is notorious for making "stunningly epic comebacks."[40]

The world economy may be approaching a digital ecosystem wherein cryptocurrency will remain an essential aspect.[41] El Salvador has become the first country in the world to adopt Bitcoin as a legal tender and other nations may follow suit.[42] Some experts suggest that Bitcoin will continue to predominate the cryptocurrency industry as the leading financial operation, predicting that its price could potentially rise to "$250,000 by 2025 and $5 million by 2030."[43]

B. Proof-of-Work Operations Contribute Substantial Amounts of Greenhouse Gases.

Bitcoin mining uses a distributed ledger called a "blockchain," which includes a record of all transactions, arranged in sequential blocks so no user can spend any of their holdings twice.[44] A user can detect tampering through hashes or long strings of numbers that serve as PoW.[45] "PoW requires nodes on a network to provide evidence that they have expended computational [energy] (i.e. work) in order to achieve consensus in a decentralized manner and to prevent bad actors from overtaking the network."[46] In simpler terms, PoW provides a mathematical problem that miners compete to solve in order to verify a group of transactions, known as a block, to add them to the ledger.[47] The first miner to do so successfully is awarded currency.[48]

PoW is favored over other mechanisms because it allows transactions to be processed securely from peer-to-peer without the need for third party verification.[49] Additionally,

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[https://perma.cc/2Y5Z-G57A] ("[FTX is a now] bankrupt company that was one of the world's largest cryptocurrency exchanges. It enabled customers to trade digital currencies for other digital currencies or traditional money; it also had a native cryptocurrency known as FTT. The company, based in the Bahamas, built its business on risky trading options that are not legal in the United States.").

38 *See* Paul R. La Monica, *Is the Worse Over for Bitcoin and the Rest of Crypto?*, CNN BUS. (Dec. 4, 2022), https://www.cnn.com/2022/12/04/investing/stocks-week-ahead/index.html [https://perma.cc/S2KC-4GAF].

39 *See id.*

40 *See id.* ("This is not the first crypto winter, as long-term fans of bitcoin can attest. There were massive corrections in 2018, the early part of 2020 and the summer of 2021 as well.").

41 *See* Aleksandra Jaworska, *Benefits of Bitcoin Mining from Economic, Social and Environmental Perspectives-Crypto Mining Asset Manager*, LINKEDIN (Jan. 11, 2022), https://www.linkedin.com/pulse/benefits-bitcoin-mining-from-economic-social-crypto-jaworska [https://perma.cc/LS8Z-BHM8].

42 *See id.*

43 *Experts Predict What the Crypto Market Will Look Like in 2022*, YAHOO! (Dec. 20, 2021) https://www.yahoo.com/now/experts-predict-crypto-market-look-200008492.html [https://perma.cc/EBF2-LW94]; *see also* Geri Mileva, *15 Essential Cryptocurrency Stats for 2022*, INFLUENCER MARKETING HUB (July 22, 2022) ("[Bitcoin's] growth, from being worth $500 in 2016 to $29,000 per coin in 2022 speaks to its exponential growth capacity.").

44 *See* Frankenfield, *supra* note 2.

45 *See id.*

46 *Id.*

47 Ashford, *supra* note 30.

48 *See id.* ("Bitcoin, for example, rewards a miner 6.25 BTC (which is roughly $200,000) for validating a new block.").

49 *See* Frankenfield, *supra* note 2.

malicious actors are discouraged from attacking the network because of the sheer computing power required as more entities seek to validate transactions for coin rewards.[50] However, PoW also requires an immense amount of electric energy to operate effectively.[51] The electricity is often generated by burning fossil fuels in electric power plants because it is the most cost effective.[52] This leads to a substantial introduction of CO_2 GHG emissions into the atmosphere.[53]

As of August 2022, "Bitcoin is estimated to account for 60% to 70% of total global" cryptocurrency electricity usage driven by PoW operations.[54] The electricity consumed by PoW mechanisms is, currently, comparable to the total electric consumption of a country, such as Malaysia or Sweden.[55] A single Bitcoin transaction consumes 898.2 kilowatt-hours of electricity and produces 500.98 kilograms of CO_2.[56] This is equivalent to the power consumption of an average U.S. household over 30.79 days and the carbon footprint of 1,110,339 VISA transactions.[57] If the value and use of PoW Bitcoin operations continues to rise, it will require even more electric energy for Bitcoin mining.[58]

The energy-intensive Bitcoin network is difficult to precisely estimate and conceptualize the scope of its environmental impact.[59] Unlike many climate change sources, such as deforestation, livestock farming, or transportation, Bitcoin mining does not produce a physical product.[60] This makes it difficult for people to actualize the substantial environmental costs of the cryptocurrency industry and, therefore, those environmental costs too often go ignored.[61]

Electricity use estimates may be inaccurate or low because many mining facilities do not disclose their location or report their electric energy usage.[62] Day-to-day operations also

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[50] *See* Press Release, The White House, *Fact Sheet: Climate and Energy Implications of Crypto-Assets in the United States* (Sep. 8, 2022) (on file with the author).

[51] *See* Elkin, *supra* note 6, at 3.

[52] *See* French, *supra* note 29.

[53] *See* Samantha T. Edgell, Comment, *Toto, I've a Feeling the Environment Isn't Safe from Cryptocurrency Anymore: The Degrading Ecological Effects of Bitcoin and Digital* Currencies, 32 VILL. ENV'T L. J. 69, 76 (May 2021).

[54] Press Release, The White House, *supra* note 50.

[55] Ivanontech, *Exploring Proof-of-Work's Electricity Consumption*, MORALIS ACAD. (Apr. 28, 2022), https://perma.cc/A5UW-NASE.

[56] *Bitcoin Energy Consumption Index*, *supra* note 4.

[57] *Id.*

[58] *See* Edgell, *supra* note 53, at 75 ("For example, miners may be able to extract their first Bitcoin for X watts of electricity, but it could take 100X watts to mine their tenth Bitcoin.").

[59] *See id*.

[60] *See id.*

[61] *See id.*

[62] OFF. OF SCI. & TECH. POL'Y, CLIMATE AND ENERGY IMPLICATIONS OF CRYPTO-ASSETS IN THE UNITED STATES (Sept. 2022); *see* MANDY DEROCHE ET AL., THE ENERGY BOMB: HOW PROOF-OF-WORK CRYPTOCURRENCY MINING WORSENS THE CLIMATE CRISIS AND HARMS COMMUNITIES NOW 3 (2022) ("Tracking down the energy sources—or even just the consumption—of proof-of-work cryptocurrency mining in the United States is difficult. The industry is notoriously opaque, and little-to-no reporting requirements exist at either the state or federal level. The most reliable sources of information are a patchwork of filings before the

fluctuate due to market dynamics.[63] To reduce uncertainties, policymakers have wisely urged all mining facilities to report their actual electricity usage and to make that information readily accessible by all.[64]

C. The Relationship Between Increasing Greenhouse Gases and Climate Change

Climate change is the long-term shift in temperatures and weather patterns caused by global warming, which is largely attributable to human activities, primarily due to burning fossil fuels.[65] Burning fossil fuels generates GHGs which trap the sun's heat and consequently, raises the earth's temperature through the greenhouse effect.[66] The last decade was the warmest on record, with the Earth now being 1.1°C warmer than it was in the late 1800s.[67] Extreme weather events, including floods, droughts, heatwaves, storms, and wildfires, are occurring at an alarming rate and are linked to global warming.[68] The continued rise of GHG emissions requires immediate action on all fronts to help in the efforts to preserve our environment for future generations.[69]

1. Air Pollutants Generated from Bitcoin Mining

Bitcoin mining often utilizes coal-fired electric power plants to generate electricity.[70] In this process coal is burned to produce steam, which drives a turbine that, with a generator, produces electricity.[71] Warm water, air pollutants, including GHGs, and coal ash are produced as waste during the operation.[72] Air pollutants deposited into the atmosphere include particulate matter, sulfur dioxide, nitrogen oxide, and CO_2.[73]

Securities and Exchange Commission (SEC) by publicly traded cryptocurrency companies, environmental permit applications, utility and other energy filings, and local reporting.").

63 OFF. OF SCI. & TECH. POL'Y, *supra* note 62.

64 *See* OFF. OF SCI. & TECH. POL'Y, *supra* note 62; *see also* Letter from Elizabeth Warren et al., U.S. Sen., to Michael Regan, Adm'r, Env't Prot. Agency & Jennifer Granholm, Sec'y, Dep't of Energy (July 15, 2022) (on file with author).

65 *See What Is Climate Change?*, U.N., https://www.un.org/en/climatechange/what-is-climate-change [https://perma.cc/5THK-VTHJ] (last visited Nov. 19, 2022).

66 *See id.*

67 *See id.*

68 *See United in Science: We are Heading in the Wrong Direction*, U.N CLIMATE CHANGE (Sept. 13, 2022), https://unfccc.int/news/united-in-science-we-are-heading-in-the-wrong-direction [https://perma.cc/B6P2-W5WP].

69 *See id.* (statement by World Meteorological Organization Secretary-General, Peter Taalas) ("Climate science is increasingly able to show that many of the extreme weather events that we are experiencing have become more likely and more intense due to human-induced climate change. We have seen this repeatedly this year, with tragic effect. It is more important than ever that we scale up action on early warning systems to build resilience to current and future climate risks in vulnerable communities.").

70 *See* Holzman, *supra* note 7.

71 JOEL B. EISEN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT, 283 (Saul Levmore et al.eds., 5th ed. 2020).

72 *Id.*

73 *Id.*

Poor air quality resulting from fossil fuel pollution contributes to environmental degradation and human health risks.[74] Sulfur dioxide combines with moisture in the air to create sulfuric acid; this falls as acid rain, directly harming vegetation and aquatic habitats.[75] Nitrogen oxide, a precursor to smog, damages the ozone layer, which humans rely on to prevent the sun's ultraviolet rays from hitting the earth's surface.[76]

GHGs produced from fossil fuel generated electricity, including CO_2, are major contributors to climate change.[77] CO_2, a heat-trapping gas, contributes to global warming and alteration of weather patterns.[78] Notably, if the electricity used in PoW comes from fossil fuels, its carbon footprint and GHG emissions disproportionately contribute to climate change, with nearly 65.4 megatonnes of CO_2 released into the atmosphere each year.[79]

2. Behind-the-Meter Electric Energy System

Many Bitcoin miners utilize BTM generation systems, as opposed to in-front-of-the-meter[80], to power PoW operations.[81] A BTM system provides local, self-generated electricity that can be used on-site without passing through a meter or interacting with the electric grid.[82] This system functions by burning fossil fuels, like coal, in electric power plants, rather than buying electricity from the grid.[83] The electricity grid complies with state required mandates, like renewable energy portfolio standards that help to control the amount of GHG emissions. [84]

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[74] *See id.* at 285; *see also Ambient (Outdoor) Air Pollution,* WHO, https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health [https://perma.cc/6QEN-LASC] (last visited Nov. 19, 2022) ("Air pollution is one of the greatest environmental risks to health. By reducing air pollution levels, countries can reduce the burden of disease from stroke, heart disease, lung cancer, and both chronic and acute respiratory diseases, including asthma.").

[75] *See* EISEN ET AL., *supra* note 71, at 285.

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] Elkin, *supra* note 6, at 3.

[80] *See* Jacob Marsh, *Behind-the-Meter: What You Need to Know*, ENERGYSAGE (Sept. 12, 2019), https://news.energysage.com/behind-the-meter-overview/ [https://perma.cc/6LCE-GNNB] ("If electricity has to pass through your electric meter to reach your property, that electricity came from in front of the meter, or the grid. If electricity doesn't need to pass through an electric meter to reach your property, that electricity came from a BTM system. All electricity end customers sit behind the meter.").

[81] *See* Elkin, *supra* note 6, at 2.

[82] Marsh, *supra* note 80.

[83] *See generally* Martin Roeck & Thomas Drennen, *Life Cycle Assessment of Behind-the-Meter Bitcoin Mining at US Power Plant*, 27 INT'L J. LIFE CYCLE ASSESSMENT 363-654 (2022) ("behind-the-meter Bitcoin mining not only goes against local climate initiatives but also poses a significant danger to national initiatives due to feasible scalability, caused by the availability of existing infrastructure and favorable financials.").

[84] *See Renewable Portfolio Standard*, N.Y. ENERGY RSCH, & DEV. AUTH., https://www.nyserda.ny.gov/All-Programs/Clean-Energy-Standard/Important-Orders-Reports-and-Filings/Renewable-Portfolio-Standard [https://perma.cc/7YE4-HD2D] (last visited Oct. 10, 2022) ("[T]o fulfill the 2015 New York State Energy Plan, the State set its sights on 70 percent of New York's electricity coming from renewable energy by 2030, established officially by the Clean Energy Standard.").

BTM generation is especially attractive to crypto miners because they do not have to buy electricity at the market price and can save money on purchased power costs.[85]Also, by not selling the electricity generated, they legally avoid being regulated as a "public utility" because they do not provide electric service to the public.[86] Additionally, they can buy and retrofit coal-fired power plants that are closed or are closing in the near future at a relatively cheap price.[87] They only need to abide by (or with) air emission permits required under the federal CAA or other state climate change laws.[88]

D. The Growing Availability of Coal-Fired Electric Power Plants

Throughout the U.S., already built coal-fired electric plants are closed or closing soon because of climate change GHG (CO_2) concerns and competition from other cleaner, less expensive sources of energy.[89] Although coal-fired electric power plants have no specific life span, power plant owners and operators have reported that they plan to shut down 28% of the utility-scale coal-fired electric generating capacity in the U.S. by 2035.[90] U.S. coal fired

[85] *See* Roeck & Drennan, *supra* note 83 ("Locating the data center at the plant ("behind the meter") eliminates distribution costs and minimizes efficiency losses associated with grid networks. By mining Bitcoin, the plan remains lucrative outside of peak load and pricing periods."); *Electricity Explained: Factors Affecting Electricity Prices*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/electricity/prices-and-factors-affecting-prices.php [https://perma.cc/PN3N-YL29] (last visited Oct. 10, 2022) (in 2021, the U.S. annual average industrial price of electricity was about 7.26¢ per kilowatt-hour).

[86] *See* Mark F. Sundback et al., *Electricity Regulation in the United States: Overview*, WESTLAW (July 1, 2020), https://1.next.westlaw.com/Document/Ieb49d7b91cb511e38578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad6ad3b000001878d5ff952af39dd8c%3Fppcid%3D72428a996d4741e995d33e899a33abb0%26Nav%3DKNOWHOW%26fragmentIdentifier%3DIeb49d7b91cb511e38578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=d4e55212849255400ad4753efc1f1de2&list=KNOWHOW&rank=1&sessionScopeId=b29383fae8255f2e08ffd29fc25e84f05eb206ee28c2034f4f97d958ee59784f&ppcid=72428a996d4741e995d33e899a33abb0&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29 [https://perma.cc/4JM4-Q77A] ("States generally have jurisdiction over local distribution, retail sales of electricity within a state from one entity to an end user, and the siting and construction of transmission facilities, generation facilities and distribution systems.").

[87] *But see* Holzman, *supra* note 7.

[88] *See Basic Information About Operating Permits*, EPA, https://www.epa.gov/title-v-operating-permits/basic-information-about-operating-permits [https://perma.cc/G5WY-VSS6] (last visited Aug. 30, 2022); *see also Our Climate Act*, *infra* note 178.

[89] *See Factbox: U.S. Coal-Fired Power Plants Scheduled to Shut*, REUTERS (Oct. 28, 2021), https://www.reuters.com/business/energy/us-coal-fired-power-plants-scheduled-shut-2021-10-28/ [https://perma.cc/E88J-3A8S]; *see also 2022 Renewable Energy Industry Outlook*, DELOITTE (Sept. 2021) ("Rapid technology improvements and decreasing costs of renewable energy resources, along with the increased competitiveness of battery storage, have made renewables one of the most competitive energy sources in many areas."); *see also* Oliver Milman, *U.S. Renewable Energy Farms Outstrip 99% of Coal Plants Economically – Study*, THE GUARDIAN (Jan. 20, 2023), https://www.theguardian.com/us-news/2023/jan/30/us-coal-more-expensive-than-renewable-energy-study [https://perma.cc/4A8T-BQ2N] ("Coal in the US is now being economically outmatched by renewables to such an extent that it's more expensive for 99% of the country's coal-fired power plants to keep running than it is to build an entirely new solar or wind energy operation nearby.").

[90] *Of the Operating U.S. Coal-Fired Power Plants, 28% Plan to Retire by 2035*, U.S. ENERGY INFO. ADMIN. (Dec. 15, 2021), https://www.eia.gov/todayinenergy/detail.php?id=50658 [https://perma.cc/RK7R-TPT3] ("The average operating coal-fired generating unit in the United States is 45 years old. The units that have reported plans to retire are not necessarily the oldest ones operating; some units built in the 1980s and 1990s are also

electricity has continued to fall from 23% in 2021, 20% in 2022, and 19% in 2023.[91] As of January 2023, there are 240 coal plants still active in the U.S.[92]

In 2021, states enacted more than 70 renewable energy and climate change policies.[93] Illinois, a major coal-producing state, adopted a comprehensive climate legislation that exemplifies the trend away from coal created energy.[94] The law includes a plan to shut down all Illinois coal-fired plants by 2045 while creating statewide renewable-energy infrastructure.[95] Nearly $500 million in funding was allocated over a twenty-year period to incentivize owners to convert their coal plants to solar installations.[96]

Efforts to combat climate change have made coal plants less useful as a source of electric energy for the grid and has sparked a movement towards renewable energy.[97] For example, green hydrogen is an emerging electric energy source which is particularly desirable because hydrogen is the most abundant material on Earth and produces almost zero GHGs when burnt.[98] In 2021, major European companies, including Shell and RWE, created a green hydrogen pipeline from offshore wind plants in the North Sea.[99]

It is projected that by 2030 the overall value of the renewable energy market will grow from 880 billion dollars to nearly 2 trillion dollars.[100] Evidently, the growth of renewable energy and shift away from coal would indicate that more and more coal-fired electric power plants will be idle in the foreseeable future and will be available for use in Bitcoin operations.[101]

Upstate New York has become a leading destination for crypto miners to retrofit closed or closing coal-fired electric power plants to fuel Bitcoin mining.[102] NYS has abundant "hydroelectric and nuclear power, relatively low electricity prices and vacant, cheap, empty properties with untapped electrical infrastructure."[103] Proponents of the industry argue that this

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scheduled to retire. When they retire, the retiring units will have approximately 50 years of service, based on their planned retirement dates.").

[91] *Short-Term Energy* Outlook, U.S. ENERGY INFO. ADMIN. (Jan. 10, 2023), https://www.eia.gov/outlooks/steo/report/coal.php [https://perma.cc/EC4D-VSSU].

[92] *Number of Coal Power Plants by Country 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/number-of-coal-power-plants-by-country [https://perma.cc/BET4-JEUH] (last visited Jan. 16, 2023).

[93] *See 2022 Renewable Energy Industry Outlook*, *supra* note 89.

[94] *See* Stephen Joyce, *Illinois Governor Signs Bill Shutting Coal Plants for Good*, BLOOMBERG L., (Sept. 15, 2021) https://news.bloomberglaw.com/environment-and-energy/illinois-governor-signs-bill-shutting-state-coal-plants-for-good [https://perma.cc/3LDK-4WPK].

[95] *Id.*

[96] *Id.*

[97] *See 2022 Renewable Energy Industry Outlook*, *supra* note 89.

[98] *See* Bernard Marr, *The Five Biggest New Energy Trends in 2022*, FORBES (Mar. 1, 2022), https://www.forbes.com/sites/bernardmarr/2022/03/01/the-five-biggest-new-energy-trends-in-2022/?sh=d1a73ccba574 [https://perma.cc/T4F4-NV8X].

[99] *Id.*

[100] *See id.*

[101] *See generally* Holzman, *supra* note 7.

[102] *See* French, *supra* note 29.

[103] *Id.*

occurrence can help boost the struggling economy of Upstate New York through job creation.[104] Opponents worry NYS's goal of reducing carbon emissions will be compromised, as well as the quality-of-life of local communities.[105]

III. INEFFECTIVE INTERNATIONAL AND NATIONAL EFFORTS

This part provides a concise overview of the challenges impeding international and national efforts to control the climate crisis thus far, which leaves the task with individual states and local governments to address. Subsection A focuses on the difficulties in implementing an international climate change treaty. Here, the Paris Climate Accord illustrates the challenge. Subsection B addresses the limitations on the U.S. federal government's ability to enact GHG control measures to mitigate climate change. The CPP and Executive Order 14607 demonstrate the difficulty of passing influential environmental regulations.

A. The International Climate Change Regime

To date, there has been no effective global regime in place to regulate the impact GHG emissions have on climate change.[106] Although countries generally agree on the science behind climate change and global warming, there has been a failure to assign responsibilities or to set enforceable emission-reduction goals.[107]

Binding international law treaties with effective enforcement provisions can help to provide policy solutions to global GHG emissions externalities that contribute to climate change and global warming.[108] Unfortunately, international negotiations over the past half century to create enforceable caps on GHG emissions have largely failed.[109] The largest GHG emitters, in considering the costs of reducing emissions against the implications of climate change, have yet to agree and comply with goals or targets for limiting GHG emissions.[110]

Internal political conflicts may also prevent a country from becoming a party to an enforceable international treaty process even if it may be ultimately in their overall best interest to do so.[111] Difficulties associated with reaching agreement coupled with nationalism have resulted in delay and failure to form a global binding climate change treaty.[112]

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[104] *See id.*

[105] *See id.* (describing excessive noise pollution and undesirable presence of large smokestacks of the Greenidge cryptocurrency coal-fired power plant); *see also* Elizabeth Kolbert, *Why Bitcoin is Bad for the Environment*, THE NEW YORKER (Apr. 2021) ("Bitcoin mining drove up the cost of electricity in the city so dramatically that, in 2018, Plattsburgh enacted a moratorium on new mining operations"); *c.f. Our Climate Act*, *infra* note 178 ("[N.Y.S.' Climate Act] will provide opportunities for residents and communities alike to partner with businesses, schools, and government to create a green economy and build a more sustainable future.").

[106] *See* Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, COUNCIL ON FOREIGN REL. (last updated Nov. 17, 2021), https://www.cfr.org/backgrounder/paris-global-climate-change-agreements [https://perma.cc/CDA7-A9T9].

[107] *See id*.

[108] *See* J. Scott Holladay & Michael A. Livermore, *Regional Variation, Holdouts, and Climate Treaty Negotiations*, 4(2) J. BENEFIT-COST ANALYSIS 131-32 (2013).

[109] *See id.*

[110] *See id.*

[111] *See id.* at 131-32.

[112] *See id.*

For example, the Paris Agreement highlights the difficulties of a successful international effort.[113] It aspires to limit global warming to well below 2°C, preferably to 1.5°C, compared to pre-industrial levels by reducing greenhouse gas emissions.[114] Currently, there are 196 signatories who have pledged to undertake these ambitious efforts and who have agreed to submit nationally determined plans for climate action every five years.[115]

The Paris Agreement's goals are laudable; however, they lack enforcement.[116] If a country fails to uphold their pledges no concrete legal consequences ensue.[117] Rather, a country may be asked to meet with a global committee of neutral researchers to create a new climate plan to meet pledges.[118] One reason a signatory will uphold their pledge, is not for fear of being punished, but because, internally, their citizens want them to cooperate in curbing GHG emissions in response to the climate crisis and want to be viewed by the world in a favorable light.[119] The U.S. temporarily withdrew from the Paris Agreement in 2020 under the Trump administration.[120]

Notably, if the growth of Bitcoin currency continues to accelerate, it is projected that it's PoW GHG emissions alone could push global warming above 2°C within less than three decades, well above the Paris Agreement and mostly without international legal consequence.[121] It is also estimated that the emission reduction pledges for 2030 need to be seven times higher to reach the overall goal of the Paris Agreement.[122]

B. U.S. Federal Climate Change Initiatives Have Been Problematic and Ineffective.

The U.S. is historically the largest GHG emitter and is estimated to have imposed more than 1.9 trillion dollars in damage to other countries from the effects of its fossil fuel

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[113] *See The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement [https://perma.cc/S5HE-G6FH] (last visited Aug. 31, 2022).
[114] *Id.*
[115] *Id.*
[116] *See* Kathryn Tso, *How are Countries Held Accountable Under the Paris Agreement?*, MIT CLIMATE PORTAL (Mar. 8, 2021), https://climate.mit.edu/ask-mit/how-are-countries-held-accountable-under-paris-agreement [https://perma.cc/AQW7-GG48].
[117] *See id.*; *see also* Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, CNN (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743 [https://perma.cc/2DPA-6EYZ] (explaining that a country can exit the agreement once three years have passed from ratification).
[118] Tso, *supra* note 116.
[119] *Id.*
[120] McGrath, *supra* note 117.
[121] Camila Mora et. al., *Bitcoin Emissions Alone Could Push Global Warming Above 2°C*, 8 NATURE CLIMATE CHANGE 931 (2018).
[122] *United in Science: We are Heading in the Wrong Direction*, *supra* note 68.

use.[123] While the U.S. has committed to minimize its environmental externalities[124] the national effort has been met with difficulties and limitations.

1. The Clean Power Plan

In August 2015, President Obama and the Environmental Protection Agency (hereinafter "EPA") announced the CPP under the CAA to reduce CO_2 GHG emissions, inter alia, from fossil fuel electric power plants.[125] The plan outlined achievable standards that gave each state the opportunity to create its own cost-effective solutions towards clean energy consistent with the CPP.[126] The EPA has projected that, under the CPP, by 2030 the electric sector's CO_2 pollution would be reduced by 32% nationally and there would be 870 million fewer tons of carbon GHG pollution released into the atmosphere, relative to 2005 levels.[127] Unfortunately, the plan was largely abandoned by the incoming Trump administration which sought to keep coal power plants open and their GHG emission levels largely unaffected.[128]

In the recent decision in *West Virginia v. Environmental Protection Agency*, the Supreme Court held that Congress did not grant the EPA the authority to implement emission caps on fossil fuel electric power plants[129] under the CAA.[130] Section III(d) of the CAA authorizes the EPA to regulate emissions of non-criteria, non-hazardous air pollutants from stationary sources through identification of the "best system of emission reduction" that is

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[123] Oliver Milman, *Nearly $2tn of Damage Inflicted on Other Countries by US Emissions*, THE GUARDIAN (July 21, 2022), https://www.theguardian.com/environment/2022/jul/12/us-carbon-emissions-greenhouse-gases-climate-crisis [https://perma.cc/C98W-LVGG] ("Developing countries and climate activists have pushed for 'loss and damage' payments to be made to those who are suffering the most from global heating through heatwaves, floods and drought. But the US, which is responsible for around a quarter of all emissions to date, has resisted setting up such a fund, citing fears that it would be held legally liable for the damages caused by its voracious appetite for fossil fuels such as oil, coal and gas.").

[124] *See National Climate Task Force*, WHITE HOUSE, https://www.whitehouse.gov/climate/ [https://perma.cc/9RAN-LWU8] (last visited Nov 20, 2022) ("After rejoining the Paris Agreement and restoring U.S. leadership on the world stage, President Biden created the first-ever National Climate Task Force, with more than 25 Cabinet-level leaders from across agencies working together on groundbreaking goals: Reducing U.S. greenhouse gas emissions 50-52% below 2005 levels in 2030; Reaching 100% carbon pollution-free electricity by 2035; Achieving a net-zero emissions economy by 2050; Delivering 40% of the benefits from federal investments in climate and clean energy to disadvantaged communities").

[125] *See What is the Clean Power Plan?*, NAT'L RES. DEF. COUNCIL (Sept. 29, 2017), https://www.nrdc.org/stories/what-clean-power-plan [https://perma.cc/6P25-8BWW].

[126] *See id.*

[127] *Id.*

[128] *See* Jeff Brady, *Trump Administration Weakens Climate Plan to Help Coal Plants Stay Open*, NPR (June 19, 2019), https://www.npr.org/2019/06/19/733800856/trump-administration-weakens-climate-plan-to-help-coal-plants-stay-open [https://perma.cc/Y3CE-946J].

[129] West Virginia v. E.P.A. et al., 142 S.Ct. 2587, 2599-60 (2022) ("Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.")

[130] *Id.* at 2599. ("The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a 'standard of performance' for their emission of certain pollutants into the air.")

"adequately demonstrated."[131] Despite these plain words, the Supreme Court held that the EPA does not have the power to set emission caps based on the electric generation shifting approach outlined in the CPP without additional, new congressional authorization.[132]

Rather, the major questions doctrine was invoked whereby in certain extraordinary cases involving statutes that confer authority upon an administrative agency, the agency must, nonetheless, point to clear congressional authorization for the authority it claims.[133] The EPA, from the majority's view, was unable to point to a clear congressional authorization to systematically control GHG emissions from fossil fuel coal plants since GHG emission issues were not an issue when the CAA was enacted.[134] This decision creates an obstacle for the federal government and the Biden administration to renew the CPP and reduce fossil fuel electric generation emissions to over 50% below 2005 levels.[135]

Currently, national GHG emissions have only fallen approximately 15% from 2005 levels, leading some experts to call into question whether the GHG emission goal is even plausible.[136] Under the present political climate, Congress is unlikely to act or authorize federal GHG emission regulations of coal fired electric power plants considering the *West Virginia* decision.[137]

2. Executive Order to Ensure Responsible Development of Digital Assets

On March 9, 2022, President Biden issued Executive Order 14607: "Ensuring Responsible Development of Digital Assets."[138] The Order explicitly prioritizes reduction of environmental externalities, including air pollution stemming from cryptocurrency mining.[139] Under the executive order, the EPA, the Secretary of Energy, and all other relevant agencies must submit a report on how distributed ledger technology impedes efforts to tackle climate change nationally and globally.[140]

While the report must address potential uses of blockchain technology that will mitigate negative environmental consequences, it does not require any agencies to transition to

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131 *Id.* at 2599.

132 *Id.* at 2595.

133 *Id.* at 2610.

134 *See* Alice C. Hill, *What Does the Supreme Court's Decision in West Virginia v. EPA Mean for U.S. Action on Climate?*, COUNCIL ON FOREIGN REL. (July 19, 2022, 12:19 PM), https://www.cfr.org/blog/what-does-supreme-courts-decision-west-virginia-v-epa-mean-us-action-climate [https://perma.cc/832W-H53X].

135 *See id.*

136 *See id.*

137 *See id.*; *see also West Virginia*, 142 S.Ct. 2587.

138 *See* Exec. Order No. 14067, 87 Fed. Reg. 14143, 14145 (Mar. 9, 2022).

139 *See id.* ("The United States has an interest in ensuring that digital asset technologies and the digital payments ecosystem are developed, designed, and implemented in a responsible manner that … reduces negative climate impacts and environmental pollution, as may result from some cryptocurrency mining.").

140 *Id.* at 14148 ("The report should specifically address: (a) potential uses of blockchain that could support monitoring or mitigating technologies to climate impacts, such as exchanging of liabilities for greenhouse gas emissions, water, and other natural or environmental assets; and (b)implications for energy policy, including as it relates to grid management and reliability, energy sufficiency incentives and standards, and sources of energy supply.").

a more sustainable framework and imposes no enforceable federal constraints on GHG emissions from cryptocurrency PoW operations.[141]

IV. NYS'S EMERGING TWO-PRONG LEGISLATIVE AND ADMINISTRATIVE APPROACH TO CURTAIL BITCOIN GREENHOUSE GAS EMISSIONS

This part discusses NYS's evolving two-prong approach to address GHG emissions from Bitcoin mining. Subsection A focuses on the new state law imposing a moratorium on BTM PoW operations.[142] Subsection B analyzes the state's administrative approach, which complements the statewide moratorium. NYS agencies may continue to exercise their authority over GHG emissions from cryptocurrency operations on a case-by-cases basis in situations that fall outside the scope of the moratorium. Here, two examples illustrate this complementary agency approach. First, the DEC rejected a CAA Title V permit to the cryptocurrency facility, Greenidge Generation (hereinafter "Greenidge")[143] and second, potentially, by the PSC in the ongoing Fortistar case.[144]

A. A Statewide Law Imposing a Moratorium on Bitcoin Mining

In January 2023, NYS enacted a law that places a moratorium on all Bitcoin mining using PoW operations for the next two years.[145] The law provides in relevant part as follows:

> 1. For the period commencing on the effective date of this section and ending two years after such date, the department, after consultation with the department of public service, shall not approve a new application for or issue a new permit pursuant to this article, or article seventy of this chapter, for an electric generating facility that utilizes a carbon-based fuel and that provides, in whole or in part, behind-the-meter electric energy consumed or utilized by cryptocurrency mining operations that use proof-of-work authentication methods to validate blockchain transactions.
>
> 2. For the period commencing on the effective date of this section and ending two years after such date, the department shall not approve an application to renew an existing permit or issue a renewal permit pursuant to this article for an electric generating facility that utilizes a carbon-based fuel and that provides, in whole or in part, behind-the-meter electric energy consumed or utilized by a cryptocurrency mining

[141] *See id.*
[142] *See* N.Y. S. 6486.
[143] *See* Letter from Daniel Whitehead to Dale Irwin, *supra* note 8.
[144] *See* Aratani, *supra* note 8.
[145] *See* Ferre-Sadurni & Ashford, *supra* note 10 (statement by Governor of NYS, Kathy Hochul) ("[The bill is] a key step for New York as we work to address the global climate crisis.") (statement by Assemblywoman Anna Kelles) ("This bill will create the pause we need in the current trend of purchasing old power plants in New York for corporate profits and allow us to properly evaluate the impact of this industry on our climate goals before it is too late… Reactivating old retired power plants that use fossil fuels as an energy source is a move in the wrong direction and we cannot afford to go backward.").

> operation that uses proof-of-work authentication methods to validate blockchain transactions if the renewal application seeks to increase or will allow or result in an increase in the amount of electric energy consumed or utilized by a cryptocurrency mining operation that uses proof-of-work authentication methods to validate blockchain transactions.[146]

The legislation requires the DEC to develop a generic environmental impact statement (hereinafter "GIS") to consider the issues of cryptocurrency mining that uses PoW authentication methods underpinning Bitcoin.[147] The GIS should include the number of PoW mining locations in the state, the amount and sources of energy used, the amount of GHGs emitted from operations, including any anticipated increase, and public health impacts.[148]

This first-in-the-nation moratorium has inspired environmentalists to push for similar regulations throughout the country, as they continue to worry that closed or closing coal-fired electric plants will be reopened.[149] Moreover, there is some indication that cryptocurrency businesses may be deterred from investing in the state for fear of being shut down.[150]

B. NYS Administrative Agencies May Complement the State-Wide Moratorium.

Fossil-fueled electric power plants used in PoW operations may be exempt from the moratorium if they are "grandfathered in"; meaning they have already submitted permit applications prior to the enactment of the moratorium.[151] However, NYS administrative agencies may continue to act in relevant individual cases that fall outside the scope of the moratorium. Part I analyzes how the DEC administers permits to power plants that align with federal air pollution legislation, using Greenidge as an example. Part II showcases how the New York PSC can enforce state climate change objectives by monitoring the transfer of ownerships among fossil fuel electric power plants, using the Digihost transfer as an example.

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[146] N.Y.S. 6486.

[147] *Id.*

[148] *Id.*

[149] *See* Marie J. French, *New York Partially Banned Cryptocurrency Mining. Now Environmentalists Want More.*, POLITICO (Jan. 7, 2023, 7:00 AM), https://www.politico.com/news/2023/01/07/new-york-cryptocurrency-mining-ban00072564#:~:text=Gov.%20Kathy%20Hochul's%20November%20signing,a%20model%20for%20other%20states. [https://perma.cc/GA9Q-WTK6].

[150] *See id.* ("The law is likely to scare off companies from coming to New York for fear of further restrictions, some owners said, and it comes as the digital currency market has also crashed following the bankruptcy of Bahamas-based crypto exchange FTX – leaving the industry with additional uncertainty.").

[151] *See id.* ("The moratorium bill exempted the only two power plants currently burning fossil fuels to run cryptocurrency mining machines, carving out any that had already submitted permit applications.").

1. The DEC Denies Greenidge Generation a Title V Operating Permit

The DEC acted to deny a GHG emissions permit to a cryptocurrency enterprise that fell outside the scope of the moratorium.[152] Title V of the CAA establishes a facility-based operating emissions permit program to be implemented by states that clarifies the control of GHG air emissions from facilities, such as coal-fired electric power plants.[153] A permit is required for any facility that has actual or potential emissions of any air pollutant, including fossil fuel GHGs, at or above the threshold of 100 tons per year.[154] The DEC is the NYS delegated agency under the Title V permit program from the EPA and therefore, holds the authority to administer or rescind permits.[155] NYS has reinforced its commitment to abide by this program to promote its environmental policy.[156]

The DEC exercised its administrative power when it denied the Greenidge facility[157] a permit renewal for its misalignment with Title V.[158] In 2014, Greenidge purchased a closed coal-fired power plant and applied for a Title V operating permit to restart electric generation.[159] Greenidge specified in its application that it would convert the facility to natural gas and would use it as a "peaking capacity" plant, to provide electricity to the state energy grid in times of high demand.[160] Greenidge never indicated that it would engage in cryptocurrency mining or use all of the electricity produced for itself.[161]

On June 30, 2022, the DEC denied a Title V operating permit renewal to the Greenidge facility considering its new, changed stated purpose and its increase in GHG emissions:[162]

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152 *See* Letter from Daniel Whitehead to Dale Irwin, *supra* note 8.

153 *See* 42 U.S.C. § 7661(c)(a) (2013) ("Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan."); *see also Basic Information About Operating Permits*, *supra* note 88.

154 *Who Has to Obtain a Title V Permit?*, EPA, https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit [https://perma.cc/4X7C-5CUM] (last visited Aug. 30, 2022).

155 *See Air Pollution Control Permit Program*, N.Y.S. DEP'T OF ENV'T CONSERVATION, https://www.dec.ny.gov/permits/6069.html [https://perma.cc/59A2-Q38G] (last visited Aug. 30, 2022).

156 *See id.* ("It is the policy of the State of New York to 'maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the state, the propagation and protection of flora and fauna, and the protection of physical property and other resources, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution.'").

157 *See* Kolbert, *supra* note 105 ("The Greenidge Generating Station in Dresden, New York, sits on the shores of Seneca Lake, about an hour southeast of Rochester. It was originally built in the nineteen-thirties to run on coal; over the decades, new units were added, and older ones shuttered. The power station ceased operations in 2011, and it sat idle until it was purchased by a private-equity firm and converted to run on natural gas.").

158 *See* 42 U.S.C. § 7661(d)(b) ("If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance.").

159 Letter from Daniel Whitehead to Dale Irwin, *supra* note 8.

160 *See id.*; *see also* Kolbert, *supra* note 105.

161 *See* Letter from Daniel Whitehead to Dale Irwin, *supra* note 8.

162 *See id.*

> (1) the actual GHG emissions from the Facility have drastically increased since the time of the Title V permit issuance in 2016 and since the effective date of the [Climate Act] in 2020; (2) this increase in GHG emissions is primarily due to the fact that Greenidge has substantially altered the primary purpose of the Facility's operation, from providing electricity to the grid in a "peaking" capacity to powering its own energy-intensive PoW cryptocurrency mining operations behind-the-meter; and (3) renewal of the Title V permit would allow Greenidge to continue to increase the Facility's actual GHG emissions through the increased combustion of fossil fuels, for the benefit of its own behind-the-meter operations.[163]

Greenidge does not want to pursue a less energy-intensive method of cryptocurrency mining, such as proof-of-stake, in comparison to PoW.[164] It also did not suggest that it would reduce its GHG emissions by switching to alternative renewable energy or by purchasing electricity from the State electricity grid.[165] Thus, Greenidge is not in compliance with the renewable portfolio standards of the State.[166]

It is estimated that if Greenidge devoted 100% of its self-generated, BTM, fossil-fueled, electric generation to Bitcoin mining, annual GHG emissions would total 656,983 metric tons of CO_2.[167] To put things into perspective, this is comparable to the annual emissions of 140,000 passenger vehicles or burning 600 million pounds of coal.[168] Its continued operation would result in significant environmental degradation.[169]

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[163] *Id.*

[164] Letter from Daniel Whitehead to Dale Irwin, *supra* note 8; *see* Hiroko Tabuchi, *In Coinbase's Rise, a Reminder: Cryptocurrencies Use Lots of Energy*, N.Y. TIMES (Apr. 14, 2021), https://www.nytimes.com/2021/04/14/climate/coinbase-cryptocurrency-energy.html [https://perma.cc/D4WF-SJQJ] ("'Proof-of-stake' method … doesn't force miners to compete to add blocks to the blockchain, and instead awards miners new blocks based on how much cryptocurrency they already own.").

[165] Letter from Daniel Whitehead to Dale Irwin, *supra* note 8; *see Story of Our Grid*, NYSERDA, https://www.nyserda.ny.gov/About/Publications/Energy-Analysis-Reports-and-Studies/Electric-Power-Transmission-and-Distribution-Reports/Electric-Power-Transmission-and-Distribution-Reports---Archive/New-York-Power-Grid-Study/Story-of-Our-Grid#:~:text=Key%20Takeaways%3A,%2Dstate%20and%20imports)%20resources [https://perma.cc/ADC5-5YV5] (last visited Oct. 31, 2022) ("NYS achieves its '70% renewables to meet load in 2030' and '100% clean energy to meet load in 2040' targets with a renewable mix of offshore wind, land-based wind, utility solar, distributed solar, and hydro (in-state and imports) resources.").

[166] *See Renewable Portfolio Standard*, *supra* note 84 ("New York's Clean Energy Standard (CES) is the most comprehensive and ambitious clean energy goal in the State's history. The CES is designed to fight climate change, reduce harmful air pollution, and ensure a diverse and reliable low carbon energy supply.").

[167] Roeck & Drennen, *supra* note 83, at 355.

[168] *Id.*

[169] *See generally* French, *supra* note 29 ("Environmental groups have also raised concerns about the impacts on water quality and aquatic life. Like many combustion plants located on shorelines, Greenidge sucks up water for cooling and dumps it back at an elevated temperature. Greenidge's warm water, which its own review shows is on average 9 degrees higher than at intake, is discharged into the Keuka Outlet.").

2. The NY Public Service Commission has the Authority to Approve or Reject the Transfer of Ownership of Power Plants.

In September 2022, the New York PSC by declaratory order approved the transfer of ownership of the occasionally utilized natural gas-fired power plant, Fortistar, to a 24/7/365 Bitcoin mining operation facility utilizing BTM PoW, Digihost.[170] Digihost's takeover preceded the enactment of the moratorium and therefore, was not subject to its provisions.[171] However, Digihost's operations could increase GHG emissions up to 3500%.[172]

Under the declaratory ruling, the New York PSC stated that its limited review does not include environmental concerns, including compliance with the Climate and Leadership Protection Act (hereinafter "CLCPA").[173] Moreover, its interpretation of existing statutes, rules, or regulations is not subject to the State Environmental Quality Review Act (hereinafter "SEQRA"), and therefore, can be issued without further SEQRA review.[174]

In January 2023, environmental groups, The Clean Air Coalition of Western New York, and the Sierra Club, sued NYS for transferring ownership to Digihost.[175] In their complaint, they argue that Digihost's operations at the facility will undermine the emission-reduction goals of the NYS CLCPA and runs counter to the public interest.[176] They further argue, that the CLCPA broadly requires the state to conduct environmental reviews when making ownership transfer decisions, to ensure climate objectives are met.[177]

The CLCPA was enacted in July 2019 to reduce statewide GHG emissions.[178] The Climate Action Council created a Scoping Plan that will aid NYS to achieve its climate agenda of reaching carbon neutrality.[179] The CLCPA requires NYS to reduce economy wide GHG

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[170] Nydia Guiterrez, *Environmental Groups File Lawsuit Challenging New York Public Service Commission's Approval of Fracked Gas-Powered Crypto Mining Operations*, EARTHJUSTICE (Jan. 13. 2023), https://earthjustice.org/press/2023/environmental-groups-file-lawsuit-challenging-new-york-public-service-commissions-approval-of-fracked-gas-powered-crypto-mining-operations [https://perma.cc/25WX-N6US]; *see* Case 21-M-0238, N.Y.S. P.S.C. (Sept. 15, 2022) ("Digihost is a wholly owned subsidiary of Digihost Technology Inc. (DTI) and was formed for the purposes of acquiring the indirect ownership interests in Fortistar. DTI is a British Columbia company that is publicly traded blockchain technology company primarily focused on cryptocurrency mining.").

[171] *See* Aratani, *supra* note 8.

[172] Gutierrez, *supra* note 170.

[173] Case 21-M-0238, N.Y.S. P.S.C. ("Pursuant to PSL §§70 and 80, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. These review processes have been adapted over time to accommodate lightened ratemaking regulation policies. Entities subject to lightened regulation operate in competitive markets and, therefore, must support PSL §§70 and 80 transfer requests with a demonstration under the Wallkill Presumption that the transaction would not present an opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully regulated utilities.").

[174] *See id.*

[175] *See id.*

[176] *Id.* ("Those opposed to the Proposed Transaction point to the noise, emissions, and water use impacts of the Facility and maintain that repurposing the use for energy-intensive cryptocurrency mining operations threatens the efforts to address climate change and meet the objectives of the CLCPA.").

[177] *See* Aratani, *supra* note 8.

[178] *Our Climate Act*, NEW YORK STATE, https://climate.ny.gov/ [https://perma.cc/GM7J-XCSR] (last visited Aug. 30, 2022).

[179] *See id.*

emissions by 40% by 2030 and no less than 85% by 2050 from 1990 levels.[180] If the current litigation re the Fortistar case is successful, the New York PSC would have to consider GHG emissions related to that power plant in exercising its transfer approval authority, notwithstanding the moratorium.[181]

V. THE SOLUTION: EXPANSION OF THE TWO- PRONG APPROACH TO A MULTISTATE COOPERATIVE AGREEMENT

This Note proposes the creation of a multistate cooperative agreement that would mimic and expand NYS's two-prong legislative and administrative approach. That is, states in a region would join to impose a moratorium on fossil fuel electric power plants that facilitate BTM PoW Bitcoin operations. The agreement would announce that the multistate moratorium would not preclude relevant agencies in each state from regulating facilities that emit substantial amounts of GHGs.

The overall efforts of such a multistate cooperative agreement would be to deter "forum shopping" or relocation, that is, if a miner is unable to perform operations in one locality they could relocate to another state with less restrictive laws.[182] Unlike other financial markets, cryptocurrency is unique in that it is a portable market that does not need to be in proximity to end users.[183] In theory, it only requires internet access and connection, so miners have the independence to operate from any locality.[184]

The proposed multistate cooperative agreement would limit and diminish the issue of relocation by reducing areas where miners are welcome to utilize fossil fuel BTM PoW cryptocurrency operations. Subsection A elaborates on the likelihood of success of this note's proposed solution by looking at two past multistate approaches that operated relatively

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[180] *Id.*

[181] *C.f.* Case 21-M-0238, N.Y.S. P.S.C. ("Sierra Club and Earthjustice filed joint comments objecting to Digihost's plan to use the electric output from the Facility for on-site "behind-the-meter" cryptocurrency production because it could undermine emission reduction objectives in the Climate Leadership and Community Protection Act (CLCPA). They also note their separate request to the New York State Department of Environmental Conservation to consider the environmental impacts when the air permits for the Facility are renewed.").

[182] *See* Mackenzie Sigalos, *China is Kicking Out More Than Half the World's Bitcoin Miners – and a Whole Lot of Them Could be Headed to Texas*, CNBC (June 15, 202, 2:12 PM), https://www.cnbc.com/2021/06/15/chinas-bitcoin-miner-exodus-.html [https://perma.cc/8SM5-M6G5] (discussing "the great mining migration" in China) ("After failing to meet Beijing's climate targets, province leaders decided to give bitcoin miners two months to clear out, explicitly blaming its energy misses on crypto mines… Because miners at scale compete in a low-margin industry, where their only variable cost is typically energy, they are incentivized to migrate to the world's cheapest sources of power… 'Chinese miners or miners that were domiciled in China are looking to Central Asia, Eastern Europe, the U.S. and Northern Europe.'"); *see also* Letter from Elizabeth Warren to Michael Regan, *supra* note 56 ("Mining operations for Bitcoin, the largest cryptocurrency by market cap, are increasingly moving onshore, with the United States' share of global mining increasing from 4 percent in August 2019 to nearly 38 percent in January 2022 – meaning that over a third of the global computing power dedicated to mining Bitcoin is now drawn from miners in the U.S., in part due to a government crackdown in China last year.").

[183] Sigalos, *supra* note 182.

[184] *See id.*

successfully in the oil industry and electric sector.[185] Subsection B suggests fundamental guiding predicates for each state to follow in participating in the multistate agreement.

A. States Acting Cooperatively to Form a Successful Multistate Agreement

A concern is that Bitcoin miners will likely seek to buy closed or closing coal-fired electric power plants in other localities as they did in NYS.[186] A multistate moratorium agreement may operate to block the emergence of miners utilizing fossil fueled BTM PoW operations by adapting the NYS two-prong approach[187] to a multistate region. If numerous states cooperatively adopt the NYS model, it could evolve into a single state cooperative approach. There are long-standing energy precedents for such multistate cooperative approaches.[188]

1. Interstate Compact to Conserve Oil and Gas Act

The Compact was enacted in 1935 to address waste and over exploitation of unregulated petroleum extraction.[189] In part, The Compact prevented forum shopping by oil developers for a jurisdiction with the least governmental regulation over oil drilling and production by adopting a uniform approach to oil well development regulation.[190] In the early 1900s, "overproduction of oil outstripped the demands of the market to buy it, the capacity of pipelines to transport it, and the ability of the refineries to convert it into saleable products."[191] Unsold oil went to waste or was stored in open surface pits, that were prone to fire and seepage.[192] Additionally, the industry was concentrated by corporate mergers and acquisitions, until the judiciary stepped in to ban monopolistic practices in 1911.[193]

The Compact sets out a multistate non-enforceable, voluntary oil production quota and other means to encourage uniform cooperative state preservation of oil and gas.[194] A multistate government body, the Interstate Oil and Gas Compact Commission (hereinafter "The Commission"), was formed to facilitate programs created to gather and share information, technologies, and regulatory methods.[195]

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[185] *See infra* Section V.A.1, 2.

[186] *See* Sigalos, *supra* note 182 ("Texas is an ideal destination for miners, thanks to its abundance of solar and wind power, its unregulated market, and its crypto-friendly political stance.").

[187] *See supra* Section IV.

[188] *See infra* Section V.A.1, 2.

[189] *Our History*, *supra* note 19; *see* An Interstate Compact to Conserve Oil and Gas, Pub. L. No 91-158, 83 Stat. 436 (1969).

[190] JAMES E. HICKEY ET AL., ENERGY LAW AND POLICY (1989).

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *See id.*

[195] *Our History*, INTERSTATE OIL & GAS COMPACT COMMISSION, https://iogcc.ok.gov/history [https://perma.cc/TQ3D-HS4B] (last visited Nov. 12, 2022); *see also* An Interstate Compact to Conserve Oil and Gas art. VI. ("Each State joining herein shall appoint one representative to a commission hereby constituted and designated as 'The Interstate Oil Compact Commission', the duty of which said shall be to make inquiry and ascertain from time to time such methods, practices, circumstances, and conditions as may be disclosed for bringing about

Today, there are over thirty oil producing states that are participants; a notable increase from the six states that were initial participants in 1935.[196] The Commission continues to support its member states through federal funded projects designed to promote the conservation of oil and natural gas sources, while protecting the health, safety, and the environment.[197]

2. The Regional Greenhouse Gas Initiative

RGGI is a cooperative effort to limit and reduce GHG emissions from large fossil fuel electric power plants among twelve Eastern states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia.[198] Participating states adopted a uniform approach, which, among other matters, acts to dissuade electric utilities and electric generating merchants from forum shopping for lax GHG emission locations.[199]

RGGI is composed of CO_2 Budget Trading Programs from each participating state that limit their emissions of CO_2 from large fossil fuel electric power plants by issuing CO_2 allowances, that can be traded in regional CO_2 allowance auctions.[200] In 2022, the RGGI emissions cap was 156,828,784 CO_2 allowances and the adjusted cap was 137,738,454 CO_2 allowances.[201]

To ensure compliance, all twelve state programs are required to limit CO_2 allowances equal to their CO_2 emissions over a three-year control period.[202] Allowances must equal 50% of the emissions cap during each control period; this will prevent one state from over emitting by purchasing an abundance of allowances.[203]

The results of RGGI have been successful.[204] CO_2 emissions have dropped over 35%, which is largely attributable to shifting away from coal, increased energy efficiency, and a

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conservation and the prevention of physical waste of oil and gas, and at such intervals as said commission deems beneficial it shall report its findings and recommendations to the several States for adoption or rejection.").

196 JAMES E. HICKEY, *supra* note 190; *Current Projects*, INTERSTATE OIL & GAS COMPACT COMM'N, https://iogcc.ok.gov/current-projects [https://perma.cc/5VJK-JPCU] (last visited Nov. 20, 2022).

197 *See Current Projects*, *supra* note 196.

198 *The Regional Greenhouse Gas Initiative*, RGGI, https://www.rggi.org/program-overview-and-design/elements [https://perma.cc/JTF6-XTN7] (last visited Oct. 6, 2022).

199 *See id.*

200 *Id.*

201 *Id.*

202 *Id*.

203 *See id.*

204 *See The Regional Greenhouse Gas Initiative: A Fact Sheet*, CERES, https://www.ceres.org/sites/default/files/Fact%20Sheets%20or%20misc%20files/RGGI%20Fact%20Sheet.pdf [https://perma.cc/9E4S-56TN] (last visited Apr. 4, 2023) (discussing reduction of GHGs, economic growth, low electricity prices, health impacts and implications for the clean power plan) ("RGGI states are well positioned to meet the EPA Clean Power Plan's carbon reduction requirements. As the CPP provides flexibility for multi-state compliance planning and the use of a mass-based program with tradeable allowances, the RGGI program presents an economically favorable model for other states looking to comply with the Clean Power Plan.").

growing use of renewable energy.[205] Since its creation, $1.3 billion in net economic benefits has accrued across the region, including economic growth, increased jobs, reductions in electricity costs and decreased emissions.[206]

B. The Proposed Multistate Cooperative Agreement

This Note proposes that NYS's evolving two-prong moratorium model on the use of closed or closing fossil fuel power plants by PoW Bitcoin operations should be expanded and serve as the basis for a multistate cooperative agreement. The cooperative agreement invites any state with Bitcoin mining facilities and closed or closing coal-fired power plants to voluntarily become a party.[207] The agreement would be formed with the general notion that the climate crisis is a global problem, and it is exacerbated by GHGs, specifically CO_2, emissions[208] from fossil fuel BTM PoW Bitcoin mining operations.

The purpose of a multistate agreement would be to deter Bitcoin miners from "forum shopping" for favorable state regulations that would enable continued fossil fuel electric use from closed or closing coal-fired power plants. States, of course, are ultimately free to negotiate the terms, scope, and content of any multistate agreement. Ideally, such an agreement would be guided by collective state acceptance of the following predicates which would form the core of the agreement:

1. The broad purpose of such an agreement is to deter the use of closed or closing fossil fuel power plants to provide electricity for PoW cryptocurrency operations for the duration of an applied moratorium period. [209]

2. States accept a duty to cooperate in reaching the agreement and in implementing any such agreement.

3. States accept a duty in good faith[210] to achieve meaningful agreement consistent with effective reduction of GHG emissions contributing to climate change from PoW cryptocurrency operations.

4. States agree to adopt methods to collect and show all relevant data related to GHG emissions from PoW cryptocurrency operations and to

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[205] *Id.*

[206] *Id.*

[207] *C.f.* An Interstate Compact to Conserve Oil and Gas art. I. ("This agreement may become effective within any compacting state at any time as prescribed by that state, and shall become effective within those states ratifying it whenever any three of the States of Texas, Oklahoma, California, Kansas, and New Mexico have ratified and Congress has given its consent. Any oil-producing state may become a party hereto as hereinafter provided.").

[208] *See supra* Section II, C.; *see also The Regional Greenhouse Gas Initiative*, *supra* note 198.

[209] *C.f.* N.Y.S. 6486 (implementing a 2-year moratorium on BTM PoW Bitcoin mining operations).

[210] *See* U.C.C. § 1-201 (amended 2001) ("'Good Faith' … means honesty in fact and the observance of reasonable commercial standards of fair dealing.").

> make all data collected freely available to the public in a timely matter.[211]
>
> 5. States accept and encourage all relevant state agencies, acting within their respective jurisdictions and authority, to complement any multistate moratorium agreement in exercising their regulatory duties for permission and approvals that might not be covered by the moratorium.[212]
>
> 6. A committee called "The Interstate Bitcoin Mining Energy Compact Commission" will be comprised of members from each participating state will be formed to facilitate communication, promulgate innovative ideas, and ensure compliance.[213]

These predicates will establish the parameters that must be set by all participants to the cooperative agreement. Acting as a guideline, states should feel free to adopt other pillars as they deem fit or that better align with their own regulatory authority, consistent with the six predicates.[214]

VI. CONCLUSION

This Note has explained the use of closed or closing fossil fuel electric power plants by BTM PoW Bitcoin mining. It has estimated that such operations, if allowed to continue, will contribute disproportionately to GHG emissions exacerbating climate change.[215] It has

[211] *C.f.* An Interstate Compact to Conserve Oil and Gas art. VI. (; *see* Kyra Bell-Pasht & Dana Krechowicz, *Why Does Access to Good Climate Data Matter?,* WMO (2015), https://public.wmo.int/en/resources/bulletin/why-does-access-good-climate-data-matter [https://perma.cc/3GFD-X5HF] ("Both private and public sector decision-makers need accessible, credible and relevant climate information to increase resilience to the more intense and frequent weather extremes scientists foresee as a potential consequence of climate change… governments have a key role to play.").

[212] *See supra* Section IV, B.

[213] *C.f.* An Interstate Compact to Conserve Oil and Gas art. VI. ("Each State joining herein shall appoint one representative to a commission hereby constituted and designated as 'The Interstate Oil Compact Commission', the duty of which said commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances, and conditions as may be disclosed for bringing about conservation and the prevention of physical waste of oil and gas, and at such intervals as said commission deems beneficial it shall report its findings and recommendations to the several States for adoption or rejection.").

[214] *C.f. State Statutes & Regulations*, THE REGIONAL GREENHOUSE GAS INITIATIVE, https://www.rggi.org/program-overview-and-design/state-regulations [https://perma.cc/SEG9-8D9T] (last visited Nov. 20, 2022) ("Through statutes or regulations based on the RGGI Model Rule, each state has established individual CO_2 Budget Trading Programs based upon its own statutory or regulatory authority. Together, these compose a regional cap and market for allowances. Each state's CO_2 Budget Trading Program limits emissions of CO2 from electric power plants, issues CO_2 allowances and establishes participation in regional CO_2 allowance auctions. In addition to their individual CO_2 Budget Trading Programs, the RGGI states have established a variety of goals and commitments related to climate and energy.").

[215] *See* MANDY DEROCHE ET AL., *supra* note 62 ("Based on the current grid generation mix and estimated Bitcoin energy consumption, we estimate Bitcoin mining in the United States is responsible for between 11 to 76 million

addressed NYS's evolving two-prong approach, including a moratorium on such operations,[216] and suggested expanding such a moratorium to the basis of a multistate cooperative agreement in the future. In cases that fall outside the scope of a moratorium, state administrative agencies may have the authority to enforce GHG emission limitations by approving or rejecting major operating decisions.[217]

The negative environmental GHG emissions implications of Bitcoin mining has sparked an environmental call for the decarbonization of the global cryptocurrency industry by 2040.[218] NYS has taken a proactive approach to begin to achieve this goal, in response to crypto miners entering the state to retrofit closed or closing coal-fired electric power plants to fuel their BTM PoW operations.[219] The failure of global and national efforts to diminish GHG emissions up to this very day supports the notion that local solutions are now, more than ever, necessary to address GHG emissions challenges like those posed by PoW cryptocurrency operations.[220]

If it is accepted that the potential of Bitcoin to evolve as a powerful, permanent presence in our global economic system is a very real possibility,[221] a multistate cooperative agreement as proposed in this note will help to assure that PoW operations do not exacerbate the exponential threat of mankind's GHG emissions contributing to global climate change.[222] Bitcoin mining operations need to alter their methods to help curb the climate crisis together with localities in an enforceable way.[223] The proposed solution within this Note is a feasible method to address an imminent environmental existential threat to the world.

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annual excess tons of CO_2 in the last year, with a central estimate of 27.4 million tons CO_2. For context, that is about three times as much CO_2 as was emitted by the largest coal plant in the United States in 2021.").

216 *See supra* Section IV, A.

217 *See supra* Section IV, B.

218 *See* CRYPTO CLIMATE ACCORD, https://cryptoclimate.org/accord/ [https://perma.cc/5JXU-S8EH] (last visited Aug. 8, 2022).

219 *See* N.Y.S. 6486; *see generally* French, *supra* note 29.

220 *See* Hill, *supra* note 134.

221 *See* Jaworska, *supra* note 41; *e.g.*, MANDY DEROCHE ET AL., *supra* note 62 ("Today, the scale of cryptocurrency mining is expanding rapidly in the United States. Cryptocurrency mining is now the largest source of electricity demand for some utilities. In Texas alone, we tracked 2,234 MW of cryptocurrency mining facilities, almost entirely built since mid-2021. Eight of the facilities are between 150 to 300 MW each. A single 300 MW facility might host nearly 100,000 machines, consuming enough electricity to power, on average, nearly 49,000 nearby homes. Unlike many industrial operations or even data centers that reduce energy usage at off-peak times, these facilities typically run 24 hours a day, seven days a week, 365 days a year, at full capacity.").

222 *See The Effects of Climate Change*, NASA, https://climate.nasa.gov/effects/ [https://perma.cc/6A3Y-A5AH] (last visited Oct. 10, 2022).

223 *See* Press Release, The White House, *supra* note 50; *see also* MANDY DEROCHE ET AL., *supra* note 62 ("In the absence of a comprehensive strategy to reduce all emissions from the power sector, adding this [Bitcoin energy consumption] massive amount of new electricity demand will drive up emissions. Until the grid and all new generation build-out has been completely decarbonized, proof-of-work cryptocurrency miners will never exclusively rely on renewable energy to power their operations. But cryptocurrency mining threatens to derail or reverse decarbonization in ways that go beyond simply adding electrical load. At a moment when the cost of fossil fuel generation exceeds wind or solar alternatives, the economic fundamentals of cryptocurrency mining distort the U.S. energy market and drive increased coal and gas generation.").

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