

RECORD NATIONALISM,
POPULISM, AND
IDENTITIES:

CONTEMPORARY
CHALLENGES

JANUARY 2023

This document compiles all the individual papers and proposal documents resulting from the analysis and research work carried out by the professionals that were called upon by the Fide Foundation, in 2020, for the purpose of Fide's 2nd International Congress on the contemporary challenges that arise from nationalistic, populist and identarian movements across the world, held at Jesus College, Oxford*.

About the Fide Foundation

The Fide Foundation is a legal-economic think-tank based in Spain, committed to involving the civil society in all major legal and economic developments in Spain, the EU and abroad.

Website: thinkfide.com

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** Originally scheduled to take place on September of 2021, the congress' date was pushed back to April of 2022 due to the COVID-19 pandemic.*



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A. PRESENTATION – THE FIDE FOUNDATION AND ITS 2022 OXFORD CONGRESS.

Cristina Jiménez Savurido

Today, Fide has secured a strong position amongst Spain's top think-tanks. As such, Fide has an increasingly representative voice on relevant legal-economic issues at the European and global levels.

Behind Fide, stand a group of ever-growing professionals from tier one law and consultancy firms, state and private economists, public officials, university professors and other academics, and representatives of Spain's private sector, who, from a position of experience and expertise, bring forth rigorous and qualified opinions to the national, as well as international debates which we regularly hold. Their analysis focuses on the major legal, economic, social, and scientific matters. Their goal, to produce effective and applicable solutions and proposals.

To this end, Fide's International Academic Council, led by Christopher Muttukumaru and composed of experts from four countries, decided to focus Fide's international efforts on the analysis of the different legal, social, and economic challenges that arise from the growth of nationalist, populist and identarian movements in the EU as well as the rest of the world. Thus, Fide's 2022 Oxford Congress on Nationalisms, populisms, and identities: contemporary challenges.

Fide would like to extend its eternal gratitude to all the professionals that took part in the discussions at Oxford, as well as their tireless work in drafting of the document before you, their extensive revisions and overall commendable job. Their names, bios and details are reflected throughout the document.

And now the time has come for this document to fulfil its original purpose and be read by its rightful audience: you. The experts working to better and further our understanding of the phenomenon that is human behaviour and its integration into our social, legal, and economic realities. Professionals working in the fields of economics, law, science, sociology, and society as a whole, as the proposals before you are intended to help form a well-



documented opinion which can then help promote further work in these fields by those who read these pages.

Christopher Muttukumar has successfully led the definition, thematic topics, and the work with the working groups as co-director of this II International Fide Congress in Oxford and Chair of Fide's International Academic Council (IAC).

In September 2022, Jorge Padilla, Senior Managing Director and Head of Compass Lexecon Europe, has now been elected Chair of Fide's IAC to continue building on the foundations laid by the former chair for Fide's international ambitions as a leading economic and legal think tank.

B. OXFORD CONGRESS WORKING GROUPS OVERVIEW

- **WORKING GROUP: CONSTITUTIONAL, LEGAL AND GOVERNANCE QUESTIONS IN THE CONTEXT OF NATIONALISM** >>> [Terms of Reference](#)
 - Ramón Palacín
 - Derrick Wyatt KC
 - Mariano Bacigalupo
 - Rafael Domínguez Olivera
 - Rafael Morlanes Fernández

- **WORKING GROUP: NATIONALISM IN THE CONTEXT OF THE COVID-19 PANDEMIC** >>> [Terms of Reference](#)
 - Federico Montalvo
 - Rosario Cospedal García
 - Senén Barro
 - Daniel Innerarity
 - Gabriel López Serrano
 - Concha Serrano

- **WORKING GROUP: NATIONALISM, POPULISM AND THE ECONOMY**
 - Jorge Padilla
 - Frédéric Jenny
 - Laurent Manderieux
 - Juan Espinosa
 - Joe Perkins

- **Subgroup 1: Globalisation and Populism** >>> [Terms of Reference](#)
 - Laurent Manderieux
 - Jorge Padilla
 - Jesús Almoguera
 - Enrique Chamorro
 - Elisabetta Marafioti
 - Kadambari Prasad
 - Juan Rivera

- **Subgroup 2: The Future of the EU Project** >>> [Terms of Reference](#)
 - Juan Espinosa
 - Frédéric Jenny
 - Maria Pilar Canedo
 - Sonsoles Centeno Huerta
 - Amanda Cohen
 - Miguel de la Mano
 - Martín Martínez Navarro
- **Subgroup 3: Populism and Inequality** >>> [Terms of Reference](#)
 - Joe Perkins
 - Jorge Padilla
 - Charles Brendon
 - Francisco de la Torre
 - Cecilia García-Peñalosa
 - Eva M. Gutiérrez
- **WORKING GROUP: NATIONALISM AND POPULISM AT THE NATIONAL LEVEL**
 - Professor Stefania Baroncelli
 - María Garrote de Marcos
 - Juan Martínez Calvo

C. NATIONALISM AND POPULISM: THE THEMES AND RECOMMENDATIONS OF FIDE'S OXFORD CONGRESS: A CALL FOR EU ACTION

Christopher Muttukumaru & Juan S. Mora-Sanguinetti¹

INTRODUCTION

In the global context, the growth of nationalism and, in particular, populism is one of the greatest challenges facing not only Europe but also North and South America and the Asia Pacific region.

Nationalism has the potential to be a positive force. Populism, however, typically embraces an extreme form of nationalism. This can be a destructive force if it means that states retreat into an isolationist mindset and away from effective multilateral solutions to perceived cross-border problems. More specifically, it is capable of resulting in damaging impacts. This encompasses mistrust of state institutions, including the judiciary. Whether this results in state action to undermine the judiciary or a state's failure to address unacceptable criticism leading to mistrust of the judiciary, populism can damage the rule of law. It also encompasses protectionism and the imposition of tariff barriers to interstate trade, and hostility towards economic migrants and refugees.

The FIDE-Oxford Congress addressed **both the problems inherent in populism and the solutions which may be developed** to address the concerns of citizens who believe that they have been left behind by supra national institutions and by national governments. Debate in respect of the challenges of populism was wide ranging. But many of the

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¹ Christopher Muttukumaru CB DL is a Bencher of Gray's Inn, was a co-director of the Oxford Congress and was chair of the International Academic Council of FIDE Fundación. Juan S. Mora-Sanguinetti is a Senior Economist in the Banco de España. But the views expressed in this document are those of the authors and should not be attributed to the Banco de España or the Eurosystem or otherwise. Juan S. Mora-Sanguinetti's participation in the other materials and contributions to the Oxford Congress was neither of an economic nature nor related to the Banco de España's areas of competence. His participation is always in a personal capacity.

solutions and recommendations were focused on the EU and its Member States, as well as third countries, primarily the United Kingdom.

Against that background, there were **two central perspectives that evolved in debate:** on the one hand, a “supra-national” perspective (the relationship of individual countries and their societies to the EU, as in the case of the analysis of Hungary-Poland and the EU) and, on the other hand, an “intra-national” perspective (recalling the examples of Scotland or Catalonia as integral parts of European countries). In considering these perspectives, it was important to avoid typecasting nationalist movements and to recognize that there were differences between them. Not every nationalist movement is populist.

Where it exists, populist ideology, in either case, is often disseminated through social media channels, where misinformation is rife and expedites the embedding of untruths.

The topics discussed at the congress have been of **prime importance in recent years** for both Spain and other European countries, but even more so, if this were possible, given **recent developments** in international politics. Nationalism is, for instance, an inherent part of the Russia-Ukraine conflict. As a result of the war, the prospects of meeting the Climate Change challenge in line with COP 26 outcomes will need to be re-considered. In addition to the growth of populism in Poland and Hungary², the recent election in Italy has witnessed the success of a coalition of far-right parties. Part of that coalition is hostile to the EU.

It is for others to judge whether the congress was a success in terms of quality and scope. Consistently with FIDE’s ethos, participants brought differing skills and experience to bear on identifying problems and problem-solving. Participants were business leaders, senior lawyers, respected economists, and top academics. If their menu of solutions and recommendations offers policy makers at the supra national or national level a realistic way of developing policy choices which respond to citizens’ concerns, whether or not at the populist end of the spectrum, the conference will have resulted in a job well done. But FIDE

² See more specifically: “Constitutional, legal and governance questions in the context of nationalism” on page 109

must now be resolute in pursuing its ambitions. There is no longer any room for elitist complacency at national or supra national level.

CROSS-CUTTING ISSUES, RECOMMENDATIONS AND GENERAL CONCLUSIONS RAISED

The conference provided a forum for discussion on the risks (and potential opportunities) of nationalism (including populism) for Spanish politics, for other European countries and for the EU, and put forward various recommendations, conclusions, and lines of action.

Discussion was structured around substantive themes such as Nationalism and COVID. But it quickly became obvious that important strategic themes were also emerging.

As the debates unfolded, topic by topic, several **cross-cutting issues** were identified. In particular, from the EU's point of view (before and after Brexit)³, what had been the EU's weaknesses in the face of populism? What, in the context of growing populism, had the EU done well and what had it failed to do or done inadequately? What was the role of the nation state itself, even if a populist government was in power? Had the EU's **communication** been effective in conveying its policies to citizens and thus countering populist arguments? More specifically, had the EU been able to effectively answer the question "What has the EU done for us as citizens?"

The current situation presented a number of opportunities for the EU to consider in order to get closer to its citizens, limiting the populist arguments and increasing its sphere of influence. One substantive example is in the area of healthcare where, in the context of the COVID pandemic, there ought to be a re-examination of the distribution of competences.⁴ On the other hand, there should also be a reassessment of how the EU approaches the way in which it regulates, especially in response to the populist criticism that the EU interferes far too much in areas which are best left to Member States.

³ On the analysis of Brexit, see more specifically: "A new and fairer globalization" or "The future of the EU's economic proposition in light of looming economic populism: a case for an endogenous response".

⁴ "EU, Covid-19 and Nationalism: Legal Aspects".

By way of specific illustration of the latter point, the congress highlighted the need for the EU to rethink its regulation in terms of "**better regulation**" policies. Much work has already been done but, even so, it is obvious that citizens are not persuaded that the EU is doing any more than paying lip service to better regulation. The EU should aim in practice to regulate in a proportionate and streamlined manner, clearly applying the principle of subsidiarity. But one step further: the future approach of EU action, beyond respect for the subsidiarity principle and based on better regulation (which must be better communicated), is to apply the principle of **solidarity**, as in the case inspired by the Next Generation EU.⁵

These questions about EU policies and initiatives come together with another important question related to the internal structure and distribution of power within the EU, raised by the UK's own exit from the EU as a result of **Brexit**, namely: "who will be able to occupy the UK's political space in a changing EU?" This question is particularly relevant for Spain. For example, could Spain open up a new channel of opportunities in the relationship between the EU and Latin America? The conference showed that Spain could do more in European and international terms and also discussed various issues relevant to both Europe and Latin America, such as pension reforms.⁶

In summary, the various Congress contributors reached some common conclusions and recommendations, some of which were:

1. Populism can hinder both the debate on measures that may improve citizens' well-being and the very implementation of measures already designed, for example, climate change scepticism, often associated with an isolationist mindset such as in the USA under its previous administration, was capable of undermining international cooperation and associated regulations which are necessary to support effective global action.

⁵ "Nationalism, populism, and the economy- Subgroup 2: The future of the EU project".

⁶ "Impact of nationalist/populist policies on the funding of South American pension schemes: the current status quo and proposals for reform".

2. Notwithstanding the progress made at COP 26, there is now an increasing risk that, in the light of the energy crisis and the linked cost of living crisis, states parties will for domestic reasons slow progress towards ambitious goals agreed in Glasgow.
3. The criticism that the EU has suffered, namely, its ineffectiveness in the face of populism may be partially due to a problem of communication with citizens that is exploited by populist movements.
4. It is not possible to conclude directly that nationalism is bad or that working together (as in the case of supranational institutions such as the EU) is good. We can, however, conclude that radical expressions of nationalism such as populism can be damaging to society, should therefore be brought to wider critical attention, and subjected to full analysis.
5. Furthermore, we should be aware that these destructive forces feed on the poor communication by institutions such as the EU or, more generally, on ineffective communication of policies.
6. For their part, supra national institutions and national governments should respond with humility especially where fault lines in their policy making process have been exposed, for example, perceived overregulation which leads to the suspicion that the EU seeks to encroach on national sovereignty. That, in turn, leads to populist attacks because loss of sovereignty is a central tenet of populist thinking even if that alleged loss is a direct result of governmental and parliamentary action, as in the case of Brexit.

SPECIFIC CONTRIBUTIONS AND ISSUES RAISED BY THE DIFFERENT PIECES OF ANALYSIS OF THE CONGRESS

These short summaries are not a substitute for consideration of the full analyses which are presented in the conclusions reached in the papers that are published below.

A new and fairer globalization (Full document on page 37.)

To understand not only the rise of nationalism, but also of populism, it seems crucial to understand how **globalisation** has developed. This contribution to the Congress describes the process of globalisation of the world economy, the impact of this process for the economies in Europe and the US and, in particular, the distributional effects of such trends. It examines how different social groups were exposed to, and affected in their identity by, the globalisation of the economy, thus fuelling the re-birth of **nationalism and protectionism**.

The analysis clearly touches on the cross-cutting themes of the conference, in particular the debate on how best to regulate in the face of the possible excesses of market liberalization that have been linked to (or promoted by) globalisation. Specifically, the analysis raises the question of whether **more or less regulation is needed** to meet the public interest or whether **self-regulation** might be adequate.

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At the EU level, this contribution encourages the EU to pursue the objective of "better regulation" and not necessarily "more regulation", while respecting the principle of **subsidiarity**. Achieving this objective of "better" and not necessarily "more" regulation is, in any case, a slow process, which has deep **cultural roots in the EU institutions tasked with developing the Union**. This cultural drift used to lead to the idea that the solution was always to pass more regulation, whereas effective action might have required less, or even no, regulation.

This debate invites fuller analysis of how to measure **regulatory burdens**, that is, the cumulative weight of regulation. Moreover, once again, it is necessary to delve into the necessary analysis of whether the regulation effectively adopted (and the policies that it implements) are adequately communicated.

The future of the EU's economic proposition in light of looming economic populism: a case for an endogenous response (Full document on page 53.)

This contribution to the Congress raises two current but relevant questions for the future of the EU: What has led the European population to disaffection and dissatisfaction with EU policies? What can be done to keep populism in check?

The answers and conclusions to these questions certainly connect the analysis to the other contributions of the conference:

- i) On the one hand, even though the EU may have been able to detect the underlying cross border problems suffered by society, it can be argued that there has been a failure to communicate (connect) the policies developed by the EU with the population. This is of course as much an obligation on the governments of Member States as on the EU itself. Wherever the primary fault lies, this has opened a space in which it might appear that the EU was interfering in areas of policy better left to Member States and so populism has been able to grow. Therefore, for the future, beyond achieving better regulation in practice, it seems necessary for the EU to make an effort to **reposition** its thinking and its proposed solutions and develop a better **communication** strategy to explain them.
- ii) The contribution also addresses **inequality** and identifies it as another of the drivers that allows populism to succeed, which is undoubtedly consistent with contribution c).⁷
- iii) As in the case of the contribution on **globalisation**⁸, the EU will have to consider in the future whether it should limit its action to fewer areas and perhaps focus more broadly on others, such as environmental and climate change policy. The development of the "Next generation EU" programme, which may allow the EU to be better understood and, in turn, better regarded, is undoubtedly another great opportunity for the **EU's future**.

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⁷ "Populism, inequality, and economic growth".

⁸ "A new and fairer globalization".

- iv) At its heart, the EU needs to address economic populism by putting citizens at the centre of policy development by developing ideas which citizens value. That should include the better application of core principles such as subsidiarity and solidarity.

Populism, inequality, and economic growth (Full document on page 78.)

Populism often has its roots, and in turn the arguments to support it, in conditions of **inequality** within a society. This contribution to the Congress demonstrated that economic inequality has increased in many western countries in the last few decades, though the timing and extent of the rise of inequality varies. As mentioned, rising inequality is one factor in the recent growth in support for populist political parties, who argue that there are simple solutions to economic problems - these are frequently attributed to external organisations or to the perceived impact of disfavoured groups such as **immigrants**. In the specific case of the UK, inequality between the richer and poorer regions of the country may have been one of the reasons for the success of the **Brexit campaign**.

The analysis of inequality touches on other issues with major economic policy implications, such as taxation, the functioning of labour markets and competition. Reforms aimed at reducing inequality clearly have implications for **redistribution**.

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The analysis of inequality has obvious links with the other subjects analysed by the congress and its cross-cutting issues. For example, the debate on the importance of **communication**: the political response to inequality by the deployment of technocratic reforms without good communication to the population and without effectively involving them in the process may have been one of the EU's weaknesses. If the European (and specifically the British) population could not understand the measures adopted, the question "**What has the EU done for me?**" will be perpetuated.

Constitutional, legal and governance questions in the context of nationalism (Full document on page 109.)

The contribution was primarily of methodological interest in that it discussed and delimited the concepts of "**nationalism**", "**populism**", and also other concepts of great relevance in the European debate, such as the principle of "**subsidiarity**". These definitions allow for a proper debate from a **legal point of view** and were used horizontally throughout the congress.

On the other hand, the contribution analysed one of the expressions of populism, namely its interest in controlling both the ordinary judiciary and constitutional courts at the national level. More specifically, this discussion was exemplified by the best-known cases of populism at the European level, seen from a "country" perspective: **Hungary** and **Poland**. In both countries, populism advanced this agenda of judicial control in a similar way (although in a more advanced form in the case of Hungary).

The working group discussed possible solutions and measures put in place to confront these situations, such as the **suspension of countries' voting rights** or the withdrawal or withholding of European funds.

More specifically, the desirability of adopting a **model statute on judicial independence** was also discussed. Specifically, it was discussed how in some countries, while the choice of the members of a high court may be a political decision, potential candidates are chosen by a non-political committee. That is, the selection process of judges should be verified by independent selection committees or agencies. Among good practices that could mitigate the possible interest of nationalism in controlling the courts, the practice of extending the term of office of high court judges until retirement age or making it more difficult to remove them from office was also discussed.

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Nationalism and populism at the national level (Full document on page 126.)

This working group highlighted that the construction of the EU has been based on a process of "**denationalisation**" of member countries since the 1970s, ceding power to the European institutions and pooling competence in respect of different subjects and policy and operational initiatives. It also recalls that, coincidentally, it has been common to observe a process of successful "**decentralisation**" of these same countries towards sub-national entities.

These two processes have recently been in crisis partly due to the tension generated by populist movements of various natures and manifestations. For example, there is a risk from the regional (or decentralised) perspective in that sub-national entities might demand their **independence**. It should also be noted that these movements are often faced with the reality that large proportions of the population do not agree with independence.

At the same time, the decentralisation process has also been challenged by another manifestation of populist movements: those that are centralist. The "federal" model, therefore, could be in trouble to provide solutions.

The working group advanced possible solutions by focusing on the idea of "**consensus**" **and its different strands**: consensus on the values and goals of a society, consensus on the "rules of the game" and consensus on political action. This also makes it possible to discuss the usefulness or otherwise of referendums as a way of finding solutions.

The question whether a referendum on independence is a useful way to respond to nationalist ambitions has also been addressed. A referendum ought not to be a "winner takes all" model since (see above) the probability is that many citizens will have voted against independence. Therefore, such options as a super majority will need to be considered. Moreover, as is now happening in Scotland, the enabling legal framework for calling a referendum must be respected.

[Impact of nationalist/populist policies on the funding of South American pension schemes: the current status quo and proposals for reform \(Full document on page 133.\)](#)

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Participants at the Congress analysed the situation of the pension systems in Latin America. From a technical point of view, the analysis showed that the individual capitalisation systems that operate in Latin America are better able to face demographic change than pay-as-you-go (PAYG) pension systems, if long-term sustainability is to be preserved. On the positive side, the experience of the last 40 years of reforms shows that pension reforms seem to have been conducive to economic growth. However, the analysis also shows that this is a difficult area of reform: **pension reforms have faced numerous political, institutional, and lock-in constraints as a consequence of the development of the COVID-19 pandemic.**

From the point of view of the central theme of the conference (nationalism and populism), it has become clear that populism can hinder both the debate on pension reforms and the actual implementation of these reforms. This jeopardises their potential positive effects. As mentioned above, a clear example of the difficulties in the debate has been the development of the COVID-19 pandemic, which has fuelled populist arguments, for example, by permitting the premature withdrawal from pension funds to meet the short

term needs of the population in two South American states without adequate recognition of the need to protect the stability of pension funds in the longer term. In general, beyond the context posed by the pandemic, it is necessary to remember that pension reforms require policy makers to address sensitive issues such as the **informality** of economic activity in some South American states or **poverty**.

Finally, it should be emphasised that the debate on pension reforms has implications for the larger debate on **regulation** and is also particularly relevant for Spain, given its preferential relationship with Latin America.

EU, COVID-19, and Nationalism: Legal Aspects (Full document on page 155.)

As in other contributions⁹, the relationship between populism and inequality plays a central role in this case. More specifically, noting the relationship between **inequality** in society and the need for fair **access to healthcare**, this contribution specifically analysed the main responses of the EU to the COVID-19 crisis during the first two years of the pandemic period.

Among the positive achievements of the EU, it may be concluded that the EU eventually was capable of setting up a common action plan in relation to the common EU strategy for procurement of COVID-19 vaccines. The adoption of a Recovery Plan appears in hindsight to have been a historically outstanding achievement. At a regulatory level, it can also be concluded that having a European Medicines Agency (EMA) has been an asset for European countries.

That said, some areas for improvement remain. There is also still an important question to be answered. In terms of areas for improvement, it is necessary to highlight the high dependence on third countries in terms of **technology and vaccine production**. At the regulatory level, it seems necessary to consider a **common health data policy** and it seems appropriate to work on a **common bioethical framework** for the EU. Finally, a big question remains: More can be done to show that the EU can do more for its citizens? In this sense, an extension of EU powers in the healthcare field could be justified.

⁹ "Populism, inequality, and economic growth" and "The future of the EU's economic proposition in light of looming economic populism: a case for an endogenous response".

Nationalism in the context of the Covid 19 pandemic: Nationalism, EU, and health: from common framework to language through the experience of the pandemic, and Knowledge, science, and data in times of Coronavirus (Full document on page 165.)

- a) There exists disaffection and dissatisfaction with EU policies which have, in part, been responsible for the growth of nationalism and populism.
- b) A question for consideration by the EU authorities and by the Member States is how to build on the way that the EU has collectively risen to the challenge of the Covid pandemic. After a faltering start by the EU demonstrating a lack of EU solidarity, not least in respect of disproportionate intra-EU border closures, the Commission and the Member States commendably raised their game in relation to a common procurement regime for vaccines and in the development of the Covid Recovery Plan¹⁰.

The construction of common health policies as an antidote to the growth of populism

- a) Participants at the Congress highlighted the need to rethink the question whether EU citizens would benefit from a new framework for common health policies. This was not a criticism of the way in which national health systems worked although, in reality, some Member States are able to deliver a higher standard of healthcare than others.
- b) The case for a common framework arguably arises from the concept of EU citizenship. EU citizenship cannot be truly said to have matured into a meaningful reality unless there is further concerted action in the healthcare field. Yet given the current allocation of competences and the costs of radical healthcare reform, the evolution of thinking is necessarily constrained. Even so, it is reasonably clear that citizens already consider that health protection should be central to the EU's mission. The pandemic has arguably raised expectations since it has become clear that elimination of the virus is not a sustainable policy in the short to medium term.

¹⁰ See Paper on EU, Covid-19 and Nationalism: Legal Aspects by Professor Neergaard

Cross-border cooperation and collaboration have become more important than ever.

- c) It is suggested that there is scope, case by case in the healthcare field, for developing a minimum standards regime to guide the approach of Member States. By contrast, it is not suggested that there should be a harmonised regime in areas of policy on healthcare.

Towards a common bioethical framework in the EU: the internal dimension within each Member State

- a. The common procurement regime which was developed during the pandemic was one of the greatest successes of the EU in recent years. But it was not matched by intra Member State action, for example, in the context of the use of resources. Where a pandemic or other serious health catastrophe occurs, the use of resources must be planned, not only on the basis of scientific criteria but must also be grounded on ethical principle and the rule of law. Ethical considerations, for example, should play a seminal role in the prioritisation of access to vaccinations.
- b. Lessons have already been learned and show the scope for cooperation and solidarity in the EU and beyond. After all, pandemics and serious viral diseases are unlikely to respect national borders.
- c. In the UK, for example, in 2020, the then UK Prime Minister commissioned a report into the reasons why COVID 19 was having a disproportionate impact on ethnic minority groups. The report (3 December 2021) concluded that “the main factors behind the higher risk of COVID 19 infection include occupation (particularly for those in frontline roles such as NHS workers), living with children in multigenerational households, and living in densely populated urban areas with poor air quality and higher levels of deprivation”. The most significant measure to protect ethnic minorities was the development and rollout of the vaccination programme. But that was not enough since vaccine take up was lower in the affected groups. Illustratively, as a matter of good government and the application of ethical principle, strong efforts were made ahead of the second wave of COVID to use a public information campaign to build trust with ethnic minority groups in vaccinations.

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- d. The challenges in the growth of populism require innovative thinking in response. Participants have asked FIDE Fundación to consider the use of their ideas to influence future EU policies on health protection which may provide part of the answer to the chorus of complaints encapsulated in the question: “What has the EU done for us?”

Knowledge, science, and data in Coronavirus times

- a. The pandemic exposed the “importance of science and the technological development that emanates from it”¹¹. The scientific communities in the EU and beyond already cooperate across frontiers. Thus, Chinese scientists “quickly posted the genomic sequence of the SARS-COV-2 virus on ...a widely available data-sharing platform: this should be both the scientific norm ...” That does not mean that there cannot be healthy competition among research scientists and pharmaceutical entities. Nor does it mean that governments should not invest in research and create the conditions in which research can be turned into pharmaceutical developments which will benefit the economy of a given state. To that extent, nationalism has a reasonable justification. But there is evidence that nationalism can be a barrier to cross-border scientific collaboration.
- b. The use of Artificial Intelligence and the proper exploitation of Big Data are pivotal to scientific advancement to combat viral disease. This is a challenge of universal application. But in general, citizens cannot keep up with the pace of change. Intentional disinformation, as is argued elsewhere in this report, has been inimical to scientific progress. But ignorance too is a challenge. Therefore, the scientific community and governments need to do far more to explain the diseases in question and persuade their citizens of the value of the use of data in research. Moreover, on any view, there must be effective safeguards to protect personal data.
- c. The participants at the Congress noted the growth of digital sovereignty, stemming in part from the European Commission’s paper “Digital Compass for 2030 – the European way for the digital decade”. Its objectives include the development of European digital sovereignty and the need to reduce dependence on countries outside the European

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¹¹ See paragraph “1” of Knowledge and Technology society of the paper on COVID-19 and of the Oxford record.

framework. Questions therefore properly arise about the levels of protection that will need to be applied in respect of data when collaborating across frontiers. Participants noted the differing interpretation of basic concepts such as ownership of health data and a variety of solutions arising in several Member States. Researchers need to be cognisant of such differing national interpretations of the applicable EU legislation; of the applicable national rules applying to their research; and of the applicable rules applying to international transfers of data for use in research.

- d. There is more to be done in this regard since, without access to data of sufficient quantity and quality, the beneficial use of Artificial Intelligence will be adversely affected. The dialogue between scientists, the pharmaceutical industry, citizens, and governments will also need to consider difficult question about how to deploy the better use of proportionate underpinning regulation to protect basic rights of citizens, while nurturing scientific progress for the benefit of the EU and the global community beyond.

Challenges to the EU: Refugee policy in western Europe in a 21st century nationalist context (Full document on page 194.)

This contribution to the conference discussed EU refugee policy (and, more generally, EU humanitarian policy), which is another of the great challenges posed in the current national and international environment, having already been a significant policy challenge in recent decades. At its heart, many critics fail to distinguish adequately between economic migration and refugees, properly so called. That failure can feed a hostile populist response to both classes of people.

It is a problem of particular relevance in the context of the crisis provoked by the invasion of Ukraine and, as in the other policies analysed at the conference, the effectiveness of the policy response may depend on an adequate treatment of the tension provoked by nationalism.

The contribution highlights that the main response has been the policy of externalisation and that it has performed poorly. Externalisation involves the relationship of EU countries (which would be the final destinations of asylum seekers and refugees) with third countries, which help prevent these migrants from arriving in EU countries. The article reviews the

evolution of these policies since 1990 (Schengen Agreement) but also discusses possible alternatives to externalisation.

Regarding the interrelationship between refugee policies and, in particular, the externalisation strategy and the central theme of the conference, nationalism and populism, the analysis concludes that the rise of nationalism and populism could exacerbate the externalisation policy. This is because a narrative has been constructed that emphasises the link between immigration and economic and security problems in EU countries.

On the other hand, this contribution provides a specific analysis of how the case of the Ukrainian invasion could change the perception of refugee policy. It concludes that the Ukrainian situation is perceived as very specific and will therefore not necessarily lead to a general change.

Misinformation and free speech in modern democratic societies (Full document on page 206.)

The availability and use of **mis/disinformation** in the modern digital environment are capable of having an adverse impact on public understanding in respect of many areas of profound policy concern. The question has been raised in relation to climate change, COVID (particularly vaccine hesitancy) and nationalism/populism. If, as a result, public trust is unreasonably and unfairly eroded in public institutions, expert groups, and governments, that may undermine democracy and society itself.

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Yet in developing solutions to the problem, it is essential to balance the competing demands of, on the one hand, freedom of expression and, on the other, the need to ensure that protective or counter measures are taken to address content which, if not corrected, could cause substantial harm or amount to a crime. But regulation should be adopted as a last resort, only where strictly necessary; and should be proportionate.

At the outset, it is important to clarify what is meant by the pivotal concepts that underpin the debate on mis/disinformation. Two working definitions are:

- Misinformation - when information is known to be false by the person sharing it, is intentionally shared, but in circumstances where no harm is intended.

- Disinformation - when information is known to be false by the person sharing it and is intentionally shared to cause harm or where the person sharing it is reckless as to the harmful consequences.

As an illustration of the complexities involved, mis/disinformation in the context of political argument runs the risk of a range of potential consequences. At one extreme, such as the pernicious disinformation leading to the Capitol riots, the circulation of disinformation led to harm to individuals and to property and might amount to a criminal offence. But for the most part, mis/disinformation is more subtle. It is clear, for example, that the former British Prime Minister's Leave campaign to persuade voters to back leaving the EU in pursuit of a populist, anti-EU agenda was riddled with lies or, at least, with reckless disregard for the truth. But it was intended to attain a nationalist political outcome, not to harm any individual. It may have led to a diminution of collective trust in parts of UK society. But it also created a new, alleged "truth" about membership of the EU (fake news), just as Trump supporters now believe that "the presidential election was stolen".

States themselves are frequently responsible for lies or untruths. Putin/Ukraine is a good example. There is no real debate in Russia since the Kremlin runs much of the media. But in most democracies, the best way to expose most political untruths is not regulating political discourse, but in objective debate, based on a reliable substratum of facts.

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Indeed, even in the context of scientific debate, objective challenge and debate are often a necessary precursor to sustainable outcomes. That should not be stifled. As Professor Kelly says in his foreword to the Royal Society's report on "The online information environment" (2022), "Science stands on the edge of error. It is a process of dealing with uncertainties, prodding, and testing received wisdom". Vaccine hesitancy, for example, if it is a serious concern, should be a matter for open debate based on verifiable data.

The authors of the Congress conclusions on this topic have considered a range of solutions. They reject the possible use of a liability model which would render on-line platforms subject to civil proceedings. Instead, the authors argue that there could be an obligation on on-line platforms to exercise a duty of care which would amount to a duty to assess risks and to mitigate the presence of illegal, false, or harmful content. In effect this would be a public interest duty. But this may be an unfamiliar role for online platforms. Moreover, it would require an oversight body which was independent of the state.

There is a particular challenge in determining the nature of the public interest duty and which type of content is illegal, false, or harmful. Given the cross-border nature of many on-line platforms and the need for consistency, the criteria will need to be set internationally even if, in dualist systems, the ground rules would need to be implemented in domestic law. Is there a case for codes of conduct to be agreed internationally?

Given the speed of events in the digital environment, these kinds of measures may not be swift enough to counter the harmful impacts of pernicious dissemination of mis/disinformation. Therefore, the wider use of fact checking websites has a major role to play. To do otherwise would run the counter risk of regulation and, in turn, unacceptably undermining freedom of freedom of expression.

Even the better use of fact checking websites is not a panacea for all ills. The authors believe that education of people is part of the solution. Urgent work needs to be done to prepare our societies to make informed judgments. This cannot be limited to school learning; it must be a lifelong learning model which responds to the dramatic speed of on-line dialogue and dissemination of mis/disinformation.”

[Net-zero will need huge investment, new technology, support for developing countries, and to overcome the blocking tactics of populists. How optimistic should we be? \(Full document on page 230.\)](#)

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This contribution discusses the possibilities of reaching the **Net-zero emissions target** by 2050, confronting this target with various risks, in particular those central to the congress, i.e., the risks arising from national positions and other geopolitical tensions such as the war in Ukraine. This contribution highlights the timeliness of the issues discussed at the congress for negotiating forums such as the UN COP26. The analysis reviews the EU's Net-zero agenda, as well as the tensions caused by the positions of different member states. It also discusses at length the positions of developing countries and other international actors, such as the UK and Japan.

In more detail, it is worth noting that there is widespread support from different countries for the goal of achieving net-zero emissions by 2050. On an optimistic view, the goal will be facilitated by technological progress (storing of energy), which will allow better use to be made of the energy generated by the sun and wind, and the price advantages of renewables over time. However, there is no guarantee of success, partly because of tensions

arising from national positions. The analysis of these risks places this contribution at the heart of the debate on nationalism and political tensions.

In terms of these risks, in the long term, developing countries blame developed countries of having historically high emissions and therefore call on them to contribute more prominently to the goal of reducing them. The contribution recalls that in this debate, achieving the target depends on today's emissions, not historical emissions, and recalls the EU's controversial move to impose a carbon tax on imports from certain countries that do not meet their targets. One year after the COP26, and against a difficult geopolitical background, COP27 at Sharm El-Sheik closed on the 20th of November with an agreement to provide "loss and damage" funding for vulnerable countries which have been most affected by climate change and disasters.

On the other hand, in the short term, the invasion of Ukraine has led to a reduction in Russian gas and oil imports in many countries, which has led to increased investment in renewable energy, but also in fossil fuels.

[The legal profession in England and Wales; how Gray's Inn fits into the legal landscape; why and how Gray's Inn values international collaboration \(Full document on page 240.\)](#)

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In a legal world in which lawyers are frequently asked to consider cross border issues, it is important to understand how other legal systems and their lawyers' approach problem-solving. FIDE Fundación values the opportunities at its international congresses to build that kind of understanding.

In 2022, Sir John Mummery, a distinguished appellate judge, provided the Congress with considerable insights into the structure of the English legal profession and the key tenets of legal professionalism and practice.

As for barristers, a specialist cadre in advocacy in England and Wales, each barrister must be called to the Bar at one of the four Inns of Court. Each inn is a mediaeval foundation. The Inns' functions include training and education of barristers. Gray's Inn is one of the four.

Populist leaders sometimes think of the judiciary and lawyers as together thwarting the will of the people because of their adherence to legal principle. Barristers are therefore taught to think independently and to be fearless in upholding the rule of law.

Sir John described how Gray's Inn connects with three themes of the Congress.

First the Inn is national in its origins, character, and core activities. But it is not nationalist. The Inn recognises “the mutual benefits of good international relations with other legal systems, cultures, and professions”.

Secondly, the Inn is not political either in a populist or party sense. That said, the Inn has many politicians among its ranks. But the politicians are aware of the need to avoid party political polemic in their advocacy, whether in court or in providing advice.

Thirdly Gray's Inn has an identity. In pursuit of that identity, it is committed, inter alia, to upholding the rule of law nationally and internationally. Politicians come and go; the inns of court are a bedrock of stability, while being open to change where change is needed.

With so many senior judges and practitioners among its members, the Inn is able to influence others through soft power. It is perhaps no surprise that King Charles III and the Queen Consort are honorary benchers of the Inn.

This does leave Gray's Inn open to the criticism that it is an elitist institution. But as Sir John, a former Treasurer, says, it is essential to listen to thoughtful and intelligent critics patiently and with an open mind. Just as in all walks of life, the worst mistakes are made by people who are so complacent that they think that they do not need to take any notice of what other people think.

CONCLUSION

Since the Congress took place, there have been a number of general elections in the EU. In September, the Sweden Democrats, became the second largest party in the country, with more than one Swede in five voting for it. In Italy, Giorgia Meloni's right wing coalition came into power in October 2022. Although derived from the members of Mussolini's party, her ruling party (although not necessarily its coalition partners) regard themselves as pro-EU and pro-NATO. But they too are an anti-immigration party. The future is uncertain. The Congress remains a timely reminder that nationalism simmers beneath the surface in an increasing number of democracies.

Readers will make their own judgments about whether nationalism and, more specifically, populism are positive forces in society. The published papers will show that nationalism and populism are complex topics and do not lend themselves to simplistic analysis. The papers will also show that policy making in the EU, while intended to benefit the citizen, seems remote. Frequently the problem lies in delivery of policy without adequate explanation for the citizen, leading to criticism, sometimes justified, that the EU has regulated with excessive zeal. The EU ought to build on its core policies such as (a) the promotion of the benefits of free trade, while preserving the interests of citizens and consumers and (b) the promotion of economic policies with a transformative social dimension, with citizens' interests at their core. No one pretends that a renewed approach to policymaking and its proportionate delivery at national level will address the concerns of citizens that supra national institutions can be overbearing or that inequalities will still exist in society. But if nothing radical is done, populism will grow and may inflict unquantifiable harm in European societies.

D. SCENE SETTER PAPER II FIDE CONGRESS AT OXFORD

The Russian invaders *"have no natural basis for normal life - so that people can feel happy and dream"*.

President Zelensky, 13 March 2022. Scene setter.

ABSTRACT

Nationalism has the potential to be a positive force. Populism, however, typically embraces an extreme form of nationalism. It is capable of resulting in damaging impacts, including mistrust of state institutions. This mistrust includes the judiciary. It encompasses protectionism and the imposition of tariff barriers to interstate trade, and hostility towards economic migrants and refugees. The Congress will address both the problems inherent in populism and the solutions which may be developed to address the concerns of citizens who believe that they have been left behind by supra national institutions and by national governments. Populist ideology is often disseminated through social media channels, where misinformation is rife. Nationalism is, for instance, an inherent part of the Russia-Ukraine conflict. As a result of the war, the prospects of meeting the Climate Change challenge in line with COP 26 outcomes will need to be re-considered.

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CONTEXT

1. In this brief introduction to the FIDE Fundación's Congress on Nationalism, Populism and Identities, my purpose is to offer a personal reflection on the debate that lies ahead. This is a synthesis of some of the ideas which are covered in the Congress papers, as well as new ones. I am grateful for the stimulating arguments in those papers. The Congress will itself discuss the competing views on several topics and then reach its conclusions. This narrative sets the scene. But it is not a summary of what each paper covers.



2. There are four elements to this scene setter:
 - a. aspects of the growth of nationalism and populism
 - b. aspects of ceding sovereignty to international institutions
 - c. Ukraine (national identity and sovereignty)
 - d. climate change.

ASPECTS OF THE GROWTH OF NATIONALISM AND POPULISM

3. To the extent that nationalism implies a strong sense of identity between the people and a nation state and their support for that state's interests, it is capable of being a positive force. Who would, for example, regard support for a national football side as a pernicious influence, provided that that support does not take an aggressive form such as xenophobic or racist chants by the host nation crowd? Even where nationalism finds its expression in a movement towards independence or secession or a federal constitutional system or devolution, it may be regarded as an affirmation of democracy so long as the constitutional mechanism to achieve any of those outcomes is (a) subject to a popular vote in line with each constitution and (b) delivers protection for the rights of the minority who "lose" the plebiscite.

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4. Populism, by contrast, is typically regarded as a more radical expression of nationalism. In some cases, populism is damaging. It is best discernible in the way in which politics in any given state are shaped by this form of radical thinking:

A. populists are opposed to the laws, values or institutions which prevent an elected government from doing what they were elected to do. There is often a mistrust of the state's institutions which are considered to be elitist. In the UK, when the UK Supreme Court held in the Miller case that the Government could not initiate the process of notification of exit from the EU under Article 50 without an enabling act of parliament, the judges were subjected to disproportionate and misconceived criticism such as in the Daily Mail (a major national daily newspaper) headline calling the judges "enemies of the people". It is ironic that,

far from negating the Brexit vote in 2016, the judges were actually requiring the Government to seek an enabling act of the UK legislature which represents the people. The Mail headline was a headline which was calculated to misinform.

B. (i) populists are typically represented as radical right-wing although that is too simplistic a categorisation. Globalisation, for example, has resulted in significant trade benefits. The received wisdom is that liberalised trade is beneficial. But there are usually winners and losers, and liberalised trade can result in a diminution of social cohesion. Why? Some national industries may suffer from increased competition as a consequence of trade liberalisation. This may result in demands for protectionism to avoid job losses or for increased tariffs on imports or in environmental damage where regulatory standards are allowed to fall in order to increase competitiveness.

(ii) Populist politicians will frequently be "against" trade liberalisation in order to put their citizens' interests first - hence "America first". There may be calls for restricted immigration to protect jobs for nationals or demands to restrict the entry of refugees. Often this is associated with rhetoric which deliberately confuses economic migration with applicants for asylum who, like so many Ukrainian families, are fleeing a war-torn country in fear for their lives.

(iii) regional economic inequality in the UK was clearly a factor in the Brexit vote. That was, however, the consequence of domestic policy choices made by UK governments over many years.

(iv) where supra national bodies have a strong influence over the laws of a nation state, that is seen by populists as a loss of national identity and a lessening of national sovereignty. There is less attention paid to the reality of why sovereignty is ceded in the first place. Sovereignty is pooled in circumstances where joint action delivers greater benefits than individual state action is able to do. An example which rarely causes argument is membership of NATO even where a state's armed forces may be subject to orders from another state's officers. But, in the view of many populist thinkers in the EU, the EU has become too overbearing, with excessive power being wielded by its institutions, and too distanced from its

citizens. The principle of subsidiarity has had less relevance in an EU which is committed to greater integration and in an enlarged Europe in which a centrist approach to law-making is welcomed in the eastern states.

ASPECTS OF CEDING NATIONAL SOVEREIGNTY TO SUPRA-NATIONAL INSTITUTIONS

5. Covid nationalism is an illuminating case study. There has been considerable attention given to the successful vaccination effort in wealthy EU countries. National politicians inevitably give overriding weight to vaccinating their citizens. But the WHO has consistently warned that, in an inter-connected world, the pandemic will only end when everyone in the world is safe. The COVAX initiative is a commendable start. But, given the simmering demands of populism, when will the wider global interest be served adequately; and how?

6. The surrender (as populists see it) of national sovereignty to supra-national institutions has become a shibboleth. Yet the success of the Commission's roles in procuring vaccines for the EU, as well as in common procurement and distribution of other health resources, has been notable. If the pooling of sovereignty in a common cause was a diminution of sovereignty, it was the right thing to do in an emergency. It showed how the EU could work together in the national interests of Member States and their citizens. To respond to the mistrust that some EU citizens feel towards the EU, the Congress will also discuss whether the development of a common health framework would be beneficial. There are also questions about the value of sharing (subject to ethical and legal constraints) personal data and big data in pursuit of common scientific research, avoiding the risks of digital national sovereignty over information as each state seeks to outdo one another.

7. The growth of nationalism is not a new phenomenon. It unfolds insidiously. An example lies in the way that the UK media portrayed the EU over many years. Some criticisms were of course justified, for example, the way in which the Commission and the Court of Justice would frequently adopt an expansionist view of EU competence. But the complaints were exaggerated.

8. Another example is the **Factortame** case, now lost in the mists of time. Gray's Inn recently published an article about parliamentary sovereignty in the UK in which the author

analysed a crucial aspect of the Factortame case. The media reaction to Factortame was another example of the drip feed effect where, by accretion of misconceived criticisms, misconception becomes truth.

9. The litigation which began in December 1988 is a leading case in EU and UK constitutional law. Its significance for Spanish readers is that, at the heart of the litigation, a group of Spanish fishermen (the claimants) were able to show that the UK authorities had unlawfully breached their rights of establishment by restricting access to UK fishing quotas by the adoption of new nationality restrictions to register fishing vessels in the Merchant Shipping Act 1988. Catch quotas were linked to fishing vessels registered on the national fishing vessel registers. The 1988 Act was passed to address the problem of quota hopping where entities of one EU member state bought registered fishing vessels of another state to enable them to land fish against the quota allocated to the other state.

10. In 1988, therefore, nationality restrictions had been introduced as a sovereign act designed to limit access to the UK fishing vessel register, long regarded as the prerogative of any government. But it could not be done at the expense of treaty freedoms under the EC Treaty which, if directly applicable, took precedence over national parliamentary legislation. It seems self-evident now. It wasn't then.

11. Fishing rights have had a totemic importance, both in the UK and in other states such as France. The Brexit negotiations demonstrated that, far from bringing back legislative control in the fishing sector, the Johnsonian nationalist promise to the UK electorate at the time of the Brexit referendum, was a chimera. The rhetoric has now exceeded the reality of the Brexit negotiations. In the new consensus, fishing rights had had to be traded for other gains in the negotiations. The outcome pleased neither the UK fishing communities nor their French counterparts.

12. The litigation has also had perennial significance for another UK constitutional doctrine, namely, that Parliament is supreme. The 1988 legislation was an act of the sovereign will of the UK Parliament. But the Spanish claimants argued that, if the legislation were allowed to stand while the fishing issues were decided by the Court of Justice, the new register under the 1988 Act would survive in the interim. Their businesses would therefore be irreparably harmed without, under EC Law at that time, recourse to damages. Moreover, at that time, the national courts could not grant an interim injunction to suspend the

Merchant Shipping Act. But the Court of Justice decided that, in order to provide full protection for EC Law rights, the national courts should have power to suspend UK primary legislation.

13 This was portrayed by parts of the UK media as the Court of Justice rewriting the British constitution. That was wrong. In another headline at the time, a national newspaper banner headline said: “Spanish Fishermen 1: British sovereignty 0”. The footballing analogy was amusing; underlying it, however, there lay a nationalist signal. Yet blaming the judges was an unsurprising occurrence as a nascent nationalism grew. As Lord Bridge said in his judgment in the UK House of Lords, the UK courts were simply being asked to suspend primary UK legislation in pursuit of powers conferred by the UK Parliament itself in 1972 at the time of accession.

14 The more recent reaction in the media to the **Miller** litigation (see above) was the continuation of a process of antipathy to the judges traceable back to **Factortame**. This was the kind of misinformation which, in the digital age, we might regard as misleading and not part of genuine political discourse. The Congress will be discussing misinformation too.

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UKRAINE, IDENTITY, AND NATIONAL SOVEREIGNTY

15. The Congress, whatever happens in the two weeks following publication of this scene setter, will happen in the shadow of world events. It is impossible to predict with certainty how the Ukraine crisis will affect our futures. Here are three observations to consider.

16. The combatants in the Ukraine war have fundamentally opposing philosophies. Russia is determined to increase its hegemony in the Eastern Slavic states. It would be right to address its defence concerns as NATO extends its defensive shield eastwards. But nothing could excuse Russia’s unjustified attack on another state. The ferocity of the attack on Ukraine and the targeting of its civilian population has the potential to undermine confidence in International Humanitarian Law. There cannot be impunity for leaders of states which act unlawfully by egregious breaches of international norms. Whether it will be possible to do anything about it seems more doubtful. The International Criminal Court (ICC) Prosecutor has already begun some initial evidence gathering in Ukraine itself. But it will also be essential to produce credible evidence of a clear chain of command from the

politicians to the soldiers on the ground and the key player with access to intelligence information is the USA. The USA has signed the ICC Statute but has never ratified it. The US Senate has recently adopted a non-binding resolution encouraging international criminal courts to investigate possible Russian war crimes. Yet since, in the absence of extradition, the capture of alleged war criminals within Russia would pose insuperable problems for the ICC Prosecutor, it seems improbable that a prosecution will be brought anytime soon. There is an interesting contrast with what happened in respect of arrests in the Former Yugoslavia in order to bring suspects before the International Criminal Tribunal for the Former Yugoslavia. There, existed UN-backed peacekeeping forces, IFOR and SFOR. The forces had a Security Council mandate to support ICTFY in circumstances where law and order had broken down. Soldiers are not policemen; but there was scope under the mandate for military forces to carry out detentions and facilitate extradition to the Hague.

17. By contrast, Ukrainian forces and, more particularly, the Ukrainian people, have shown the strength of nationalism. It is common ground that they, in pursuit of a sense of national identity and a love of their nation, have fought the invader with considerable bravery. Whether Ukraine achieves its original ambition of joining NATO and/or the EU is a moot point; but their assertion of national sovereignty, even to the point of death, is a remarkable phenomenon.

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18. Just as significantly, the very EU countries which opposed the diaspora of Syrian refugees have demonstrated a revived commitment to the protection of humanity. Their generosity seems boundless. Poland and Hungary were in the vanguard of populist states when the Syrian refugee crisis erupted. Perhaps their hostility to accepting Syrian refugees is now outweighed by their generosity in speedily accepting, without question, the urgent need to welcome Ukrainian refugees unconditionally. The next challenge for the EU, already voiced by Poland, will be whether the EU as a whole will continue to collaborate in resettling refugees and whether funds will be made available to the front-line EU states.

CLIMATE CHANGE POST COP 26: RISKS FLOWING FROM THE UKRAINE WAR.

19. The Congress will consider the way in which Sri Lanka has addressed the climate change challenge. That will provide unique insights from a South Asian perspective. There will also be debate about the challenge of attaining the goals of COP 26. Some commentators would argue that the global consensus at COP 26 is now in jeopardy. As the former Secretary General of the UN, Ban Ki Moon, has warned, given how the availability of oil and gas will be affected detrimentally by the sanctions imposed on Russia, it would be wrong to seek greater supplies of fossil fuels. Yet that is what the UK currently seeks from Saudi leaders. The present UN Secretary General was reported in the Guardian (22 March 2022) as saying that: “As major economies pursue a ...strategy to replace Russian fossil fuels, short term measures might create long term fossil fuel dependence and close the window to 1.5C”.

CONCLUSION

20. The FIDE Congress will have a unique opportunity to bring together experts from several disciplines to address the challenges of populism, Climate Change in the aftermath of COP26 and Misinformation. Given the scale of what lies ahead, the hope is that FIDE Fundación will succeed in developing ideas and proposals to address those challenges.

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E. A NEW AND FAIRER GLOBALIZATION

ABSTRACT

This Chapter describes the process of globalisation of the world economy, the impact of this process for the economies in Europe and the US and, in particular, the distributional effects of such trends. It examines how different social groups were exposed to, and affected in their identity by, the globalisation of the economy, and fuelling the re-birth of nationalism and protectionism.

The Chapter describes these developments, but also discusses the causes of these changes and the negative implications of protectionists policies for economic growth. It also contains recommendations for a new and fairer globalization by considering how to move back to a multilateral world, where trade across regions and, in particular, between the North and the South is re-energised while ensuring that the benefits of such a multilateral order are better distributed between people and better respecting sustainable development goals than they were in the past.

1. INTRODUCTION: THE FACTS

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Four dominant issues must be considered: the distributional effects of Trade, offshoring trends, immigration flows and movers versus stayers.

The idea that trade liberalization, as one of the pillars of globalization, benefits society and the economy is deeply rooted in economic thinking. The advantages of international trade have been highlighted in classics such as *The Wealth of Nations* of Adam Smith and *On the Principles of Political Economy and Taxation* of David Ricardo, just to cite two founding fathers of trade economics. The idea that trade (and, consequently, trade liberalization) is beneficial for nations has been pervasive in the development of international trade law, from early bilateral trade agreements and friendship, commerce and navigation (FCN) treaties during the 19th century up to the establishment of trade multilateralism during the 20th century (notably, with the creation of the Bretton Woods organizations, the adoption of the General Agreement on Tariffs and Trade of 1947 (GATT 1947) and, much later, the creation of the World Trade Organization (WTO)).

This notwithstanding, it seems clear that trade liberalization does not leave everyone better-off. Indeed, by liberalizing trade, some national industries suffer from increased competition with negative effects for the economy and workers. As pointed out by some scholars, not everyone will be better off under trade liberalization, and the protection of special interests, among others, may lead countries to adopt protectionist measures¹², to environmental damages, shortages of supplies, or placing essential facilities in undesirable or abusive countries. More specifically, increased competition (following trade liberalization) may cause the loss of jobs in some sectors.¹³ Some recent studies on the effects of international trade on the economy of the United States have highlighted that the economy as a whole has benefitted from trade but these benefits have been unequal.¹⁴ Notably, households with different income or wealth levels have been affected differently, as trade liberalization and increases in trade affect not only goods and services offered (and their prices) but also labour markets.¹⁵

As a result, it has been noted that, while international economic institutions have been built on and have promoted the principle of “growing the pie” and “raising all boats”,¹⁶ the advance of trade liberalization’s opponents may be explained precisely in light of the absence of trade liberalization’s promised economic benefits for many.¹⁷ Along these lines, already in the 1990s a number of studies had stressed that the economic and technological changes brought about by trade liberalization would affect some categories of workers and open the door to political backlash against free trade.¹⁸ And navigating popular discontent, populist politicians have been among the strongest trade liberalization opponents.

With some caveats and important nuances, these trends have concerned both developed and developing countries alike. The general, progressive lowering of tariffs has been accompanied by a technologically driven higher efficiency in supply chains and lower

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¹² P. Van den Bossche, W. Zdouc, *The Law and Policy of the World Trade Organization: Text, cases and Materials*, (Cambridge University Press: Cambridge, 2017), pp.25-26.

¹³ N. Pavcnik, *The Winners and Losers from International Trade*, International Institute for Strategic Studies (23 January 2019), <https://www.iiss.org/blogs/survival-blog/2019/01/winners-losers-trade>.

¹⁴ D. Carroll, S. Hur, *The Winners and Losers from Trade*, Federal Reserve bank of Cleveland – Economic Commentary 2019-15 (30 September 2019), pp.1-2, file:///Users/gabrielegagliani/Downloads/EC_201915.pdf.

¹⁵ *Id.*, p.2.

¹⁶ H. G. Cohen, *Editorial Comment: What Is International Trade Law For?* 113 *American Journal of International Law* 2 (2019), p.326.

¹⁷ *Id.*, pp.328-329.

¹⁸ E. B. Kapstein, *Winners and Losers in the Global Economy*, 54 *International Organization* 2 (2000), p.360.

transportation costs. This has led, in turn, to a massive offshoring of industrial and productive activities: since production costs in developing countries have generally been lower (due to generally lower labour costs and less stringent social and environmental standards to be complied with), lower tariffs have meant that goods produced abroad could be easily exported to developed economies. This offshoring trend has generated, however, a certain degree of economic insecurity in a number of industrialized countries¹⁹, and not only in these countries. Also, the massive off-shoring of industrial activities has been connected by some to deindustrialization processes in both developed and developing countries (a point which is, however, subject to debate in the economic literature).²⁰ It spurs new forms of domestic movements of population, and of immigration to countries and areas that are the winners of the new game, and these movements of population are creating major tensions in society, including between the movers and the stayers, both in the areas affected by economic insecurity and in areas that are the primary beneficiaries of trade liberalization. As a consequence, all these factors bring concern among both economic “winners” and “losers” groups on the preservation of their cultural identity. And these multiple tensions are fuelling populism and nationalism.

This notwithstanding, overall, concerns over the effects of trade liberalization for low-skilled workers should not necessarily lead to refuse trade liberalization altogether: as a case in hand, some studies show that high-skilled workers are more likely to benefit from offshoring and outsourcing.²¹ Besides, it should be noted that the current system of regulation of international trade does not represent the “only possible world”. As a case in hand, concerns on the effects of trade liberalization were expressed during the negotiations of the Charter of the International Trade Organization (ITO) (the s.c. Havana Charter) by the United Kingdom and Latin American countries.²² With the Havana Charter failing to be adopted, the GATT 1947 was kept as the Agreement enshrining multilateral rules on trade

¹⁹ W. Milberg, D. Winkler, *Globalization, Offshoring and Economic Insecurity in Industrialized Countries*, DESA Working Paper No.87 (November 2009), p.5 ff., <file:///Users/gabrielegagliani/Downloads/1597341761.7356.pdf>.

²⁰ S. M. Shafaeddin, *Trade Liberalization and Economic Reform in Developing Countries: Structural Change or De-Industrialization?*, UNCTAD Discussion Papers No.179 (April 2005), p.17 ff., https://unctad.org/system/files/official-document/osgdp20053_en.pdf.

²¹ H. Görg, *Globalization, Offshoring and Jobs*, in M. Bacchetta, M. Jansen (Eds.), *Making Globalization Socially Sustainable*, (International Labour Organization and World Trade Organization: Geneva, 2011), pp.21 ff., 36 ff., https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_144904/lang-en/index.htm.

²² A. Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press: Oxford, 2011), p.24, 27.

in goods. And while compared to the Havana Charter the GATT 1947 reflected a liberal vision of the world economic order, some scholars have highlighted that key Contracting Parties – notably the United States, the United Kingdom, and France – agreed on the possibility for them to intervene to promote full employment.²³

The international regulation of trade may have moved in a different direction from the ideas animating the GATT 1947, the WTO and its Covered Agreements being, among others, the result of the Washington Consensus of the early 1990s and its emphasis on open markets.²⁴ But the past proves that a different course and regulatory choices in the field of international trade and globalization are possible.

In this context, it may be worth mentioning the Lakner-Milanovic graph, otherwise known as the “Elephant Chart”, revising the global income distribution between 1988 and 2008.²⁵ The study carried out by Lakner and Milanovic shows that in the twenty years assessed, China was the country that grew the most, both in terms of average income growth and change in income inequality, and India also registered a positive growth, though slower. Moreover, interestingly, the study shows mixed results in Latin America, Europe (where some EU member States were among the biggest winners while others among the biggest losers) and Sub-Saharan Africa. The Elephant Chart has also led to conclude that there exist great differences, in terms of winners and losers of globalization, between social groups (elites, upper middle classes and middle classes, and the extreme poor). Nonetheless, it should be noted that recent studies have challenged some of the findings of the Elephant Chart.²⁶ In addition, changes in global income distribution may not be due only to trade and trade liberalization. Several factors of a different nature may concur to explain these changes. Notably, internal, and external political dynamics, internal and external economic

²³ Ibid., p.29.

²⁴ C. VanGrasstek, *The History and Future of the World Trade Organization*, (World Trade Organization: Geneva, 2013), pp.19-21.

²⁵ C. Lakner, B. Milanovic, *Global Income Distribution: from the Fall of the Berlin Wall to the Great Recession*, The World Bank Policy Research Working Paper 6719 (December 2013), <https://openknowledge.worldbank.org/bitstream/handle/10986/16935/WPS6719.pdf?sequence=1&isAllowed=y>.

²⁶ H. Kharas, B. Seidel, *What's Happening to the World Income Distribution? The Elephant Chart Revisited*, Global Economy & Development Working Paper 114 (April 2018), Brookings, <https://www.brookings.edu/research/whats-happening-to-the-world-income-distribution-the-elephant-chart-revisited/>.

and social changes, as well as problems and/or questions of any sort influencing may affect the income growth (or lack thereof) and (in)equality within a country.

The digital and technology revolution has expanded the ability of businesses to geographically disperse their businesses and to design and deliver goods and services in new ways. For example, the emergence of Internet-based platforms has created competition and, in some sectors, has eliminated traditional physical activities. Furthermore, it has also allowed completely new production methods crowds and open-source software projects that have allowed a significant reduction in costs.

From the observatory of companies and multinationals, sustainable supply chain design (Frota Neto et al., 2008; Koberg and Longoni, 2019) is a new emerging approach that arise in response to this situation and tries to embed economic, environmental as well as societal decisions in supply chains at design time. To make a step change when dealing with supply chain sustainability, innovative frameworks and governance for collaboration and sustainable supply chain planning are required, to support decisions and help organizations manage economic, environmental, and social efforts of their supply chains in a more collaborative way. This approach has been classified by UN in WIR as investments aimed at improving supply chain resilience (WIR, 2021). In the short-term resilience will not lead to a rush to reshore but will rather lead to a gradual process of diversification and regionalization therefore implying new investments. Policy pressures and recovery plans implemented by various countries and nations could influence the speed and breadth of this evolution.

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In any event, though for the time being no new trend is in sight, it is currently discussed whether the digital and technological revolution (thanks to the advent of the data economy, Artificial Intelligence (AI), 3D printing, Internet of Things (IoT)) will lead to re-shoring in the future²⁷ and to reducing current tensions between “winners” groups and “losers” groups, including on cultural identity.

²⁷ This is one of the forecasts of the World Trade Organization, *World Trade Report 2018 – The Future of World Trade: How Digital Technologies Are Transforming Global Commerce*, (WTO Publication: Geneva, 2018), p.107 ff., https://www.wto.org/english/res_e/publications_e/wtr18_e.htm.

2. THE RE-BIRTH OF NATIONALISM AND PROTECTIONISM

Since the end of the Cold War, the collective worldview presumed that democracy, free-market, and individual freedom had won the war of ideas for good. The first half of the 20th century was far too tough to object to that belief once and for all. As stated by Francis Fukuyama, “we had reached the end of history”. Recent events, however, have shown that there is still some history to be told, ideas should never have been underestimated. The concept of “us” as something naturally different from “them”, the collective identity entailing a village, a region, a nation, a group of people who share the same ideas and customs, remains one of the key elements determining the destiny of humans and societies.

A kind of tribalism (the stayers against the movers), in the form of populism and nationalism, has gained such strength that we can no longer be sure whether democratic cosmology is actually the last stage of our social evolution or just another step on the road, heading towards something worse, or simply different.? There are certain issues that are, beyond any doubt, perfect victims for populism, such as race, gender, sexual orientation, or national pride; and there is no better tool to divide humans between “us” (the victims) and “them” (the offenders): political correctness. Perhaps, Mr. Orwell should have warned us that his was not a fiction book. However, there is one topic that has an unrivalled cross-cutting nature in everyday politics: protectionism and commercial balance, as it touches everyone’s pocket. “Chinese products compete unfairly with ours”, “The EU weakens our export potential”, “America first”.

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There was a time where globalisation was appealing, progressive, attractive. But it is no longer so. Governments around the world are starting to shift back to protectionist trade systems by ending free trade agreements, exiting international organizations, and raising taxes on imports. The name says it all: “protecting” national economy should be a major concern for any government. A quick look around easily demonstrates this new reality.

Starting in the British Isles, UKIP-led Brexit supporters repeated a series of key (unproven) ideas that everyone should firmly believe in, including that the EU stole UK’s sovereignty in trade deals, which means a reduction in exports. The legal consequences of this wave are known to all: the UK is undergoing the biggest change of legal system that any European country has ever experienced in the 21st century. Will the UK be able to adapt their exports to a new system based on bilateral relationships?



On the other side of the ocean, Donald Trump announced that one of his main foreign policy action lines would be a firm commitment to US industry, meaning that imports were to be sharply curtailed in favour of domestic trade, hitting the EU and China with millions in direct losses. These were the origins of the so-called trade war, where custom tariffs can play the role of guns and bombs, without bloodshed.

Since the beginning of 2018 the Trump Administration adopted a more belligerent tone in trade policy: it increased tariffs on Chinese imports worth 250 billion dollars. In 2018, the US imposed tariffs sequentially on three “lists” of goods from China, targeting first \$34 billions of annual imports, then \$16 billion more, and finally an additional \$200 billion²⁸.

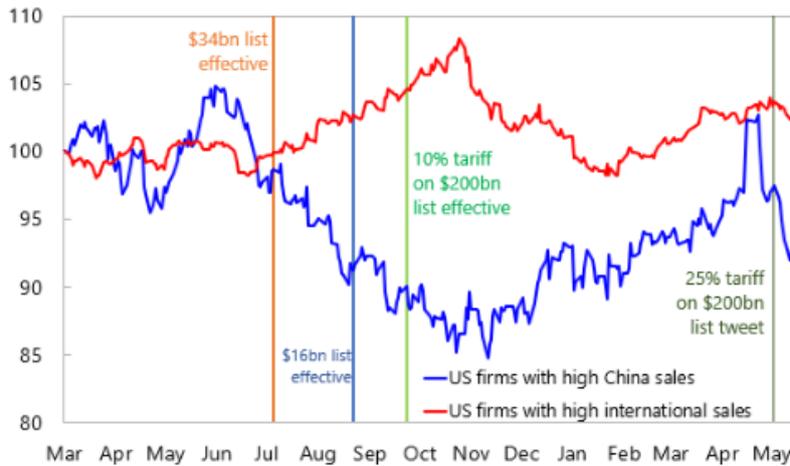
Those tariffs were largely passed to US consumers, while others were absorbed by importing firms through lower profit margins.

The impact on US producers with significant exposure to Chinese markets was also captured in stock market valuations. For instance, the equity price performance of US companies with high sales to China underperformed relative to US businesses exposed to other international markets, after tariffs linked to the \$34 billion retaliation list by China were implemented.

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The gap narrowed at the beginning of 2019 and reopened again after the US tariff increase to 25 percent on the \$200 billion list. (Chart 1)

²⁸ <https://blogs.imf.org/2019/05/23/the-impact-of-us-china-trade-tensions/>



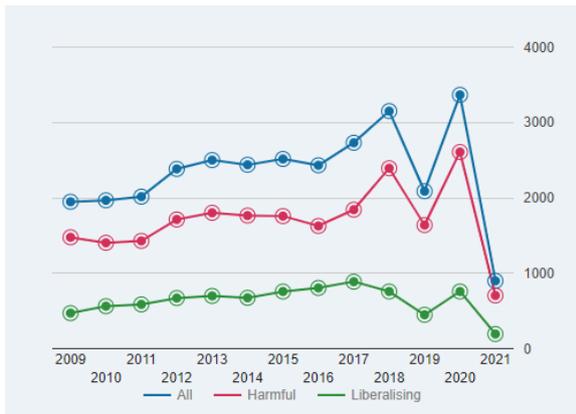
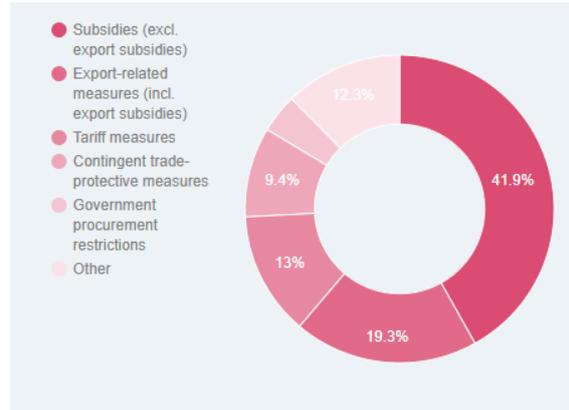
Sources: Bloomberg L.P.; and IMF staff calculations.

In net terms, estimates also suggest that the positive effect on the economic activity is less than the direct negative impact. Very often, foreign countries that have been the subject of the tariff raise tend to respond by imposing similar measures. As a result, global trade has been affected by this distortion as shown in the Global Trade Alert Database ²⁹.

According to data from this database encompassing traditional and non-traditional trade measures, the number of new discriminatory actions announced by G20 economies has risen steadily since 2012 and surged further in 2018 (see charts below showing the number of interventions per year and the type of “harmful” interventions). Anti-dumping measures and import tariffs were the two most widely used instruments, together accounting for around 30% of all of measures imposed. The use of indirect measures, such as state loans to exporting companies, has also increased gradually.

²⁹ https://www.globaltradealert.org/global_dynamics

By 2017 more than 50% of exports from G20 countries was subject to harmful trade measures, up from 20% in 2009. Accordingly, trade growth has decelerated more sharply in those sectors in which extensive discriminatory measures have been adopted than in sectors that have benefited from trade liberalization.



As shown in the chart above, the number of interventions in 2021 has decreased significantly. Biden election in the US created a wind of hope to revive the [values of multilateralism](#) and while that could be true in certain areas, it is not in trade. The stance of the US authorities has not changed, just the rhetoric, and authorities are working on alternative ways to counter China ³⁰. An

example of this is the EC [regulation](#) to address distortions caused by foreign subsidies in the single market, which builds on the 2020 FDI screening mechanism and the aim to safeguard the EU industrial policy.

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Research from Caixabank³¹ published in July 2019 forecasted a GDP growth decline between 0.3% and 0.8% depending on scenarios of medium and high tariffs.

What are the true causes of these dangerous trends, that can also prompt a change in paradigm? Populism and Nationalism are nothing but expressions of unfulfilled egos and unsuccessful government social and economic policies but built-in part on legitimate concerns. We have a duty to show that protectionism is merely a regression of rights and a

³⁰ <https://www.ft.com/content/e4c7dfla-5048-4cfl-8a2d-c9a2d721ba92>

³¹ <https://www.caixabankresearch.com/en/economics-markets/activity-growth/threat-protectionism-global-economy>

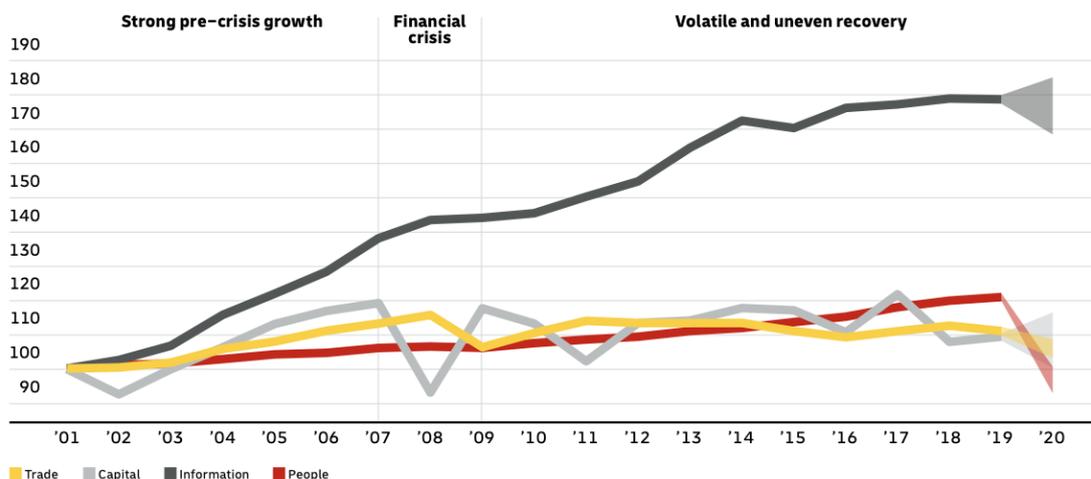
long-term damage to our economies. Those who believe in the rule of law, individual freedom, democracy, and free market must act accordingly. Irrationality can only be fought with rationality, i.e., with education focused on excellence, substantiated information, and sound institutions, also by facing the real drawbacks, and a few problems and addressing the legitimate concerns. It is time to take responsibility in the battle of ideas in order to effectively reduce the influence that certain immaterial ideas have in our daily life as a society. Globalisation and social media have contributed to damaging our perception of humanity's achievements until the second half of the 20th century. Let us now use them to our advantage to remind new generations not to take such achievements for granted. It has cost us a lot of time, blood and suffering to get this far, but it can easily and quickly be lost if we forget how and why we did it.

The ECB, besides of documenting the multiple and adverse consequences of the rising protectionism in the economic activity, and the amplificatory effect of the uncertainty factor, stated³² that "Trade liberalization within the framework of multilateral cooperation has been a key factor driving global economic prosperity. Trade integration helped to drive economic growth in advanced and developing economies in the second part of the 20th century, while also helping to pull hundreds of millions of people out of poverty. At the same time, although free trade is often seen, even in some countries that are largely beneficial of the globalisation (e.g., Germany and the Netherlands, but also in particular Poland) as one of the factors behind rising inequality both within and across countries, winding back globalisation is the wrong way to address these negative effects: it may be that globalisation in itself is insufficient. A retreat from openness will only fuel more inequality, depriving people of the undisputed economic advantages that trade and integration bring. Instead, countries should seek to resolve any trade disputes in multilateral fora. By encouraging regulatory convergence, multilateral cooperation helps to protect people from the unwelcome consequences of openness, and therefore remains crucial as a response to concerns about the fairness and equity of trade. The distributional and social effects of greater economic integration should also be addressed by targeted policies that

³² https://www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201903_01~e589a502e5.en.html#toc2

achieve fairer outcomes, including, for example, redistributive policies or adequate training and educational measures”.

However, as a matter-of-fact globalization has not gone to the reverse. According to DHL that on a yearly base measures the global connectedness index, it shows a world where people, companies and countries continue to connect and do business with each other even if it COVID pandemic could mark the “end of globalization.”, as per figure below.



Trade and capital flows globalized steadily before the 2008-09 global financial crisis but have since fluctuated below their pre-crisis peaks. Information and people flows, on the other hand, continued setting new records until the Covid-19 pandemic caused people flows to collapse. *2020 projected

3. A NEW AND FAIRER GLOBALIZATION

Globalization has been the call of capitalism and the neoliberal ideology in the twentieth century. It has generated immense benefits for the world, and its potential benefits are even larger now given the growing connectivity and impact of technology. The proponents of the neoliberal globalization did not consider there to be a trade-off between policies that generated economic benefit and those that generated socially desirable outcomes because the benefits of globalization were expected to automatically ‘trickle down’ to the individuals. However, as explained earlier [ref to section 1/2] this has not been the case. Globalization has not benefited all stakeholders in equal measure and has dramatically raised the importance of address inequality. This is primarily because globalization has been fuelled by the principle of freedom and meritocracy and maximization of total welfare, rather than fairness and justice and promotion of equality, and so has consistently prioritized economic considerations over social considerations of access to resources,

equity, participation, diversity, and human rights. In addition, the rules of the game are set by powerful players, both within and between nations, thereby leading to a ‘democratic deficit’³³ in policymaking which is unsustainable. It is therefore unsurprising that we have seen a rebirth of nationalism and protectionism in the past ten years.

There is hence an urgent need to rethink some of the fundamental principles underlying globalization. We argue that there is no reason to assume, particularly given the evidence, that neoliberal globalization as it stands today will automatically generate the socially desirable outcomes,^{34,35} and merely insisting on globalization while denying the new problems that have arisen is not the solution. We therefore propose that globalization policies need to be designed from the outset in a way that they uphold the principles of fairness, justice, equity diversity and respect for all people, to all countries and to all cultures, particularly with respect to minorities.³⁶ Only then can we limit the negative externalities of globalization, and ultimately arrive at a sustainable future.

³³ “A fair globalisation: creating opportunities for all”, World Commission on the Social Dimension of Globalisation, ILO, 2004.

³⁴ “The marketplace, by itself, cannot resolve every problem, however much we are asked to believe this dogma of neoliberal faith. [...] Neoliberalism simply reproduces itself by resorting to the magic theories of “spillover” or “trickle” – without using the name – as the only solution to societal problems. There is little appreciation of the fact that the alleged “spillover” does not resolve the inequality that gives rise to new forms of violence threatening the fabric of society. It is imperative to have a proactive economic policy directed at “promoting an economy that favours productive diversity and business creativity” and makes it possible for jobs to be created and not cut. Financial speculation fundamentally aimed at quick profit continues to wreak havoc. Indeed, “without internal forms of solidarity and mutual trust, the market cannot completely fulfil its proper economic function. And today this trust has ceased to exist. The story did not end the way it was meant to, and the dogmatic formulae of prevailing economic theory proved not to be infallible. The fragility of world systems in the face of the pandemic has demonstrated that not everything can be resolved by market freedom. It has also shown that, in addition to recovering a sound political life that is not subject to the dictates of finance, “we must put human dignity back at the centre and on that pillar build the alternative social structures we need”. “The twenty-first century “is witnessing a weakening of the power of nation states, chiefly because the economic and financial sectors, being transnational, tend to prevail over the political. Given this situation, it is essential to devise stronger and more efficiently organized international institutions, with functionaries who are appointed fairly by agreement among national governments and empowered to impose sanctions”. When we talk about the possibility of some form of world authority regulated by law, we need not necessarily think of a personal authority. Still, such an authority ought at least to promote more effective world organizations, equipped with the power to provide for the global common good, the elimination of hunger and poverty and the sure defence of fundamental human rights” (Fratelli Tutti).

³⁵ “Maximizing profits is enough. Yet by itself the market cannot guarantee integral human development and social inclusion. At the same time, we have “a sort of ‘superdevelopment’ of a wasteful and consumerist kind which forms an unacceptable contrast with the ongoing situations of dehumanizing deprivation” (Laudato Si).

³⁶ “Nonetheless, there are attempts nowadays to reduce persons to isolated individuals easily manipulated by powers pursuing spurious interests. Good politics will seek ways of building communities at every level of social life, in order to recalibrate and reorient globalization and thus avoid its disruptive effects. It follows that “it is an equally indispensable act of love to strive to organize and structure society so that one’s neighbour will not find himself in poverty” (Fratelli Tutti).

CONCLUSIONS AND PROPOSALS

The Working Group proposes this can be achieved by a multi-pronged approach, which we describe below.³⁷ The six working directions recommended may represent six working areas that question us, and deserve debate:

1. **Expanding the scope of the policies:** we propose that the framework of rules under which exchange of goods, labour, investment, and know-how occur can be expanded to include fairness considerations.
 - a. First, we propose that policies should ensure that individuals not only retain the right and liberty to remain rooted to their own traditions, religion, culture and, generally, *ecosystem* but also this is considered a goal in itself. If the different aspects of fairness (such as fair-trade regulation towards national or local cultural heritage and traditions, the environment, social equality, etc.) are not taken into consideration the risk is for globalization to provoke violent, populist and/or protectionist reactions. This means also enhancing sustainable development values in and through trade regulation. Along these lines, since sustainable development animates already (at least, in part) international trade law, for rules on international trade to factor in the interests of all stakeholders even more than what is currently done, we propose: a revision of exceptions provisions in multilateral trade agreements (so as to make it easier for countries to comply with them – this would ensure that exceptions may be effectively used by countries to pursue legitimate goals while concurrently preventing abuse); a revision of flexibilities and special and differential treatment provisions in multilateral trade agreements; and an enhancement of technology transfer and technical training to developing and least-developed countries needing help in taking advantage of the multilateral trading system with specific attention to economically and socially disadvantaged communities within these countries.

³⁷ We take inspiration from [management of globalization by Jacoby and Meunier]

- b. Second, we propose that global policy should be more sensitive to local needs. Given the large differences in economic and social fundamentals between countries, global policies should also allow the right degree of local autonomy. Trade and migration policies should also be aligned with local policies on, for example, education which promotes certain basic and universal values while is also respectful of diversity.
2. **Exercising regulatory influence:** we propose that global or European regulatory institutions can be reinforced to ensure that globalization is fair, including thanks to bottom-up participation of citizens. Such institutions – which tend to comprise of agencies, courts and ombudsmen - are already common at a national level, and we believe can help countries work together to achieve fairness goals. These institutions can be given large powers to enforce regulations and facilitate damages actions if the objectives of the new paradigm are not met. They may also hold politicians accountable, demanding honesty and competence and draw the appropriate consequences for the lack of it as long as citizens are sufficiently involved.
 3. **Ensuring fine-tuned governance of international institutions for empowering them:** in addition to new regulatory influence, we propose that international institutions that are already active in the regulatory space should both get their governance fine-tuned with larger and bottom-up citizens' participation, so that they be empowered to engage more with the new paradigm. This could of course involve regulation, supervision and enforcement, and the power to seek compensation of unfair acts of exploitation, while in any case avoiding over-regulation: the big concept to be drawn relates to better implementing rules rather than constantly and overwhelmingly norm-setting.
 4. **Engaging corporates and multinationals, as well as NGOs:** in the perspective of fostering policies implementation at micro level, we propose that corporates and multinationals that are already actively involved in programs aimed at implementing in their organization UN SDGs (i.e., through supply chain redesign) can be empowered to engage more with the new paradigm, in cooperation with civil society NGOs. This could imply early involvement in design phase and at a later

stage in implementation and revision. Public-private-NGO partnership would indeed prove useful to meet this working direction.

5. **Redistributing costs of globalization:** we propose that active measures can be taken to ensure that the costs of globalization can be redistributed in a fairer way. While nations have made some efforts to redistribute these costs within their country, there are also significant differences in how different European countries bear the cost of globalisation, in particular, driven by differences in saving patterns or the composition of GDP. The gap is wider when we consider countries outside of Europe, where the differences in policies and labour costs may be starker. To address these, additional measures are needed. For example, there can be non-reciprocal trade benefits to help disadvantaged countries, improved market and financial access for developing countries, funds and training for workers who lose their jobs due to trade and technology dynamics, technology transfer schemes further developed and streamlined, and increased corporate social responsibility to level the playing field for businesses located in developing countries.³⁸ It is important however to put in place efficient mechanisms that ensure that the funds flows to the less developed countries are effectively devoted to the end for which they exist avoiding *leakages* to incompetent or corrupt intermediaries and politicians. Connected to this issue, we propose that active measures do not only focus on redistributing costs of globalization between countries but should also focus on redistributing costs of globalization within countries and within the European Union. On the flipside too, we must ensure that such a redistribution, and an asymmetric application of targeted policy instruments does not generate other costs. In this regard, redistribution must be aligned with the effects of other policies, for example, policies related to climate change, so we can minimise additional frictions.

³⁸ For e.g.: the Dutch Child Labour Duty of Care Law- Wet Zorgplicht Kinderarbeid 2019- and the French Law on Parent Corporations' Duty of Care -Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre 2017 inserting art L 225-102-4 and 225-102-5 in Code du Commerce 1807.

6. **Education for all and promotion of a new attitude.** The political, economic, and technocratic paradigms must be subservient, at various playground levels, to an authentic anthropocentric, humanistic approach. Hyper-consumerism must be curbed and disciplined as it fosters individual selfishness, superficiality and violence and erodes natural resources in raw materials and the environment.

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F. THE FUTURE OF THE EU'S ECONOMIC PROPOSITION IN LIGHT OF LOOMING ECONOMIC POPULISM: A CASE FOR AN ENDOGENOUS RESPONSE.

ABSTRACT

This article will discuss the extent to which the European Union is equipped to provide, and is indeed providing, an appropriate response to the economic issues that have amounted to the rise of economic nationalism/populism. It will be argued that if the EU delivers satisfactory solutions in terms of growth, prosperity and equality, economic populism will be kept at bay. A relationship will be acknowledged between the criticisms from economic populism and certain economic policies and performances from the EU in the current context. The situation of such stances will be analysed in turn, in order to propose workable solutions in the quest of an ever more prosperous, egalitarian, value-providing EU.

INTRODUCTION

We live in times where enthusiasm for the so-called *European Project* no longer seems to find yesteryear's widespread unanimity amongst the folk of Europe. The last decade has taught us that the future of the enterprise is not self-fulfilling, let alone evident, and so we should not take it for granted. There are a range of elements that amount to that realisation. Such elements are roughly the same ones identified and built upon by the nationalist/populist discourse - whether from the Left or Right side of the political spectrum - in portraying the vision of the European Union (EU) of late as a lame, lackadaisical and, ultimately, ailing entity.

If the Brexit episode made a highly impactful finale for a season that spanned over longer than a decade, the following instalment in *The Whereabouts of Europe*, which we are now well ventured into, promises no less troublesome, unresolved cliff-hangers, from the challenges stemming from post-Covid-19 to the new geo-political order and, not least, even a real military conflict in the continent. Since the EU is called for a starring role in her own show, it seems timely to contrast the vigour and momentum to keep fulfilling her foundational purpose against the growing pace of nationalism and populism. More

precisely: against the economic dimension thereof - as many of populism's supporting concerns are economical in nature.

Hence, this contribution discusses the extent to which the European Union (EU) is equipped to provide, and is indeed providing, an appropriate response to the economic issues that have amounted to the rise of economic nationalism/populism.

The EU clearly fulfils the role of culprit of all evil from populism's ranks. She herself is an attempt to transcend nations and nationalism. She tries to build an overarching economic logic via integration of national economies. She is as interested in process as in results - and her array of institutions is not for the unexperienced. There is indeed space for the EU to address this "clash of propositions" by taking direct stances, from economic sanctions to third parties to budgetary retaliation to members that divert from settled democratic standards. This very moment could be ripe for such a confrontational approach - the role of Europe in combatting populism with all possible economic weapons, "whatever it takes" as some would have it.

However, the perspective chosen for this contribution is neither defensive nor confrontational. A utilitarian approach of sorts has been favoured instead as, when considered broadly, the economic outcomes to be pursued can be shared from both the EU and the populist perspectives: growth, prosperity, equality. What they offer is different diagnoses and different toolkits. So, if the validity of the EU's economic proposition depends largely on how she performs, what we need to look at is how she is performing. Because, ultimately, the case of *more, not less Europe* will be about citizen support and appeal, not academical discussion. More than anything else, the EU needs to seduce her people and ground a certain sense of belonging, or *to* belonging, upon her capacity to provide solutions - also in the economic remit.

Considering the above, we will first sketch precisely what economic populism is. Following that, we will delve deeper into the sources of economic dissatisfaction experienced throughout Europe lately and how economic integration should be rebalanced as a consequence thereof. Then we will analyse the might of the EU's economic reach to contend economic populism, namely: economic regulations and policies; monetary policy; public funding activity; and institutional layout. Finally, some conclusions on the current

strengths and shortcomings and practical insights on how to implement any possible ways forward will follow.

A WORKABLE NOTION OF ECONOMIC POPULISM

Economic nationalism and populism cannot be approached in isolation from the wider concept of political populism as a challenge to liberal democracy.³⁹ We may define political populism as a polarizing, emotional ideology, across the left-right political gamut, which “considers society to be ultimately separated into two homogeneous and antagonistic groups, the (pure) people versus the (corrupt) elite.”⁴⁰ This people/elite dichotomy inherent to populism does of course exhibit an economic dimension.

The reasons for the rise of populism are manifold, but recent research reveals common trends – which turn out to be fundamentally economic. To name but a few: the comparative losses in competitiveness and productivity; the reverberations of the world financial crisis starting late in the first decade of the 21st century; the potential exhaustion of some local industries and services; an increasing importance of digital and platform economies endorsing disruptive models in asymmetrically regulated markets; demographic shifts; and the difficulties of some job markets to adapt to changing circumstances. As a common, overarching theme we find the consolidation of economic globalisation, a pattern that dates back decades. The causal link between globalisation and political/economic backlash leading to populism is widely accepted⁴¹ and has been recognised since at least 1997.⁴²

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The dynamics referred to above are not transitory in nature, but instead pervade structurally in Western capitalist economies, notably in Europe’s: aging population, fragmented and distorted labour markets, pressures on wages from globalisation. However, it is equally evident that such issues become more salient in times of dire

³⁹ For a systematic rapport of both strands, we may refer to Bertola, G., Driffill, J. (2017). Economic Policy and the rise of Populism – it’s not so simple, https://www.researchgate.net/publication/316642278_Economic_policy_and_the_rise_of_populism_-_It's_not_so_simple. See page 4 ff. in particular.

⁴⁰ Mudde, C. (2004), “The Populist Zeitgeist”, in *Government and Opposition*, 39, 542-563.

⁴¹ See Guriev S, Papaioannou E. 2020, *The political economy of populism*. CEPR Discuss. Pap. 14433, Centre for Economic Policy and Research, London.

⁴² Rodrik D. (1997), *Has Globalization Gone Too Far?* Institute for International Economics, Washington, DC, https://econpapers.repec.org/article/meschalle/v_3a41_3ay_3a1998_3ai_3a2_3ap_3a81-94.htm

economic contexts, aka crises.⁴³ Crises make underlying tendencies more likely to morph into tangible threats such as growing inequality divides, growth stagnation, public and private debt overuse, rampant unemployment, risk of exclusion, deterioration of social welfare, exhaustion of “safety-net” social services and the like. These economic indicators - which may anticipate an uprising in populism - ramp up in crises and affect the middle and working classes, particularly the ones related to unemployment rates, median income, and wealth concentration.⁴⁴

From the above follows that it is fear - or, put conversely, the longing for security - that ultimately drives the continuum unemployment-inequality-exclusion-dissatisfaction. This is an important point as, essentially, the gist of economic populism is dissatisfaction, namely with the economic policies adopted and maintained by policy-making establishments in such contexts: austerity, minimum intervention, a deferred passive monetary policy (at least for quite some time), preservation of free trade and de-regulation, the sometimes-unintuitive handling of moral hazard in the presence of a systemic threat.

“Take back control”, read the Brexiter claim in 2016’s referendum. In line with that aspiration, whether or not delusional, populist economics focus on pursuing growth and redistribution via control, particularly national, *inter alia*: expansionary fiscal policies with lesser regard of capacity limitations and intertemporal budget constraints; a restriction on international trade in favour of national protectionist measures; consequently, a disbelief in supranational economic integration; immigration-limiting labour policies; a more active role of the State in the economy, as a direct provider of citizen’s needs so as to avoid the effects of inequality. This “need to intervene” - even if it involves going it alone - in turn ties economic populism to the “people vs. elite” rhetoric of the wider populist movement.⁴⁵

⁴³ This is a recurring point in many of the citations included. For one, Kahn, R., Tananbaum S.A. (2015), Addressing Economic Populism in Europe, Council of Foreign Relations <https://www.cfr.org/sites/default/files/pdf/2015/12/December%202015%20GEM.pdf> .

⁴⁴ Some interesting analysis on how this structural context has influenced the Brexit vote and Trump’s election:

- Darvas, Z. Efstathiou, K., 2016, Inequality and the vote for Trump, Bruegel, <https://www.bruegel.org/2016/11/income-inequality-boosted-trump-vote/>
- Darvas Z., 2016, Brexit vote boosts case for inclusive growth, Bruegel, <https://www.bruegel.org/2016/07/brexit-vote-boosts-case-for-inclusive-growth/>

⁴⁵For a comprehensive, comparative account cfr. Ivaldi, Gilles & Mazzoleni, Oscar. (2021). Economic Populist Attitudes in Western Europe and the United States. 10.1007/978-3-030-53889-7_8. https://www.researchgate.net/publication/348208721_Economic_Populist_Attitudes_in_Western_Europe_and_the_United_States

NAVIGATING DISSATISFACTION: A REBALANCING OF EUROPEAN INTEGRATION

Populists are opposed to European integration, the internal market and the Euro. Moreover, they reject the implied loss of sovereignty for the Member States and challenge the freedom of EU citizens to live and work in other EU countries. Why?

As mentioned above, a significant cause is the unequal impact of globalisation and technological change on different parts of the EU. Economic developments like structural change and the associated costs in terms of uncertainty and job losses are seen as the outcome of international economic integration. These forces were exacerbated by the 2008 Global Financial Crisis, which had harsh consequences, particularly for the unemployed and young adults looking for a first job. Moreover, throughout the crisis, national and European policymakers had to implement unpopular structural reforms in the labour, capital and product markets and enforced austerity policies to stimulate the economy. There is a consensus among economists that economic populism may result in unsound policy choices by oversimplifying economic realities and isolating such countries from the global economy. But precisely, this is why economic populism is appealing. It promises simple solutions to complex problems. In the aftermath of the financial crisis, for citizens in debtor countries like Greece and Portugal, who suffered from falling living standards with no end in sight, rejecting austerity was perceived as the only viable option.

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This led to a debate about the failure of the ruling elites and the fact that the costs of the crisis were disproportionately borne by "ordinary people" and not those deemed responsible for it.

EU economies are as integrated and as open externally as they have ever been. Yet, although populist parties have been active throughout Western countries for many years, it is only over the last decade that we have seen a general trend of increasing support. This is happening against the backdrop of longer-running economic trends: the labour share in income has gradually decreased, and the demand for lower-skilled labour has declined. The result has been a rise in inequality between skill and income groups, with a distinct regional profile. While the deepening globalisation and EU integration, combined with skill-biased technical progress, have unambiguously generated overall income gains via higher static and dynamic efficiency, these outcomes have not been Pareto-optimal.

Moreover, a series of adverse economic shocks have particularly hit the "losers" of this development. Austerity policies have further increased distributional conflicts instead of countering this development with welfare state measures. This fuelled an already existing undercurrent of discontent and fading trust in democratic institutions. Ordinary citizens have gradually lost confidence in the so-called "elites" to deal with the (real or imagined) unfair distribution of gains and burdens in society. In this context, EU policies have been increasingly perceived as being biased pro-market and pro-business, paying little attention, if any, to their social impact and undermining cohesion, solidarity, autonomy, and governability at the national, regional, and local level.

These effects were predictable. The workhorse models of international trade and economic integration have strong redistributive implications. Under competitive conditions, as long as the importable goods continue to be produced at home (that is, ruling out complete specialisation), there is always at least one factor of production that is rendered worse off by trade liberalisation. That factor is the one used intensively in the importable goods, in the case of the EU: low-skilled labour. In effect, the deepening of the Single Market has had winners and losers: income inequalities between factor owners of labour and capital have increased. Simultaneously, inequalities increased within the labour income group. Demand for high-skilled labour increased, while less-skilled workers suffered from job and wage losses.

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In principle, the gains from trade can be redistributed to compensate the losers and ensure no group or region is left behind. However, these redistribution mechanisms designed and operated at the national level, whilst successful in the successive rounds of the EU's expansion, appear not to work effectively anymore. Some insights can be suggested:

- First, the redistributive effects of liberalization and international trade get larger and tend to swamp the net gains as the trade barriers in question become smaller,⁴⁶ which explains why globalisation becomes politically more contentious in its advanced stages.

⁴⁶ Rodrik, Dani. "Populism and the economics of globalization." *Journal of international business policy* 1.1 (2018): 12-33.

- Second, redistribution to mitigate economic inequality can be very costly.
- Third, there is a strong empirical association between financial globalisation and financial crises over time.
- Fourth, capital mobility gives employers a credible threat: accept lower wages, or else we move abroad, which further shifts the burden of economic shocks to labour.
- Fifth, as capital becomes globally mobile, it becomes harder to tax.
- Sixth, support for redistribution measures decreases with the inflow of migrants.
- Finally, "Brussels" has become an easy scapegoat, being accused of ignoring the social consequences of its policies and, even worse, undermining the capacity of the nation state to deal with them.

In this economic context, the most critical challenge the EU faces is not lack of openness but lack of legitimacy. As long as EU integration is seen as a project of the political elites and the wealthy, it will carry the seeds of its own destruction. The push for ever deeper economic integration has to go hand in hand with policies that strengthen a more Social Europe. The best way to confront economic populism is to prove it wrong and ensure that the tide of EU integration lifts all boats, not just the yachts.

However, dealing with economic populism does entail much more than providing an adequate response to inequality. It will require not merely a re-adaptation of the EU's economic principles but a proper handling of the economic toolkit at her disposal in order to adapt to the current circumstances. Furthermore, it will involve doing so in a recognisable fashion that connects with the concerns of her citizens and with a certain European *ethos*. In all, this means no other thing than offering an added value to citizens.

THE EUROPEAN UNION ´S ECONOMIC TOOLKIT AS A CONTENDER TO ECONOMIC POPULISM

What we call the economic foundations of the EU is a complex interrelated set of policy, regulatory and institutional dimensions. Interestingly, each one of these spheres has merited criticism from the ranks of economic populism. It is worth analysing the extent to which such criticisms do reflect the current situation and, more importantly, the potential that there is in each of them for the European Project to provide valid solutions to persistent, and upcoming, economic challenges.

The rise of economic populism needs to be addressed by finding better ways to combine the benefits of open markets and integration with social protection and fairness. Is the EU on the right path? We will review some of these remits in turn.

IV.1 ECONOMIC REGULATION AND POLICY

Unsurprisingly, the EU ´s sectoral regulatory action has been somewhat identified with the promotion of liberal paradigms, coupled with a certain vision of these policies being deployed through remote, cumbersome procedural methods dominated by technocratic shenanigans. Elite-driven formulations, protracted discussions, far from our people: good crop for populism ´s rhetoric.

The picture of highly liberal policies with weak regulatory drive might however not fully correspond to the current situation, both in terms of aspiration and execution. Today, the *Brussels Effect*⁴⁷ sets the world ´s regulatory bar in many respects. Those standards do not embed only, or even mainly, a libertarian vision. For one thing, there are other mottos increasingly justifying the EU ´s policy actions. Disruptions and risks brought about by technology and, not least, technological sovereignty itself; environmental aspirations and social responsibility standards; financial instruments in increasingly decentralized contexts;

⁴⁷ As termed by Bradford, A., 2020, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press.

the protection of consumers both online and offline. These belong in the current EU's (notably the European Commission's) high-level political mission as much as the four freedoms. Hence the aspiration of strong, prescriptive regulatory frameworks at the EU level.

An analysis of certain policies currently under scrutiny supports this view. For example, as regards the pursuit of efficiency as an economic outcome, we can mention the transformation of European competition law that is taking place in response to the phenomenon of digital platforms via the Digital Markets Act (DMA).

This is a piece of regulation where ex-post analysis and remedies - traditionally the cornerstone of competition policy - is giving way to ex-ante solutions, introducing concepts such as "gatekeepers" to whom certain specific behavioural requirements will be applied. Hence its value as an example of how the EU provides a way of protecting citizens and small and medium businesses in the light of technological, global, libertarian, monopoly-prone business models (a populist theme), with a fresh, non-deferred, ex-ante approach drawn from the experience acquired in the enforcement of arts. 101 and 102 TFEU. Beyond the bold instrumental layout however lies the very same motivation as that driving competition law since its modern development during the industrial revolution in the USA: to protect the general interest, market functioning, consumers and, ultimately, democracy.

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On a different note, we can consider sustainability and corporate responsibility issues, which go beyond mere economic policy. The EU is signalling a clear thrust in those. The call is not only to contain negative social impacts from business activities but to foster positive impacts. One such example would be 2019's European Green Pact, with an ambition to become GHG-emission "net-zero" by 2050, and the subsequent Green Deal and Fit for 55 policy toolkits. In order to achieve this, in January 2020, the Commission launched an investment plan for a sustainable Europe that will mobilize at least EUR 1 trillion in sustainable investments over the next decade from the EU budget.

Likewise, the green transition requires investment, both public and private. This is where another EU instrument, the European Taxonomy, comes into play. In order to redirect private investment flows towards sustainable activities a comprehensive regulatory scheme, comprising a general Regulation and several successive Delegated Acts, has been

devised to signal environmentally sustainable economic activities, providing common appropriate definitions, and providing security for investors, avoiding greenwashing.

Another ambitious remit is the Corporate Social Responsibility provisions to tighten companies' compliance obligations on issues such as human rights, the environment or good governance in their value chains. These policies purport to build a more social-friendly regulatory environment for the EU's business ecosystem. For instance, this year the Commission's Proposal for a Directive on sustainable corporate governance and due diligence saw the light of day. The proposal aims to promote sustainable and responsible business behaviour across global supply chains.

It is then clear that the EU's economic policies currently go well beyond market integration and free trade, whether by traditional economic themes being refashioned or through the intensification or environmental and social overtones. What remains to be seen is whether this will contribute sufficiently to any narrative reinforcing her pertinence in the future.

IV.2 MONETARY POLICY AND THE ROLE OF THE ECB.

The European Central Bank ("ECB") is one of the main "specialised" institutions of the EU. It has two main tasks: first, it has the exclusive competence to define and implement the monetary policy of the EU Member States whose currency is the euro (currently they are 19)⁴⁸; second, it contributes to the prudential supervision of credit institutions and to the stability of the financial system (a competence it shares with national central banks).⁴⁹

By exercising these competences, the ECB has become a decisive EU actor, as became apparent during the 2008 financial crisis and the ensuing sovereign debt crisis. ECB's President Mario Draghi: "*whatever it takes*" speech is widely seen as a defining moment in the 2010's financial crisis recovery,⁵⁰ followed by massive asset purchase programmes for the acquisition of bonds in secondary markets ("Quantitative Easing") and other non-

⁴⁸ Articles 3(1)(c) and 119(2) TFEU.

⁴⁹ Article 127(5) TFEU.

⁵⁰ <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>

conventional measures (e.g., negative interest rates).⁵¹ For many observers and analysts, the ECB truly saved the existence of the euro during such troubled times.⁵²

However, it is not unusual for Eurosceptics to develop a discourse around a pledge to restore economic and monetary sovereignty as their recipe of choice to attain the economic prosperity which, according to them, the EU is incapable of providing to its citizens.⁵³ It is in this context that the ECB finds itself often in the crosshairs of Eurosceptic populists. The typical accusations may range, under a variety of versions, from failing to adopt sound policies to prevent and deal with crises to failing to take into account the needs of « the people ».

Such criticisms are not so worrisome as an interpretation of past events but as an anticipation of how the ECB is supposed to behave in light of the prospective challenges ahead. Will the populist claim of a passive monetary authority hold? Will the ECB change course to disarm its critics? The design of the ECB could and should be fine-tuned in order to ensure that its monetary policy effectively contributes to the achievement of tangible results to the benefit of EU citizens (economic growth, employment, fight against climate change) and gains citizens' trust. The following could be some ways forward.

Firstly, as far as the mandate of the ECB is concerned, the monetary policy of the eurozone has as its primary objective to maintain price stability “and, without prejudice to this objective, to support the general economic policies”.⁵⁴ The ECB had defined since 2003 the objective of price stability as maintaining inflation rates below, but close to, 2% over the medium term.⁵⁵ In July 2021, the ECB slightly modified its inflation target by declaring that price stability is best maintained by aiming for a 2% inflation target over the medium term

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⁵¹ For a brief discussion of the ECB's monetary policy toolbox, see the speech by Philip R. Lane, Member of the Executive Board of the ECB, at the 2020 US Monetary Policy Forum, available at <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200221~d147a71a37.en.html>.

⁵² See for instance <https://www.nytimes.com/2019/05/24/opinion/after-draghi-wonkish.html>, <https://www.nytimes.com/2019/06/16/business/mario-draghi-ecb-euro.html>, <https://qz.com/1038954/whatever-it-takes-five-years-ago-today-mario-draghi-saved-the-euro-with-a-momentous-speech/> and https://www.kfw.de/KfW-Group/Newsroom/Latest-News/News-Details_426753.html.

⁵³ See, for instance, the programme of Marine Le Pen, candidate of the *Front national* to the French Presidential elections of 2017, whose first measure was a pledge to open negotiations with the EU in order to restore the monetary and economic sovereignty of the French people; available at <https://rassemblementnational.fr/pdf/144-engagements.pdf>.

⁵⁴ Articles 119(2) TFEU and 127(1) TFEU.

⁵⁵ See <https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html>.

(which means that negative and positive deviations of inflation from the target are equally undesirable).⁵⁶ The primary implication of this is that, in principle, the ECB's monetary policy cannot pursue other main objectives different from price stability and which are equally important, such as economic growth or the promotion of full employment.⁵⁷ It is noteworthy that, in contrast, neither the Federal Reserve nor, arguably, the Bank of England have a similar narrowly defined mandate.⁵⁸ Unsurprisingly, authoritative voices have considered the ECB's inflation-fighting mandate as counterproductive.⁵⁹

Another consequence of defining so narrowly the objectives of monetary policy is that if and when the ECB interprets its mandate in a "flexible" manner and adopts non-conventional instruments that may be seen as pursuing other objectives of economic policy (which are legitimate but are not included within the ECB's mandate under a strict reading), the ECB's actions are exposed to political attacks and even legal challenges for exceeding the limits of its competence. Similarly, the possibility for the ECB to implement a "green" monetary policy is surrounded by uncertainty and open to potential challenges, in particular if such policy can somehow be regarded as threatening the objective of price stability.

Furthermore, and relevant to the populists' frequent attack of the ECB as overly detached from the sources of political legitimacy, it would be advisable to increase the ECB's democratic legitimacy and its political accountability, without prejudice to its independence when conducting its functions and the non-renewable character of its presidency.

⁵⁶ See <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708~dc78cc4b0d.en.html>.

⁵⁷ When inflation is extremely low and remains below 2 %, as it was the case for several years until the recent geo-political tensions erupted and exacerbated unusual upwards pressures, the ECB could argue that it is aiming at getting inflation closer to the 2 % target through a monetary policy that indirectly may favour economic growth and employment. However, this possibility rests on a hypothetical premiss that may not necessarily arise in the real world.

⁵⁸ See <https://www.federalreserve.gov/faqs/what-economic-goals-does-federal-reserve-look-to-achieve-through-monetary-policy.htm> and <https://www.bankofengland.co.uk/monetary-policy>.

⁵⁹ See J. STIGLITZ, "Rewriting the Rules of the European Economy", Norton, 2020, pp. 72-73. See also J. STIGLITZ, "The Euro. How a Common Currency Threatens the Future of Europe", Norton, 2018, pp. 145 *et seq.* For a simple discussion of the harmful economic effects of the inflation-only mandate, see also P. KRUGMAN, "Euro Zone Death Trap", published on the New York Times on 25 September 2011, available at <https://www.nytimes.com/2011/09/26/opinion/euro-zone-death-trip.html>.

Lastly, the EU treaties establish an absolute prohibition on monetary financing, which prevents the ECB from financing public spending by Member States or the EU institutions through monetary policy.⁶⁰ This prohibition aims at ensuring price stability, protecting the ECB's independence and promoting fiscal discipline among Member States and the EU institutions. In accordance with standard economic theory, it is preferable for public authorities to finance spending through taxation or capital markets, rather than through monetary policy. However, in the aftermath of the financial crisis and in the context of the Covid-19 pandemic, some economists have argued that the absolute prohibition of monetary financing should be re-examined and perhaps nuanced.⁶¹

IV.3 ACTIVE FUNDING AND THE CASE OF NEXT GENERATION.

The active funding to member states via regional, structural or social policies has been instrumental in the EU's economic integration process. It can be argued that without the affluent-to-recipient rent transfer logic embedded in the EU's budget, in exchange for the perks of market opening and liberalisation, the so-called ever closer union would have not come this far. Conversely, this issue has proved one of populism's most effective claims, particularly resonant in the poorer regions within EU's richer countries, as the somewhat coarse arguments made during the Brexit campaign show all too well.

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Since redistribution is key to fighting inequality, and the latter is so related to the dissatisfaction themes that have both partially grounded economic populism and called for a reshaping of EU's policies, funding programs will remain key in the European agenda for some time, in particular in the topical context of the Next Generation EU (NextGen EU) program. Again, the EU has often been depicted as a distant, non-interventionist witness of the evolution of the economy, surpassed by circumstances when crises come about or, if at all, providing improvable solutions. Now comes a context, however, where the EU is

⁶⁰ Article 123 TFEU. This implies that the ECB cannot grant credits to or purchase debt instruments directly from Member States and EU institutions.

⁶¹See I. AGUR, D. CAPELLE, G. DELL'ARICCIA & D. SANDRI, "Should Monetary Finance Remain Taboo?", IMFBlog, 22 February 2022, available at <https://blogs.imf.org/2022/02/22/should-monetary-finance-remain-taboo/>. See also A. WATT, "Quantitative easing with bite: A proposal for conditional overt monetary financing of public investment", Institut für Makroökonomie und Konjunkturforschung (IMK), Düsseldorf, 2015, Working Paper n° 148, available at <https://www.econstor.eu/bitstream/10419/110391/1/82030462X.pdf>. As regards the covid-19 pandemic, see <https://www.ifuturecitizen.com/post/monetary-financing-against-the-covid-19-crisis-safe-or-risky> and <https://voxeu.org/article/fight-covid-pandemic-policy-makers-must-move-fast-and-break-taboos>.

bound to be active and intervene. And it has done so in spades, via Europe's Recovery Plan, a stimulus scheme amounting to €1.8 trillion overall and, namely, NextGen EU, the boldest fiscal policy effort at the EU level to date.

It is in the EU's best interest that NextGen EU not only becomes a success but is perceived as such. Will this sheer effort then contribute to better align the EU to her citizens, to show the kind of positive impact that stems from being part of such a supranational entity? It will all depend on how some design features end up playing out.

Firstly, from a national standpoint, NextGen EU does imply a transactional (in terms of net contributor vs recipient member states) over a pan-European vision. In a clear signal of inter-state solidarity, funds have been distributed by member States, not through "European-wide" projects, which might affect their overall effectiveness and efficiency. The net effect on the "inequality" challenge will in any case be uncertain. Furthermore, the increase of inequality being one of the foundational positions of economic populism, it is clear that citizenry will perceive the thrust clearly in the biggest recipient countries, but less so in the less intensely benefited ones.

Secondly, funds are dependent upon examination of "national recovery" plans containing several regulatory and policy commitments. Funds are, hence, conditional. Conditionalities imposed by EU's institutions pertaining liberalisation, market reforms and the like, alongside budgetary contention, played a major role in sourcing populist claims in the midst of the past decade's crises. It remains to be seen if the conditionalities agreed here will act similarly if the scheme underperforms.

Moreover, a further difficulty arises regarding the overarching theme of NextGen EU via, mainly, the RFF, which is to shift towards the transition to a greener and more digital economy. This normative approach differs from a traditional stimulus package, aiming at "merely" restarting the economy back to the structural point it hitherto was.

In the European context, where lagging issues related to productivity, economic structure and aging population pervade, linking the recovery action to specific objectives and reforms that different member states need looks like a sound decision. As the ECB has pointed out when modelling the NextGen EU impacts, a mere fiscal transfer that shies away

from real reforms will not have a sustained effect on growth and ultimately lead to higher debt.⁶²

However, this ambitious transformational purpose can not only be difficult - or not evident - to measure but, more importantly, also hindered by the myriad of requirements to abide by, with the possible effect of making the action scattered and sometimes even contradictory or inconsistent with speedy economic recovery.⁶³ Measures may cover a wealth of possible areas but, at the same time, need to contribute to some of the seven possible European Flagships;⁶⁴ respect gender equality and equal opportunities; contribute to the strategic autonomy of the Union; be consistent with the periodic Country Specific Recommendations; improve the quality of the Public Administration; expand the effective use of public-private partnerships... and so forth.

Lastly, even though the consequences are yet to be clearly envisaged, the evolution of the Russia-Ukraine conflict will greatly affect how current plans will end up. Most likely some re-prioritisation of NextGen EU's foundational objectives will be involved - particularly the environmental ones, greener economy, and energy and the like. At best, some relaxation in their ambition and timelines will be needed.

To sum up, as strategic as they are for the repositioning of the EU's role in promoting resilience, NextGen EU's design traits make it difficult to ascertain whether the potential for a clear narrative in positioning the EU's valid role as opposed to economic populism's main tenets will be matched.

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⁶² See European Central Bank, (2021), "The macroeconomic impact of the Next Generation EU instrument on the euro area", Occasional Paper Series, No 255, January www.ecb.europa.eu/pub/pdf/scpops/ecb.op255~9391447a99.en.pdf .

⁶³ Here we are drawing extensively from the findings in Núñez Ferrer J. (2021), Avoiding the Main Risks in the Recovery Plans of Member States, CEPS, <https://www.ceps.eu/ceps-publications/avoiding-the-main-risks-in-the-recovery-plans-of-member-states/> .

⁶⁴ These are: 1) Power up, 2) Renovate, 3) Recharge and Refuel, 4) Connect, 5) Modernise, 6) Scale-up and 7) Reskill and upskill.

IV.4 INSTITUTIONAL LAYOUT AND LEADERSHIP.

No analysis of the EU's economic might would be complete without a reference to the institutional layout and leadership muscle necessary for the EU to be credited in the future as an impactful actor. The EU has been cartooned from the nationalist/populist stance as an irrelevant dwarf in the international arena and increasingly incapable of fostering their economic principles domestically. These claims do show that the way the EU is perceived by her people is important to her significance.

If the EU is unfit in the decision-making process, dissatisfaction of citizens grows. If the EU is not perceived to give adequate solutions, this may generate a vacuum which is filled by those who place EU's inaction and paralysis at the forefront of the criticism. Hence, the way the EU deals with such issues may undermine or, conversely, reinforce the opportunity for a stronger impact on the economic remit, and so vis-à-vis economic populism. Several broad elements define the current and immediate context in this respect:

- 1) The digestion of the somewhat short-sighted Conference on the Future of Europe.⁶⁵ This process is intended to give citizens a leading role, though it is still difficult to say at this stage whether it will have any impact on the EU policies.
- 2) Overcoming the COVID-19 health crisis. The EU has had a prominent role in the response to the pandemic, with iconic actions such as the vaccination program that have helped provide vital services to the population. The action has then turned to economic recovery plans, namely Next Generation EU, which aims at transforming the economy by injecting floods of money to pursue digitisation and sustainability outcomes.
- 3) The relationship with the United Kingdom: The effective use of Article 50 TEU has proven that the EU is not permanent, and it is the will of its Member States that allows this project to continue.⁶⁶ This was hard enough for the EU's self-esteem and

⁶⁵https://ec.europa.eu/info/sites/default/files/en_-_joint_declaration_on_the_conference_on_the_future_of_europe.pdf.

⁶⁶ The slogan of the UK Brexiteer campaign "take back control" in 2016 was a clear demonstration of economic populism. Citizens who were disappointed with their living conditions, together with a backdrop of polarised politics and disinformation, were seduced by the campaign.

fast-forward dynamic. However, getting used to the new relationship with the UK, and also rebuilding the EU without the UK, are no less straightforward long-term tasks that transcend the EU-UK partnership agreement. This is important for the EU's credibility as a relevant economic actor.

- 4) Navigating through the current military conflict in Ukraine and the consequences thereof. It is still early days to minimally envision the implications that Ukraine's invasion will bring for the EU's geo-political and economic position in the region and the world at large. One thing is for certain: sanctions, economic retaliation regarding raw materials, energy inflows being shrunk and the ensuing urgency to reduce the dependence of certain external EU energy suppliers, shifting budgetary priorities to build a real common defence apparatus... will make previous plans and policies for economic recovery harder to implement.

The evolution of these issues will determine the confidence of the EU in her own future and her force relationship vis-à-vis populism, including the economic aspects. However, they also provide opportunities for the EU to reposition and further connect with the concerns of citizens and economic and social tissues. They will be crucial in how the EU will portray herself.

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Chiefly, if the EU wants to combat economic populism, she will need to perform convincingly toward both citizens, Member States, and the international community. The key issue is how to ensure that these three perspectives, which are essential to the Union's actions, converge and have a positive impact on the day-to-day life of citizens so that economic populism can be minimised. As a starting point, any action needs to have due regard to the principles of subsidiarity, solidarity, and mutual trust.

- Subsidiarity⁶⁷ aims to ensure that decisions are taken as closely as possible to citizens, and that constant checks are made to verify that action at EU level is justified in light of the options available at national, regional, or local level.⁶⁸ The EU must avoid superfluous actions.
- Solidarity is enshrined in the Treaties as one of the values of the society in which we live under Article 2 TEU, although its use has been limited.⁶⁹ The COVID-19 pandemic has intensified its use, both in speeches and in certain regulations.⁷⁰
- Mutual trust is the basis of the relations between the Member States and the EU and a consequence of sharing the values of Article 2 TEU.⁷¹

These are long-standing principles in the European acquis; however, looking forward, the first two in particular can be key to redefine what kind of role and leadership the EU needs to deploy in relation to Member States: a firm albeit not invasive, proactive yet subtle role.

Finally, we can complement this traditional toolkit with more creative innovations that pertain to the projection of the EU's leadership, including in the economic remit. One such concept is that of "open strategic autonomy", adopted by the EU to serve as a coordinating framework for a very broad set of policies to boost the external projection of the EU in its commitment to open trade and multilateralism while, at the same time, reinforcing the region's economic and financial resilience.⁷² The EU Strategic Agenda 2019-2024 provides

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⁶⁷ Article 5 TEU

⁶⁸ Specifically, this principle means that the EU does not take action (except in the areas that fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. President Juncker emphasised this principle in his 2018 State of the Union address: "*This Commission has sought to be big on big issues and small on the small ones*"

⁶⁹ It is the basis of the Solidarity Clause 222 of the Treaty on the Functioning of the European Union (TFEU) or Article 122 TFEU in the area of economic policy.

⁷⁰ For instance, Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak or Council Regulation (EU) 2020/2094 of 14 December 2020 establishing an EU Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

⁷¹ The EU has established a new legal order based on the same values and the same system of enforcement, which is composed of national judges and the ECJ

⁷² BDE, Economic Bulletin 1/2021, Pilar L'Hotellerie-Fallois Armas, Marta Manrique Simón y Antonio Millaruelo de Lafuente
<https://www.bde.es/f/webbde/SES/Secciones/Publicaciones/InformesBoletinesRevistas/BoletinEconomico/21/T1/descargar/Files/be2101-it-Box5.pdf>

that "the EU needs to pursue a strategic course of action and increase its capacity to act autonomously to safeguard its interests, uphold its values and way of life, and help shape the global future";⁷³ and the European Council Conclusions of 1-2 October 2020 stressed the need to achieve "strategic autonomy while preserving an open economy".

In summary, the contention of economic populism goes beyond economic policy and performance. Credibility, leadership, coordination with Member States, and a sound roadmap for the future are paramount for the EU to have a meaningful role.

⁷³ The European Commission defines OSA when referring to trade. It recalls the EU's commitment to open and fair trade with well-functioning, diversified and sustainable global value chains. It encompasses resilience and competitiveness to strengthen the EU's economy; sustainability and fairness, reflecting the need for responsible and fair EU action and assertiveness and rules-based cooperation to showcase the EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed. (Trade Policy Review - An Open, Sustainable and Assertive Trade Policy https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF)

CONCLUSIONS AND RECOMMENDATIONS

The glance provided gives way to certain conclusions as regards the aspiration, opportunities, and possible difficulties for the *European Project* to remain ahead of economic populism. We shall outline them in turn.

- i. ***The EU must pay attention to the sources of current economic dissatisfaction.***
By identifying such concerns - inequality, a narrow scope for economic regulation and policy, insufficient public economic stimuli in times of resilience, an increasing disconnection to states and citizens and a weakened leadership - the EU allows herself to preserve her core economic principles of economic integration. It is fair to acknowledge that the EU has identified this necessity.
- ii. ***The EU is moving towards alternative and efficient ways of promoting the benefits of free trade while preserving the interest of citizens and consumers.***
In the current context, the trade-off is demanded to be particularly exigent. The EU does seem to have gripped this issue, via a renewed approach to landmark economic policies related to market efficiency, such as competition policy, in the context of new challenges like digital platforms.
- iii. ***The EU is promoting and leading economic policies with a transformative social dimension, with the interest of the citizen at their core.*** This is a field where the EU seems to be delivering as well – from environmental issues like the Taxonomy regulations and circular economy packages to corporate governance frameworks or more social-oriented regulation. The regulations and policies of the EU are no longer the sole remit of free trade, deregulation, liberalisation and the like. The vision of a more social Europe is present.
- iv. ***The EU could consider broadening the ECB's monetary policy mandate and could review the ECB's institutional framework.*** Even with a fair share of criticism from populism, the ECB's seminal role in past crisis has been widely recognised. There is however space for some reforms of the current situation in order to make the ECB more impactful, now - when preserving price stability remains a fundamental concern - and in the future: pursuing a wider range of policy

objectives, such as promoting economic growth or full employment; reinforcing democratic legitimacy and accountability; re-examining the absolute prohibition on monetary financing.

- v. **The EU must guarantee that redistribution mechanisms address clearly, and impactfully, the concerns and needs of her societies.** NextGeneration funds make an evident opportunity. However, beyond implementation, there remains the issue of whether they are going to suffice per se to convey a distinct, European impact.
- vi. **The EU needs to address economic populism from a holistic approach, taking into account its economic, social, and political dimensions coherently, putting citizens at the centre of its action.** The EU should not neglect the current context and use essential principles like subsidiarity and solidarity along with new concepts such as “open strategic autonomy” to enhance leadership and close coordination with Member States.

Building from these conclusions, some possible concrete, and immediate recommendations as to how the EU might go about better contending economic populism - some economical, some institutional, some strategic in nature - might be the following.

1. **Own the narrative.** What can the EU do for me? This is the question that should never be lost sight of. The EU must have a role in favouring those economic outcomes that their citizens and societies value. There is no more effective response to economic populism than being present. There is though more to this assertion than meets the eye. In today’s complex environments, well addressed economic policy is not enough. Connecting with citizens is paramount -precisely what populism tries to do. The EU must avoid being perceived as a fabrication of elites with the sole logic of consolidating free markets - particularly as this is no longer the case if it ever was. The current debate is not about things like regulatory quality, institutional reform and the like; it is about what value the EU brings to the table and how citizens perceive it. To be present, the EU’s *raison d’être* needs to be connected with a European ethos.

2. Promote and explain regulation in a pedagogic manner. If the role and regulatory stances of the EU need to be explained, then why not do it? Populism's PR can get a country off the EU; it has happened. So it will not hurt the EU to strengthen her own. Regulation makes an evident candidate: the EU needs her citizens to know and understand. The key to relevance - or presence - is not conquering any available space that is available for regulation, and overregulating it; indeed, less can often be more. The key however is explanation: not so much via hefty ex-post assessments but by conveying to all citizens of Europe -not just the elite- what the point is. It is not true that people's views on economic policies and regulations are unchangeable. Recent economic research compellingly demonstrates that when policy decisions are explained a certain way, whether on the grounds of effectiveness, efficiency and - to a lesser extent, which is also telling - fairness, people can change their preconceptions.⁷⁴ The EU needs to explain economic policies and what she brings to the table more and better. This is particularly acute in the case of the poorer regions of richer countries, where a sense of lagging attention and resource displacement in favour of other regions in Europe might find a stronger grasp.

3. Address inequality, reinforce redistribution. This is the elephant in the room in terms of economic outcomes. There are several issues than can be addressed.

- a. *Firstly, **make NextGeneration a success.*** This means: reasonable impact - on the strategic themes of digitisation and sustainability and on aggregate EU growth and spill over effects; reasonable implementation - Member States making the most of programs' availability; sufficient transparency and accountability via the instruments set out at the European level, such as the Recovery and Resilience Scoreboard, and the involvement of national Independent Fiscal Institutions - so that money is not lost in translation.

⁷⁴ Stantcheva, S., 2020, Understanding economic policies: What do people know and learn?, available at: <https://socialeconomiclab.org/understanding-economics/>

On top of that, as the EU's core-periphery economic conditions continue to diverge, it would be convenient that these funding efforts strengthened social and regional cohesion - allowing for some catch-up of the poorer areas, whether national, EU-wide or cross-border.⁷⁵

b. *Secondly, **work towards a dedicated fiscal capacity for the Euro Area.***

This, as called for in the Five Presidents Report in 2015,⁷⁶ would not only add to the macroeconomic stability properties of EMU; it could at the same time serve distributional functions, be it in support of pre-market fairness via social investment or post-market cohesion in the form of unemployment benefit funds. Access to the social minimum is not effectively guaranteed for all Europeans, and one in four is still at risk of poverty or social exclusion.

c. *Lastly, **concentrate on labour markets.*** There is ample evidence that increasing job insecurity makes people more susceptible to populist rhetoric. This effect dominates in regions lagging behind. At the same time, increasing labour market mobility decreases the attractiveness of the far-right agenda in regions where people benefit from new job opportunities generated by the Single Market. Therefore, unemployment assistance and active policies to re-integrate unemployed people into the labour market remain critical. In this respect, employers must be incentivised to continuously invest in their workers' qualifications. This is best done at the EU level. Similarly, debt relief and personal bankruptcy regulations should also be developed at the EU level to avoid a race to the bottom among the Member States.

⁷⁵ For a detailed discussion on the matter, Pilati, M., (2021), National Recovery and Resilience Plans: Empowering the green and digital transitions?, EPC Discussion Paper, <https://www.epc.eu/en/Publications/National-Recovery-and-Resilience-Plans-Empowering-the-green-and-digit~3e58f0v> .

⁷⁶ https://ec.europa.eu/info/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en.

4. ***Harness the current contingency... by getting back to basics.*** The EU's perception is penalised by the fact that, normally, no one cares about the things they take for granted - in particular if they reasonably work. But the opposite also holds true. Like it or not, a single whatever it takes, a couple of bold moves in the context of Covid-19 or the invasion of Ukraine, are worth more to citizens than one thousand cautiously designed regulations or a well thought of Conference on the Future of Europe. Some economic challenges from the current situation are distinctly European - energy supply, the monetary path, industrial policy, the repositioning of economic solidarity. Today's context calls for the EU's leading role and, moreover, for a new momentum on European unity and purpose. Namely all actions to be taken can be channelled via either solidarity or subsidiarity, those ageing principles.

5. ***Make it a shared responsibility.*** However, to each their own. There is a role to play for Member States, governments, national political ecosystems and stakeholders as well, in order to nurture the EU towards the future and contend economic populism. As we are constantly reminded of, lately with the French election, populism will conquer or be conquered in nations, not at Berlaymont. We should be done with the scapegoating exercise of the EU as the punching ball of national politics, as if she were that uncomfortable neighbour one needs to cope with. The European Union is not the European Commission, nor Brussels/Luxembourg for that matter - this structural mental image being possibly populism's foundational win in Europe. National dynamics are part of the EU's ecosystem and national leaders need to be committed to the task of defending and preserving the EU, not using it as a way to divert frustration. Likewise, national leaderships play as large a role, if not larger, than EU counterparts in promoting long-term ambition, as Italian President Draghi has recently shown in front of the European Parliament with his pledge to more integration in order to protect the EU from future crises. And so, we plead leaders of Europe, behold your people.

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G. POPULISM, INEQUALITY, AND ECONOMIC GROWTH

ABSTRACT

Economic inequality has increased in many western countries in the last few decades, though the timing and extent of the rise varies. Increasing inequality is linked to declining social mobility, as children born into poverty are more likely to remain in poverty in later life than their parents who were born in more equal societies. Rising inequality is one factor in the recent growth in support for populist political parties, who argue that there are simple solutions to economic problems - these are frequently attributed to external organisations or to disfavoured groups such as immigrants. The evidence to date suggests that populists in power tend to have some effect on inequality – right-wing populists raise inequality, left-wing populists lower it, but at the expense of reduced economic growth overall. We argue that there are alternative ‘non-populist’ ways of tackling increasing inequality, but that doing so effectively is likely to require a broad range of policies, rather than just changes to specific aspects of, for instance, taxes and benefits.

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INTRODUCTION

In this paper, we assess how economic inequality has changed over time, and how this could be linked to the rising prominence of populist movements. We provide an overview of the economic effects of populism to date and consider alternative approaches to tackling economic inequality.

We do not include lengthy discussion of definitions, but have instead used the following working definitions of key concepts:

- a. We define populism as encompassing those political movements which emphasise their anti-pluralism and anti-elitism, along with the moral right of leaders of those movements to represent ‘the people’.⁷⁷
- b. We consider several different concepts of economic inequality, defined as differences in material well-being, or the possibility of achieving material well-being, between individuals and / or groups. Our principal focus is on inequalities in wealth and income, and on inequalities between all individuals in a society, rather than between different groups.⁷⁸

The remainder of this document is divided into six sections, covering: the growth of inequality in western societies (Section 2); the links between inequality, social mobility and merit (Section 3); the growth of populists in unequal societies (Section 4); economic and social implications of populism (Section 5); the effects of the pandemic on inequality and populism (Section 6); and how to address inequality in a non-populist way (Section 7). In addition, the Appendix lists the members of the subgroup.

THE GROWTH OF INEQUALITY IN THE WEST

Global relative inequality has fallen significantly in recent decades, driven by the rapid growth of previously poor countries such as China and India.⁷⁹ However, the picture looks quite different within many countries, particularly in the West. Income and wealth inequality in many western countries reached a historic low point in the late 1970s. Inflation and labour disputes had eroded the value of capital, and the growth of the meritocratic society had reinforced a sense of high levels of income and occupational mobility. Political leaders and other prominent figures were often from middle class or poorer backgrounds

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⁷⁷ See Müller (2016), “What is Populism?”, **University of Pennsylvania Press**; Guriev and Papaioannou (2020), “The Political Economy of Populism”, *Journal of Economic Literature*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542052

⁷⁸ United Nations (2015), “Development Issues No 1: Concepts of Inequality”, available at: https://www.un.org/en/development/desa/policy/wess/wess_dev_issues/dsp_policy_01.pdf

⁷⁹ Niño-Zarazúa, Roope and Tarp (2016), “Global Inequality: Relatively Lower, Absolutely Higher”, *Review of Income and Wealth*, available at: <https://onlinelibrary.wiley.com/doi/epdf/10.1111/roiw.12240> note though that absolute inequality, based on the absolute gap between rich and poor, has risen.

– ‘poor kids made good’ through the opportunities opened up by military service and the widening of education systems, or children of small business owners such as Margaret Thatcher and Jimmy Carter.

This began to change in the 1980s, beginning first in the UK and the US, before spreading to continental Europe from the 1990s. By the time the global financial crisis hit in 2008, several western societies were as unequal as they had been since reliable recording began. The financial crisis and its aftermath may have stabilised income inequality, but wealth inequality continued to rise, creating fears of a permanent capitalist elite. The richest people on earth began to challenge their Gilded Age counterparts such as John D. Rockefeller and JP Morgan in the amount of wealth they controlled.

As this basic narrative suggests, changes in inequality are driven by many factors, including long-term moves in the structure of economies (for instance, the shift towards high-tech and high-skill industries), crises and the responses to them, and institutional and political factors, such as changes in labour markets and in taxes and benefits.

FORMS OF INEQUALITY

We focus here on income and wealth inequality.⁸⁰ Each of these displays differing dynamics over time, and between countries, and each has several different measures that can tell somewhat different stories. The dynamics are also not necessarily the same at different points of the distribution. Nonetheless, some broad themes emerge.

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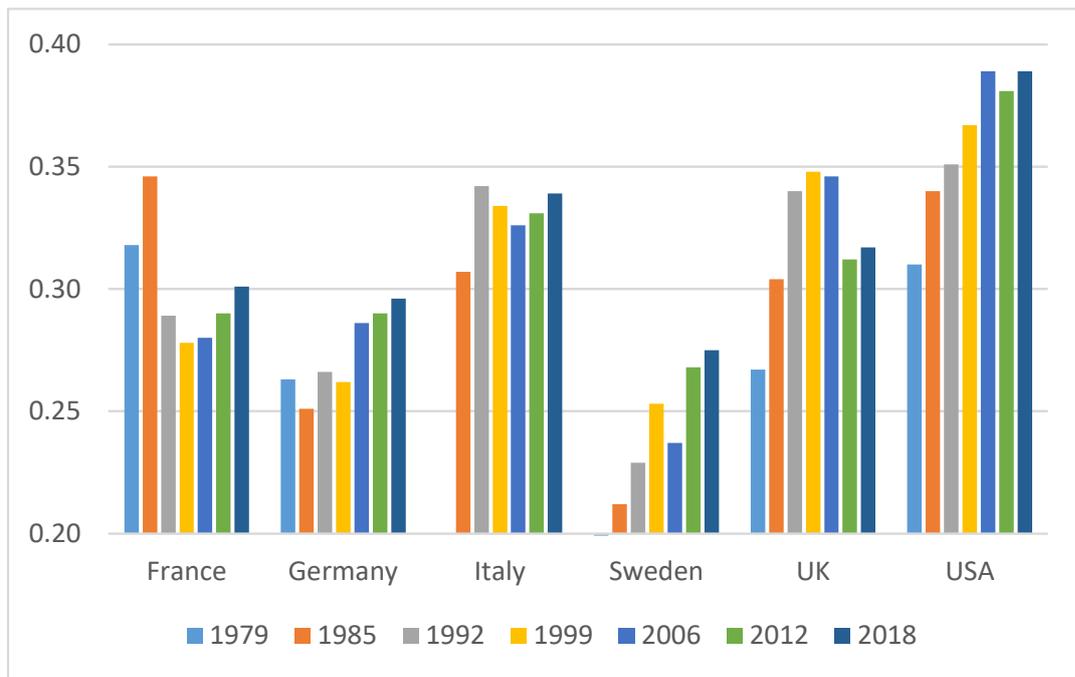
Income inequality

The most common way of measuring income inequality is via the Gini coefficient – a measure of income inequality between 0 and 1, where 0 indicates absolute equality, 1 indicates that the richest person receives all of the income. Figure 1 presents data for six

⁸⁰ There are many other valuable ways of thinking about economic inequalities, such as inequality of labour or capital earnings, or inequalities of different types of wealth, such as land holdings.

selected countries.⁸¹ The data indicate that, amongst high-income economies, the Gini coefficient now varies between 0.29 and 0.39. Income inequality increased markedly in the UK and the US in the 1980s and early 1990s. Increases in inequality in other western economies typically came later, and from a lower base.

Figure 1: Gini coefficient, disposable income



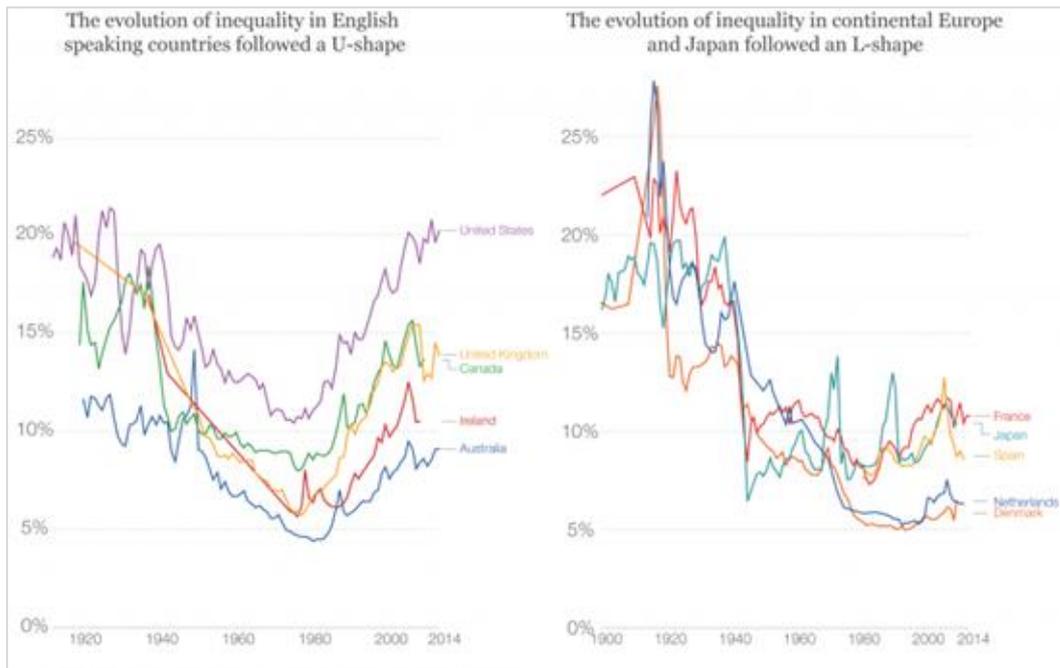
Source: Luxembourg Income Study and OECD.

The Gini coefficient provides a useful overall measure of inequality in a country but can hide dynamics at different points in the income distribution – for instance, a country with a small wealthy elite and a lower-middle income majority could have the same coefficient as one with an equal spread of people across the income scale. Figure 2 shows that English-

⁸¹ See LIS data available at: <https://www.lisdatacenter.org/> and OECD data, available at: <https://data.oecd.org/inequality/income-inequality.htm>. The data report household disposable income adjusted for the number of household members. While broad trends tend to be similar, precise figures differ depending on the definitions and data sources used.

speaking countries have seen significant increases in the share of income going to the top 1%, but this has not been replicated more widely.

Figure 2: Share of Total Income to the Top 1% since 1900



Source: Our World in Data.

WEALTH INEQUALITY

Wealth tends to be much less equally distributed than income; Alfani and Schifano (2021) estimate that in 2010 the Gini coefficient for wealth in G7 countries varied between 0.63 (Italy) and 0.88 (USA).⁸² This reflects the inevitable dynamics of wealth accumulation (poor

⁸² Alfani and Schifano (2021), "Wealth inequality in the long run", available at: https://www.researchgate.net/publication/350384345_Wealth_inequality_in_the_long_run.

people tend to have lower saving rates than rich people), as well as limited taxation of wealth in most countries.

Wealth inequality has increased particularly significantly in the US, where the richest 0.1% of the population now controls about as great a proportion of the nation's wealth as they did a hundred years earlier. The share of this top 0.1% has more than doubled since the 1970s (Figure 3).⁸³ Unlike with income inequality, several measures of wealth inequality continued to increase following the financial crisis, perhaps due to increasing asset prices in a time of low interest rates and quantitative easing.

Figure 3: Top 0.1% wealth share in the United States (capitalized incomes, equal-split adults)



Notes: This figure shows the share of total household wealth owned by the top 0.1% richest adults (individuals aged 20 and above) in the United States with wealth equally split between married spouses.

Source: Saez and Zucman (2016), updated.

⁸³ Zucman (2019), "Global Wealth Inequality", Annual Review of Economics, Vol. 11, available at: <https://gabriel-zucman.eu/files/Zucman2019.pdf>.

However, the picture in other countries is more mixed; Zucman (2019) finds only limited increases in the share of wealth going to the richest groups in France and the UK. There is some evidence of a shift in wealth towards highest-income households relative to those with middle incomes, related to an increase in the importance of financial and business wealth relative to property.⁸⁴

CAUSES OF CHANGING INEQUALITY

A wide range of causes has been suggested for increasing inequality, and inevitably each of them has some validity. We provide an overview here of some of the leading proposed explanations.

Technological causes

Skill-biased technological change was an important early explanation of rising inequality, based on the argument that technology changes have increased demand for (e.g.) college-educated workers relative to their less-skilled counterparts. There is some evidence that this has had an effect in the US and Germany, with rising wage premiums for more educated workers, though much more limited effects in other countries.⁸⁵ Capital-biased technological change (higher returns to capital rather than workers) could also be a factor, but it is only likely to be particularly significant in the US.⁸⁶

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Globalisation

Globalisation seems likely also to have had an impact – increasing competition from goods imported from developing countries, or from immigrants, could in principle reduce low-skilled wages in developed economies (while possibly increasing wages among a mobile globalised elite). There is some evidence of effects, particularly on changes in

⁸⁴ Advani et al (2021), “The UK’s wealth distribution and characteristics of high-wealth households”, Fiscal Studies, Vol. 42(3-4), available at <https://onlinelibrary.wiley.com/doi/full/10.1111/1475-5890.12286>.

⁸⁵ Hoffman, Lee and Lemieux (2020), “Growing Income Inequality in the United States and Other Advanced Economies”, Journal of Economic Perspectives, available at: <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.34.4.52>.

⁸⁶ See “Blogs review: Robots, capital-biased technological change and inequality”, available at: <https://www.bruegel.org/2012/12/blogs-review-robots-capital-biased-technological-change-and-inequality/>.

regional inequality due to the so-called China shock.⁸⁷ However, impacts on overall inequality are difficult to disentangle. For example, increased trade and immigration could also have affected inequality indirectly, by reducing the bargaining power of labour, making it easier to push through institutional changes such as a reduced role of trade unions in wage setting. Lastly, globalisation is potentially a cause of high incomes at the very top of the distribution, as global competition has created an international market for super-stars.

Societal and institutional causes

Changes in labour markets are likely to have had significant impacts – though not all in one direction. For instance, high rates of unionisation can increase coordination of bargaining (tending to reduce inequality) while also increasing unemployment (raising inequality). The overall conclusion tends to be that changes in unionisation have been a significant driver – Checchi and García-Peñalosa estimate that the UK Gini coefficient would have been about 9 percentage points lower if it had Finnish labour market institutions.⁸⁸ Similarly, the Hartz reforms to German labour markets seem to have contributed to increased inequality from the early 2000s.⁸⁹ But note that changes in labour market institutions have gone in different directions (before the Great Recession) with some countries weakening them (US/UK) but others strengthening them (such as Spain).

Product market developments can also have an impact on inequality, for instance if increased competition were to lower prices and improve workers' real incomes. The evidence here is mixed; product market deregulation seems to be associated with lower prices and higher labour productivity, potentially reducing inequality.⁹⁰ But increased market power in several industries (associated with changing antitrust policy) could tend

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⁸⁷ Autor et al. (2016), "The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade", Annual Review of Economics, Vol. 8, available at: <https://economics.mit.edu/files/12751>.

⁸⁸ Checchi and García-Peñalosa (2008), "Labour market institutions and the personal distribution of income in the OECD", available at: <https://air.unimi.it/retrieve/handle/2434/142829/122345/2.pdf>.

⁸⁹ Immel (2021), The Impact of Labor Market Reforms on Income Inequality: Evidence from the German Hartz Reforms.

⁹⁰ Bouis et al (2016), Product Market Deregulation and Growth: New Country-Industry-Level Evidence. Conversely, MacKay and Mercadal (2021), Deregulation, Market Power, and Prices: Evidence from the Electricity Sector, find that deregulation increased efficiency but also increased market power, leading to higher consumer prices overall.

to increase inequality; Khan and Vaheesan (2017) argue that, in the US, “market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1% and 0.1% at the top of the income and wealth distribution.”⁹¹ Some scholars have identified a trans-Atlantic divide, suggesting that increased market power may be a more important explanation of increased inequality in the US than in Europe.⁹²

Tax and benefit changes

Changing progressivity of the tax and benefits system could reduce or increase inequality. In most western countries, taxes and benefits play an important redistributive role, reducing inequality substantially relative to market outcomes. 4 shows the significant differences in the progressivity of taxes and benefits between different European countries. In Slovenia and Finland, the tax and benefit system reduce inequality by more than 50%, while the impact is much smaller in countries such as Bulgaria and Cyprus.⁹³

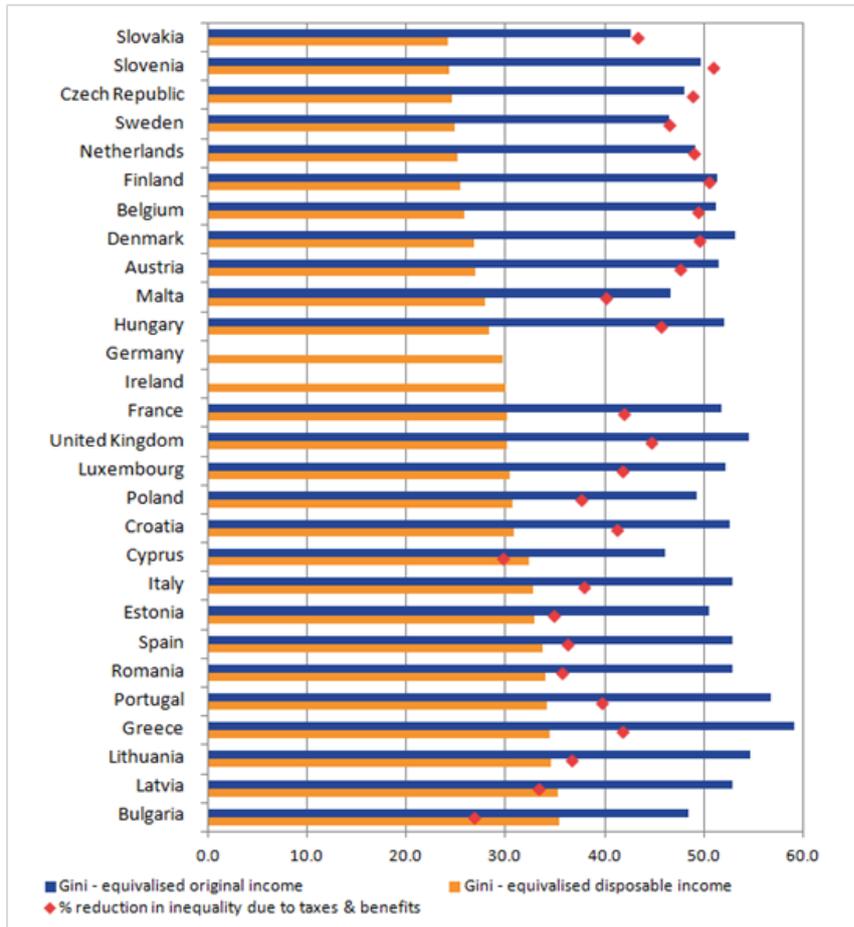
⁹¹ Khan and Vaheesan (2017), Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents.

⁹² Philippon (2019), The Great Reversal. See also Eggertsson et al (2021), Kaldor and Piketty's facts: The rise of monopoly power in the United States.

⁹³ ONS (2016), “The effects of taxes and benefits on income inequality: 1977 to financial year ending 2015”, available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/theeffectsoftaxesandbenefitsonincomeinequality/1977tofinancialyearending2015>.

Figure 4: The effects of taxes and benefits on income inequality: 1977 – 2015



Source: UK Office for National Statistics.

The key variables are:

- a. the extent to which taxes and benefits are progressive (for instance, the extent of targeting of benefits on the poorest groups, and the balance between indirect taxes (which tend to be regressive) and direct taxes (which tend to be progressive); and

- b. the size of benefits (or taxes) relative to incomes.

A detailed study of the tax and benefit system in the UK since 1977 suggests that the overall impact has not changed significantly over time – while the targeting of cash benefits has fallen, their absolute size has increased, meaning that the net change is small. However, some specific tax reforms do seem to have had significant impacts on inequality; for instance, reforms to capital gains taxation in Sweden are associated with large increases in top income shares.⁹⁴

Crises and responses to them

Historically, crises, particularly major wars, have been a significant driver of changes in inequality. Progressive taxation was often developed to help pay for conflicts, and wars also affected the balance of power between capital and labour.⁹⁵ In most western countries, income inequality has largely stabilised since the financial crisis, perhaps reflecting changing political dynamics as well as reduced opportunities for high incomes as growth has stagnated. However, as noted above, wealth inequality in the US has increased.⁹⁶ The interaction between the Covid pandemic and inequality are discussed below.

⁹⁴ Roine and Waldenström (2011), “On the Role of Capital Gains in Swedish Income Inequality”, *Review of Income and Wealth*, Vol.58(3), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050893.

⁹⁵ Besley and Persson (2009), “The origins of state capacity: property rights, taxation and politics”, National Bureau of Economic Research, available at: https://www.nber.org/system/files/working_papers/w13028/w13028.pdf

⁹⁶ Kuhn et al (2018), “Asset prices and wealth inequality”, available at: <https://voxeu.org/article/asset-prices-and-wealth-inequality>.

CONCLUSIONS

It is impossible to disentangle entirely the impacts of each differing factor on inequality. For instance, skill-biased technological change may have influenced deunionisation, which itself affects the political power of labour and the extent of redistribution via the tax and benefits system.⁹⁷ Similarly, globalisation is likely to have had an impact both directly and through indirect impacts on technological adoption, specialisation, and institutional change.

However, given the differing dynamics between the Anglophone sphere and other high-income economies, it seems likely that policy-related factors are important drivers of changes in inequality over time. Since inequality before taxes and benefits have increased as much or more than inequality after transfers, such policy causes may be deep-rooted – based in changes to the working of labour and product markets.

Even if inequality as measured by the Gini coefficient of disposable income stabilizes, perceptions of inequality may matter as much (or even more) to political and social dynamics than actual inequality. In particular, developments at the very top of the income and wealth distribution have become a focal point for protests and anti-elitist political movements, as discussed further below.

⁹⁷ Acemoglu et al. (2001), “Deunionisation, technical change and inequality”, Carnegie-Rochester Conference Series on Public Policy, available at: <https://www.sciencedirect.com/science/article/abs/pii/S0167223101000586>.

INEQUALITY, MOBILITY, AND MERIT

Inequality in the aftermath of the Great Recession

European economies displayed a variety of inequality patterns over the second half of the 20th century. For Europe as a whole, inequality seems to have stabilised during the 21st century to date, but with significant differences between countries. Some countries have reversed their long-term trend, as is the case of Sweden where inequality started to increase around 1990, while in the UK, after almost three decades of rising inequality the trend was reversed during the Great Recession. While Europe has recently witnessed stable or decreasing inequality, inequality has typically continued to increase in the US.

The neoliberal rhetoric of the previous decades implied that by the time these changes in inequality became apparent two paradigms had been widely accepted. The first is the idea that market incomes are solely determined by technology and preferences, so that the pre-tax distribution is providing factors with the rewards they “deserve”. The second is the concept of meritocracy which implies that achieving a position of influence or economic success is the result of demonstrated abilities or merit. As a result, the rhetoric of opportunity that characterized both the post-war decades and the neoliberal dogma turned, as inequality rose, into a rhetoric of failure. Those whose incomes did not grow were *responsible* for such outcomes.⁹⁸

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The 2007-08 Financial Crisis questioned this view of the world. The crisis was the result of inadequate decisions taken by individuals that were supposedly highly skilled, reportedly highly educated and undoubtedly highly paid. Such an outcome challenged the idea that market rewards were deserved, a perception that was exacerbated by government interventions to support the banking sector which, although justifiable in terms of macroeconomic stability, implied that those responsible for the crises did not suffer the corresponding losses. Not surprisingly, a widespread questioning of how income was distributed arose.

⁹⁸ See Sandel (2020), “The tyranny of merit: What’s become of the common good?”, on meritocracy, who argues that the defence of meritocracy is largely a way for elites to justify the intergenerational transmission of privilege.

Mobility patterns

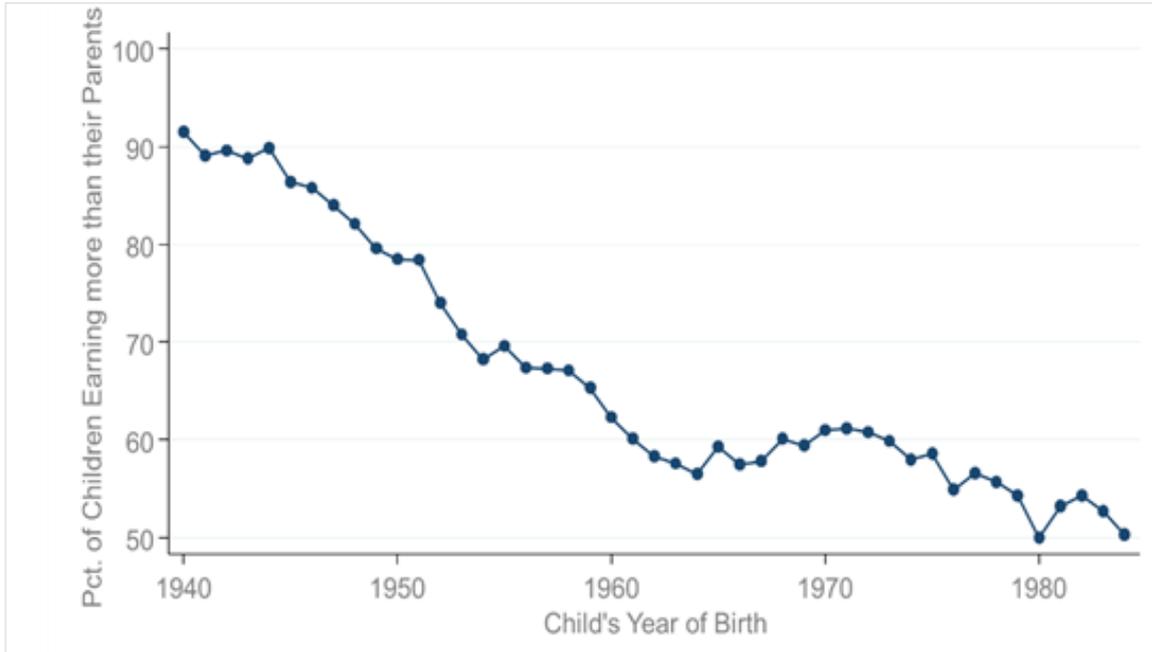
The debate on distributional outcomes has been reinforced by a marked decline in the extent of social mobility observed in high-income countries. After decades of extensive upwards social mobility driven by both economic growth and the expansion of higher education, this trend has been largely reversed.

To measure mobility, we can compute a simple statistic: the fraction of children who go on to earn more than their parents did, measuring both the children's incomes and their parents' incomes in their mid-30s. Figure 5 plots the statistic for the US separately by the year in which the child was born, including children born between the 1940s and the 1980s

The figure shows that for children born in the middle of the last century, it was a virtual guarantee that they would experience upwards mobility. Yet, over time there has been a dramatic reduction in this probability, which, for those born in the 1980s, is only about one in two. Similar declines have been observed in a number of countries.⁹⁹

⁹⁹ Blanden, Gregg and Machin (2005), "Intergenerational mobility in Europe and North America. Report supported by the Sutton Trust", Centre for Economic Performance, London School of Economics.

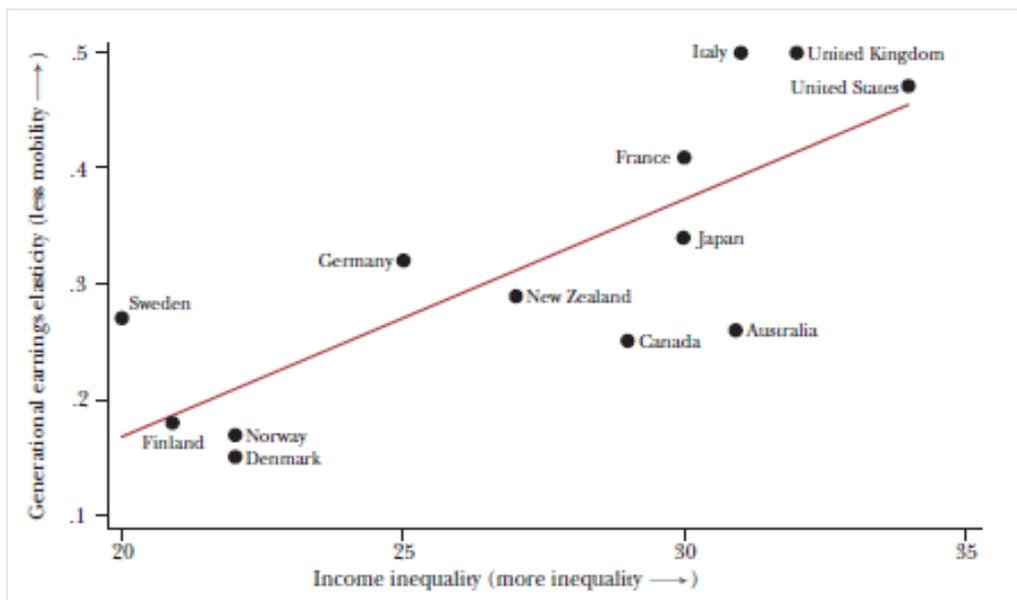
Figure 5: Percent of children earning more than their parents by year of birth



Source: Chetty et al. (2017).

Mobility and inequality are closely related, with less equal societies also displaying less social mobility. Consider Figure 6. The vertical axis shows the intergenerational earnings elasticities, the values lying between 0 and 1. A lower intergenerational elasticity means that there is higher income mobility in that country. The horizontal axis shows the Gini coefficient (Gini coefficient of disposable household income, measured in around 1985). The *Great Gatsby Curve*, as termed by Krueger (2012), indicates that overcoming one's parents' income level is easiest in countries with low Gini coefficients. This observation suggests that rising inequality may reduce upward mobility, which would compromise the fairness of a society.

Figure 6: Cross-sectional inequality vs. intergenerational mobility (the Great Gatsby curve)



Notes: Income inequality is measured as the Gini coefficient of disposable household income, measured at around 1985 (OECD data). Intergenerational income mobility is computed as the elasticity between fathers' and sons' earnings as adults (the latter measured in the mid to late 1990s) and compiled in Corak (2006).

Source: Corak (2013).

A meritocratic society?

The idea of identifying talent throughout an entire society in order to employ talented individuals in government,¹⁰⁰ although initially developed in China found its strongest defendants in the Western economies, where the combination of Protestantism with the

¹⁰⁰ Well, men. Until the mid-20th century, the concept of talented individuals included exclusively males. A notable exception is Plato who, in *The Republic*, claimed that women were equally capable of being “guardians” of the ideal Republic.

Enlightenment led thinkers to formalise the importance of natural ability and education to identify those that should lead a society. The traditional elites (based on birth) forfeited their privileged access to education and Western universities acquired the crucial role of identifying talent, thus shaping future employment possibilities and earnings (see Woolridge, 2021).

Public funding and a reform of the institutions providing higher education delivered several decades in which educational attainment expanded and intergenerational income mobility was high. Yet, even at its best, the meritocratic ideal is problematic. As argued by Michael Young in his 1958 book *the rise of meritocracy*, meritocracy risks dividing a society. In his satire, when intelligence and hard work replace traditional divisions based on social class, society becomes stratified between a merited power-holding elite and a disenfranchised underclass. Two problems appear: the elite will seek to transmit privilege while the underclass, if they accept the meritocratic ideal, will need to accept that their outcome is deserved.¹⁰¹

Young's vision seems to have, to some extent, come true in the early twenty-first century, as Western societies have polarized, and elites have increased the extent of social reproduction. In his critique of the US higher education system (although many of his arguments apply elsewhere too), Michael Sandel (2020) shows how what were once merit-based entry exams have become a system in which the children of the elite have privileged access through networks, all-the-coaching-that-money-can-buy, or undisclosed payments in the form of donations.¹⁰² The result has been a sharp decline in the social mix in top institutions, a reduction in intergenerational mobility, and an increasing feeling of entitlement of those who get educational credentials.

Interestingly, this decline in equality of opportunity has, to a large extent, been driven by parental decisions rather than by policy choices.¹⁰³ But why are today's parents different from those in the 1950s and 1960s? Doepke and Zilibotti (2019) argue that this change is the

¹⁰¹ The first problem was a major concern for Plato, who argued that the price that the 'guardians' had to pay for being the ruling elite was not to have children.

¹⁰² Sandel (2020), *Tyranny of Merit: What's Become of the Common Good?*

¹⁰³ Although the reduction in public funding, and in particular the decline in the relative salaries of primary- and secondary-school teachers, in many high-income countries has not helped.

result of growing inequality.¹⁰⁴ When income inequality is low, your child's expected income will be rather similar whatever her education. As a result, parents invest little time and monetary resources in trying to advantage to their child. In contrast, as the income gap associated with different educational paths increases, it becomes rational for parents to forgo leisure time and own consumption in order to increase the likelihood of their children getting into an elite institution. Since high income parents have more resources, they will best advantage their children, thus increasing the likelihood that the latter have access to the best education irrespective of the child's natural ability. As a result, social mobility declines and the Great Gatsby Curve appears.

FROM MERITOCRACY TO POPULISM

Starting in 2007, the Financial Crisis, the Sovereign Debt Crisis and the ensuing Great Recession constituted a major shock that questioned the economic dogmas that had been put forward since the late 1970s. The distribution of market incomes is under scrutiny, and an awareness of the role of socio-political relations in shaping inequality and mobility has emerged that rejects the idea that we live in a meritocratic society and that markets deliver all individuals their worth.¹⁰⁵ Several aspects have paved the road for a rejection of the meritocratic ideal. The first is the increased awareness that opportunities, and in particular educational opportunities, are not equally distributed. The second has been the way in which the Financial Crisis questioned whether the earnings of those at the very top of the distribution actually reflect their productivity, when their decisions lead to systemic risk and put in peril the entire financial system.

Lastly, a key element was the way in which the international community dealt with the twin crises of 2007-09 and 2011-13. The decision to bail out banks during the Financial Crisis was the right decision in terms of economic policy yet had massive political costs. The looming crisis was largely the result of excessive risk-taking in the financial sector, yet those responsible for the crisis were getting away with it. Shortly after, when Greece, Ireland and

¹⁰⁴ Doepke and Zilibotti (2019), Love, Money and Parenting: How Economics Explains the Way we Raise our Kids.

¹⁰⁵ For example, Piketty (2020) presents a historical perspective of inequality dynamics, where distributional outcomes are not a deterministic outcome but rather result from the combination between fundamentals (preferences and technology) and ideological factors.

Portugal found themselves in a debt crisis because of inadequate financial decisions, the policy was not to bailout these countries but to argue that moral hazard problems required making them responsible for their decisions. The consequence was austerity, recession and a massive loss of income that hit hardest those with fewer resources and fewer skills.

Moreover, austerity in the wake of the crises was widespread in the EU, with major consequences for the wellbeing of certain groups of the population that felt left behind. A possible reading of those policy decisions was that punishment falls on the people but not on the elite.

THE GROWTH OF POPULISM IN UNEQUAL SOCIETIES

Populist movements may adopt some policies associated with traditional conservative or social democratic parties, such as immigration control or nationalisation of key services, meaning that there is no bright line between populist and mainstream programmes. Moreover, some mainstream parties have become closely associated with populist movements, such as the Republican Party and the Tea Party in the United States and the Conservative Party and the Brexit movement in the UK. Nonetheless, Timbro argues that “In general, it is not as difficult to categorize political parties as one might expect. Despite some disagreement on labels, there is a rather wide consensus among scholars on where parties fit in.”¹⁰⁶

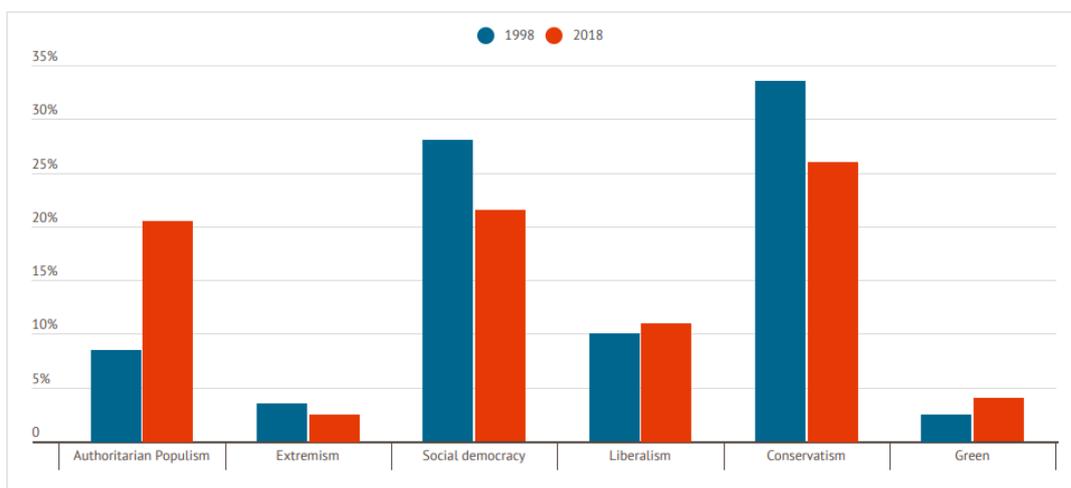
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While precise definitions can be questioned, studies of populism have consistently identified increasing political prominence of populist parties over the last forty years. For instance, the Timbro Authoritarian Populism index finds that more than a quarter of European voters supported populist parties in 2018. The growth of populism has come at the expense of traditional social democratic and conservative parties (Figure 7).¹⁰⁷ Populist parties have entered power in several European countries (typically as part of coalitions), and populist movements have also had substantial influence on the platforms of traditional parties.

¹⁰⁶ Timbro Authoritarian Populism Index (2019), available at: <https://populismindex.com/wp-content/uploads/2019/02/TAP2019C.pdf>.

¹⁰⁷ Ibid.

Figure 7: Percent of votes for different ideologies, 1988 and 2018.



Source: Timbro Authoritarian Populism Index (2019).

A potential link between political developments and economic inequality has long been recognised. Amartya Sen identifies a two-way link between rebellion and inequality, writing that: “The relation between inequality and rebellion is indeed a close one, and it runs both ways. That a perceived sense of inequity is a common ingredient of rebellion in societies is clear enough, but it is also important to recognize that the perception of inequity ... depend[s] substantially on possibilities of actual rebellion.”¹⁰⁸

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It is therefore tempting to associate together contemporary rises in economic inequality and support for populist parties. Inequality, it may be thought, induces greater resentment and distrust of elites, and a drive to find simple solutions that will overthrow their power on behalf of ‘the people’. This could particularly be the case if rising inequality is attributed to outsiders, such as increased globalisation or immigration.

¹⁰⁸ Sen (1973), “On Economic Inequality”, Oxford: Clarendon Press.

Quantitative evidence supports the case for a link between inequality and populism. In their study of 14 OECD countries, Engler and Weiss tanner (2021) find that increased income inequality is associated with growing support for right-wing populist parties, with middle-income high-status voters particularly likely to be attracted to right-wing populism; they attribute this trend to fears of losing subjective social status.¹⁰⁹ The link between inequality and declining trust in elites, and increasing national identity, may also help to explain how inequality increases populism.¹¹⁰

Inequality therefore does seem to have encouraged the growth of populist movements, particularly on the right of the political spectrum. The relationship is, however, not one to one, and some countries have seen increasing populism without noticeable rises in inequality (such as France and Spain). This suggests that other factors are important too – and perhaps that perceptions of inequality may play at least as large a role as objective measures of it.

¹⁰⁹ Engler and Weisstanner (2021), “The threat of social decline: income inequality and radical right support”, *Journal of European Public Policy*.

¹¹⁰ Stoetzer et al (2021), “How does income inequality affect the support for populist parties?”, *Journal of European Public Policy*, available at: <https://www.tandfonline.com/doi/full/10.1080/13501763.2021.1981981>.

ECONOMIC AND SOCIAL IMPLICATIONS OF POPULISM

Populism is a broad term, encompassing what can be thought of as right- and left-wing populism. Right-wing populists tend to emphasise national identities, and oppose the influence or status of outsider groups, such as immigrants or minorities. Left-wing populists tend to emphasise class identities and oppose the influence of a (perceived) corrupt self-sustaining domestic elite.

Nonetheless, populist economic programs of both left and right have some common ‘anti-market’ elements. Populist leaders present themselves as true representatives of “the people”, promising to fight some “elite” who works on their own interest as opposed to “the people’s” interest. Economic populism is therefore typically anti-market; a populist leader knows better than the outcome of individual choices.¹¹¹ Populist movements often support limitations on immigration and international trade, for a mix of cultural and economic reasons. Anti-elitism and anti-pluralism can also be manifested through opposition to international organisations and treaties; in the US, Donald Trump’s presidency emphasised the need to renegotiate the NAFTA agreement, while in Europe, populists have reacted to fiscal discipline measures imposed by the European Union and “elite” bureaucrats. Since at least the 19th century, populism has also been associated with measures to counteract powerful companies, for instance through the 1890 Sherman Act in the US.¹¹²

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Populist movements often downplay the costs of significant interventions in existing regimes, or of major changes to market outcomes; for instance, reductions in trade or immigration are often argued to have few or no downsides. Concerns about fiscal sustainability can also be dismissed, particularly if they are associated with outside actors such as the IMF or the European Union. This denial of trade-offs in policymaking, and of the need for compelling evidence for policy changes, is an important characteristic of many populist movements. In the UK, this view was summarised during the 2016 debate over Brexit by then-Lord Chancellor Michael Gove’s statement that “the people in this country

¹¹¹ See Bourne (2019), “Economic Populism on the Left and Right is Poisoning US Political Discourse”, available at: <https://www.cato.org/commentary/economic-populism-left-right-poisoning-us-political-discourse>.

¹¹² Wright and Portuese (2019), “Antitrust Populism: Towards a Taxonomy”, Stanford Journal of Law, Business and Finance, Vol. 21, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400274.

have had enough of experts from organisations with acronyms saying that they know what is best and getting it consistently wrong”.

Empirical studies find negative economic impacts of populist governments both right and left wing. Funke et al (2020) is an important recent study of the economic consequences of populist governments since the early 1900s.¹¹³ The authors find that over 15 years, GDP per capita and consumption decline by more than 10 percent compared to a plausible non-populist counterfactual for each individual populism episode. This economic stagnation is linked to economic nationalism and protectionist policies, unsustainable macroeconomic policies, and the erosion of institutions and legal protections, hampering long-term growth through negative effects on innovation, education, and capital accumulation.¹¹⁴ Prior to 1990, the decline in GDP growth is driven by left-wing populists while in recent decades it is increasingly driven by right-wing populists. Several other studies focussed on populism in Latin America have also found negative economic impacts of populist governments.¹¹⁵

The bulk of evidence on the economic impacts of populism is negative, but Funke et al do find that left-wing populism is associated with reductions in inequality. They conclude that, compared to a plausible counterfactual, Gini coefficients fall by about 2 percentage points on average over 15 years after a left-wing populist leader comes to power, while rising by about 1 percentage point after a right-wing populist comes to power. Left-wing populism is also associated with workers receiving a higher share of total GDP, while the reverse is true of right-wing populism.

Inevitably, academic work to date has not produced definitive results on the economic impacts of very recent populist movements in the US or Europe, though there have been analyses of some specific aspects, such as trade policy.¹¹⁶ Before the arrival of Covid, discussed below, recent populist governments seem to have broadly acted in line with the longer-run evidence on populism, including fiscal expansions, restrictions on international

¹¹³ Funke et al. (2020), “Populist leaders and the economy”, Kiel Working Papers 2169, available at:

<https://www.ifw-kiel.de/publications/kiel-working-papers/populist-leaders-and-the-economy-15277/>.

¹¹⁴ See also Acemoglu, D., S. Johnson, J.A. Robinson (2005), “Institutions as the Fundamental Cause of Long-Run Growth”, Handbook of Economic Growth, available at: <https://economics.mit.edu/files/4469>.

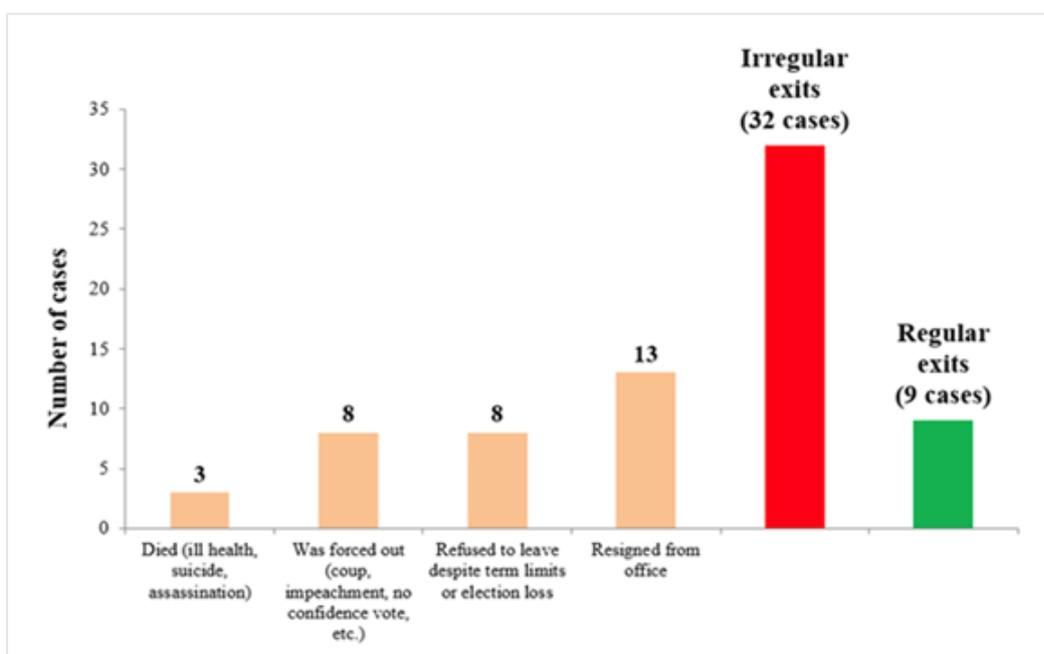
¹¹⁵ See e.g., Grier, Kevin, and Norman Maynard (2016), “The economic consequences of Hugo Chavez: A synthetic control analysis.” Journal of Economic Behavior & Organization.

¹¹⁶ Amiti et al (2019), “The impact of the 2018 trade war on US prices and welfare”, National Bureau of Economic Research, available at: <https://www.nber.org/papers/w25672>.

trade and / or immigration and conflicts with international institutions. Some populist governments have provided significant income support to lower-income households, either through social work programmes (Hungary) or minimum income schemes (Italy, Spain).

Beyond such economic effects, Funke et al (2021) provide important evidence on wider social and political consequences of populist governments, finding that populist leaders are associated with reductions in judicial independence and constitutional integrity, and that populist leaders often leave office ‘irregularly’ (for instance, through resignation, after refusing to leave following an election defeat, or being forced out by a coup or impeachment) – see Figure 8.¹¹⁷

Figure 8: Exit patterns of populist leaders (since 1970)



Source: Funke et al. (2021).

¹¹⁷ Funke et al (2021), “The cost of populism: Evidence from history”, available at: <https://voxeu.org/article/cost-populism-evidence-history>.

COVID, INEQUALITY AND POPULISM

Covid and inequality

The scale of the Covid pandemic has had correspondingly large economic effects, including on inequalities. Initial assessments suggest that poorer workers have been disproportionately likely to suffer employment impacts; Chetty et al estimate that, in the US, employment rates fell 37% for workers in the bottom quartile of the wage distribution, compared to 14% for workers in the top quartile.¹¹⁸ In France, richer households were more likely to increase their savings during the pandemic, while poorer ones borrowed more.¹¹⁹ Recent dramatic rises in energy prices are also likely to have disproportionate impacts on poorer households, who spend a higher proportion of their incomes on heating and electricity.¹²⁰

However, these effects have typically been counteracted, at least in the short term, by the extent of public support packages, which caused a significant drop in poverty levels in the US, and reduced income inequality in several European countries.¹²¹ Of course, this is not good news overall – merely a sign that, due to government interventions, poorer households seem to have suffered proportionately less economically than richer ones.

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¹¹⁸ Chetty, Friedman, Hendren, Stepner and The Opportunity Insights Team. (2020), “How did COVID-19 and stabilization policies affect spending and employment? A new real-time economic tracker based on private sector data”, Cambridge: National Bureau of Economic Research, available at: <https://www.nber.org/papers/w27431>.

¹¹⁹ Bounie, Camara, Galbraith (2020), “Consumers’ Mobility, Expenditure and Online-Offline Substitution Response to COVID-19: Evidence from French Transaction Data”, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3588373.

¹²⁰ House of Lords Library (2021), “Rising energy costs: the impact on households, pensioners and those on low incomes”, available at: <https://lordslibrary.parliament.uk/rising-energy-costs-the-impact-on-households-pensioners-and-those-on-low-incomes/>.

¹²¹ Matthews (2021), “The big drop in American poverty during the pandemic, explained”, available at: <https://www.vox.com/22600143/poverty-us-covid-19-pandemic-stimulus-checks>; Clark, Ambrosio, Lepinteur (2021), “The Fall in Income Inequality during COVID-19 in Five European Countries”, available at <https://halshs.archives-ouvertes.fr/halshs-03185534/document>.

The longer-term effects of the Covid pandemic are still highly uncertain, but there are several ways in which it could affect economic inequality, including:

1. People whose connection to the labour market is less stable, such as older workers and those with caring responsibilities, may have chosen to drop out of the labour force, with effects on their human capital and future earnings.¹²² Those just about to enter the labour market may also suffer long-term negative effects.¹²³
2. Already lower-achieving children seem to have particularly suffered from educational disruptions, with potentially serious impacts on their long-term life chances.¹²⁴
3. The substantial increases in public debts may contribute towards governments' decisions to cut future public services, with disproportionate impacts on poorer citizens. Conversely, inequality could fall if governments decide to raise taxes.

Covid and populism

As with Covid and inequality, Covid and populism can interact in both directions – populist governments may adopt different strategies to tackling the virus from mainstream political parties, and the political and social effects of the pandemic could affect the demand for populist rulers.

While there is little comprehensive evidence to date, some researchers have identified differences in the approaches to Covid taken by populist and non-populist governments – with the former less likely to impose restrictions on social interactions. This has consequent impacts on death rates during the pandemic. For instance, Bayerlein et al (2022) conclude that Covid mortality rates in countries with populist governments have been almost twice

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¹²² House of Commons Library (2022), "Coronavirus: Impact on the Labour Market", available at <https://researchbriefings.files.parliament.uk/documents/CBP-8898/CBP-8898.pdf>.

¹²³ Cribb et al (2017), "Entering the labour market in a weak economy: scarring and insurance", IFS Working Paper, available at <https://ifs.org.uk/publications/10180>.

¹²⁴ Grewenig et al (2020), "Covid-19 and Educational Inequality: How School Closures Affect Low- and High-Achieving Students", CESifo Working Paper No. 8648, available at: <https://www.cesifo.org/en/publikationen/2020/working-paper/covid-19-and-educational-inequality-how-school-closures-affect-low>.

as high as those in countries with non-populist governments.¹²⁵ Historical links between populism and vaccine scepticism might also be expected to increase mortality rates in countries with populist leaders, though there is no direct evidence on this to date.¹²⁶

It might be concluded that perceived failures of populist governments to handle the pandemic effectively could reduce the demand for populism among voters. Immediately after the 2020 US Presidential election, Lacatus and Meibauer (2020) argued that Trump's populist appeals failed to increase his vote share, while his "obvious lack of a competent COVID-19 management strategy may well have doomed him electorally."¹²⁷ Similarly, the popularity of the Bolsonaro government in Brazil collapsed during 2020 and 2021, as it was associated with high death rates and perceived mishandling of the pandemic.

However, this might be too comforting a conclusion for those who dislike populist approaches. To the extent that the long-term effect of the pandemic is to heighten distrust in politicians and to increase political polarisation, it might be expected to increase the appeal of populism over time.

ADDRESSING INEQUALITY IN A NON-POPULIST WAY

Increasing economic inequality is one of the central features of developments in many western societies over the past few decades. It can have significant impacts on political and social developments too, including by encouraging the growth of populist movements. Evidence suggests that populist parties once they attain power can have highly negative economic and social impacts. This therefore provides added impetus for a fight to reduce unjustified inequalities of economic outcomes. The need for a compelling approach to tackling inequality is further heightened by the many major challenges western societies

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¹²⁵ Bayerlein et al. (2022), "Populism and COVID-19: How Populist Governments (Mis)Handle the Pandemic", available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3849284. Note though that Spilimbergo (2021), "Populism and Covid-19" concludes that "I find no clear evidence to suggest that populists in power systematically mismanaged the response to Covid-19..."

¹²⁶ Kennedy (2019), "Populist politics and vaccine hesitancy in Western Europe: an analysis of national-level data" European Journal of Public Health, Vol. 29, available at: <https://academic.oup.com/eurpub/article/29/3/512/5364298?login=true>.

¹²⁷ Lacatus and Meibauer (2020), "Donald Trump's populist appeals failed to win over an electorate which wanted and needed a competent COVID-19 response".

are facing, including combatting global warming and responding to expansionist autocracies.

Here, we discuss first some principles that a non-populist approach to tackling inequality could follow, and then some potential policy changes that could be considered. Our role is not to provide definitive solutions – different members of the subgroup inevitably have different views on the desirability of otherwise of each of these policies. Moreover, there is no one size fits all solution – different approaches will be relevant in different countries. Rather, we aim to suggest issues and areas that may merit deeper consideration.

PRINCIPLES

First, **policies to reduce inequality should consider both ‘predistribution’ and redistribution**. Redesigning taxes and benefits can have a significant impact on inequality, but a narrow focus only on fiscal measures could overlook the main drivers of changing inequality. Market outcomes are not a fait accompli, and there is scope for well-designed policy measures to influence them significantly. Influencing market dynamics by, for instance, increasing carbon taxation could potentially benefit both environmental outcomes and social welfare. Conversely, redistribution via the tax system can be both politically and economically costly – both the givers and the recipients of perceived ‘charity’ may end up resenting it.

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Second, **a non-populist approach needs to win hearts and minds**, positively making the case for a good society. Experience suggests that, without a positive case for actions to reduce inequality, any changes are unlikely to be robust to changing political dynamics. The framing of policy interventions is therefore important – the subtleties of utilitarian cost-benefit analysis may be harder to communicate than clearer rights-based formulations. A minimum wage is easier to understand than the outcome of a tax credit application, for instance. An effective non-populist approach may also require a different approach to policy design at the regional or community level, to ensure wider involvement of people across society, rather than just a perceived narrow elite based in the capital city. This could help to reduce geographical inequalities too, combatting the sense of regional decline that has set in in many post-industrial towns.

Third, **the process of policymaking should encourage long-term actions** and discourage a populist drive for immediate wins. Investments in, for instance, education and pre-school children may have significant positive effects, both overall and in reducing inequalities, but their impacts may not be seen for decades. The World Bank's move to place inequality at the centre of its policy process could be a model for national authorities to follow. Better reporting of the long-term effects of policies could help to embed a longer-term vision in political decision making. This also interacts with wider questions of how to support robust media scrutiny and political engagement in an age of social media – the experience of the pandemic shows how effective policymaking can become impossible where trust in any authority figures is lacking.

RECOMMENDATIONS AND PROPOSALS TO CONSIDER

Labour markets and industrial strategy

Approaches to improve the outcomes from labour markets include:

- 'Levelling up' labour market standards to reduce imbalances between the gig economy and the more permanent sector, which have become marked in many countries.
- Assess links between precarious employment (consumer risk-bearing) and (a) stress and health outcomes for employees, and (b) aggregate macroeconomic outcomes - including incentives to invest in an employment relationship, and propensity to consume.
- Target investments to achieve net zero to help tackle regional inequalities in particular. There are often strong opportunities for net zero investments in former industrial areas.
- Increase the role of employees in industrial management, for instance by expanding employee representation in boards.

Taxation and public spending

The rises in wealth inequality since the financial crisis create a strong case for increased use of wealth taxation. There may be scope for rebalancing taxation to increase the progressivity of tax systems for a given total tax take, for instance substituting direct taxation of wealth for indirect taxation of consumption.

A guarantee of universal basic services, potentially expanded outside traditional core roles of the state in health and education, could help to reduce both direct inequality and inequality of opportunity. For instance, this might include guaranteeing availability, cost, and standards of services in local transport or housing.¹²⁸

Competition policy

The focus of competition authorities on promoting consumer welfare, and protecting competition rather than competitor firms, remains crucial to achieving good societal outcomes. However, there could be changes in focus to recognise the wider impacts of agreements and mergers, such as where labour markets may be harmed by agreements between firms or where mergers reduce workers' bargaining power.

Better understanding of the reasons for the growth in mark-ups and profitability is also important. Is this an inevitable consequence of technological trends towards concentration? Is it best combated by competition policy, or dealt with ex-post by seeking wider ownership of capital?

Macroeconomic stabilization

Low interest rates, and more recently QE, are commonly held responsible for fast relative growth in asset prices post-2000. An alternative potential tool for macroeconomic stabilisation is VAT (and/or other final sales taxes), which could be varied at relatively high frequency. As well as implying fewer wealth effects, this has the possible advantage of

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¹²⁸ See Unesco (2021), "Move the debate from Universal Basic Income to Universal Basic Services", available at: <https://en.unesco.org/inclusivepolicylab/analytics/move-debate-universal-basic-income-universal-basic-services>.

affecting budget constraints more evenly across the economy. It is also of particular use in the euro area, where it can be targeted to the particular conditions of individual countries.

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H. CONSTITUTIONAL, LEGAL AND GOVERNANCE QUESTIONS IN THE CONTEXT OF NATIONALISM

ABSTRACT

The Working Group considers the growth of populism in the Member states of the EU, notes that populist governments in Hungary and Poland have consistently failed to respect the rule of law and human rights and identifies the EU mechanisms which have been put in place to uphold these core values.

One mechanism allows the EU to suspend certain rights, including voting rights, of a Member State which commits serious and continuing infringements of core values. Another mechanism allows the EU to withhold funds from a Member State whose breaches of the rule of law have affected the EU budget.

So far, both of these mechanisms have been activated, but not fully enforced, against Hungary, and the procedure for suspension of rights has been initiated against Poland.

WGB recommends that the EU takes all steps necessary to uphold the rule of law and human rights and ensure its place as a union of these core values as well as an economic and monetary union.

Constitutional courts and supreme courts with constitutional jurisdiction in the EU and around the world are targeted by populists who wish to control their membership and the judgments which they hand down. The WG considers how to insulate senior judges from populist interference, and how to ensure in a populist and non-populist context the right balance between democratic oversight and quality assurance in the selection and removal of judges. WGB recommends the adoption of a model statute on judicial independence providing for the selection of judges, whether by political authorities or not, from candidates whose eligibility has been verified by independent and apolitical selection committees. WGB also proposes that the removal of judges be subject to safeguards such as a high degree of consensus in one or both houses of the national legislature.

More broadly, the WG considers how the composition of courts and other agencies such as competition authorities and central banks might be subject to democratic oversight while

maintaining high standards of technical competence in individual appointments. WGB recommends that where there is selection by politicians, that selection should be from candidates whose expertise has been confirmed by independent advisory committees comprising suitably qualified experts with no leading involvement in political parties and whose independence from partisan influence is beyond doubt.

Public spending is a target of populists of left and right, and one potential risk is of excessive public expenditure and inflation. It is possible to devise safeguards to inhibit excessive debt, such as the Stability and Growth Pact, at EU level, but it has been suspended and there are opposing views as to whether it should return in its current form or be relaxed, with some relaxation being more likely. WGB recommends that in the medium-term public authorities should focus on debt reduction and tax reform to preserve competitiveness.

The WG explores the use of quantitative easing (QE) (“printing money”) by the European Central Bank (ECB) and by national central banks around the world. The ECB has already had cause to reject calls for what would in effect be a populist monetary policy, but both the ECB and national central banks enjoy a considerable discretion to fund government borrowing by printing money. These are days in which a number of factors argue for increased public spending: recovery from the pandemic, the need to finance state and private action in the battle against climate change, and spiralling energy costs resulting from the invasion of Ukraine by Russia. All this could change views about what we mean by “prudent” levels of debt, and about the means used by central banks to support higher than normal levels of state borrowing. At the same time, increased levels of inflation make this a risky time to experiment with extensions of Quantitative Easing. WGB recommends that Quantitative Easing in coming years rules out both cancellation and direct purchasing of national debt.

INTRODUCTION

Populists are majoritarian. They are opposed to laws, values, and institutions which in their view prevent elected governments from doing what they are elected to do. They contrast the will of the people, which they claim to represent, with what they see as unrepresentative bodies and elites such as the EU institutions and national courts and other agencies such as competition authorities and central banks. Populists seek to put things right by transforming the membership and values of “elite” institutions and removing any independence they enjoy under the principle of the separation of powers or because their autonomy was designed to provide part of the machinery of checks and balances of the modern state.

KEY POINTS

A theme pervading the work of WGB has been the activities of the populist Governments of Hungary and Poland. Serious and serial violations by these countries of the rule of law and human rights have been going on for many years and clearly demand a vigorous response from the EU.

Proceedings against Hungary have been launched under the new “conditionality” regulation, which provides for withholding funding from Member States which breach the rule of law in a way which affects the EU budget. If this not enough, the EU may have to seek ways of neutralising the veto of Poland so as to suspend the voting rights of Hungary, which is blocking some EU measures to combat Russia’s invasion of Ukraine.

Neutralising Poland’s veto will not be easy, because in the past Hungary and Poland have each agreed to protect the other from action to suspend their rights. Poland would only agree to supporting suspension of Hungary’s rights if it were given assurances that its own rights would not be suspended. Yet the EU could only agree to this if it received some credible assurances about Poland’s own future conduct in respect of the rule of law and in particular the independence of the judiciary.

It is a hallmark of populist governments that they mistrust “unrepresentative elites” such as constitutional courts, human rights watchdogs, and independent economic regulators. This mistrust manifests itself in attempts to control the composition of such bodies, and discipline existing members if they obstruct the “popular will”.

On the other hand, political involvement in the appointment of judges and economic regulators such as competition authorities and central banks is a feature of democratic governance in numerous countries around the world. Since senior judges and economic regulators take decisions which are not entirely predetermined by technical expertise, political involvement in their appointment lends democratic legitimacy to their decisions.

A balance between democratic legitimacy and technical proficiency is to be found in selection procedures which allow politicians a choice between candidates whose qualifications for office have been confirmed by an independent expert committee.

Safeguards against unjustified disciplinary measures or removal from office will also be necessary, especially in the case of the judiciary.

As regards public expenditure which has for a number of good reasons, rather than populist excesses, increased in recent years, and is likely to do so for some while, WGB reckons that in the medium-term public authorities should focus on debt reduction and tax reform to preserve competitiveness. At the same time, increased levels of inflation make this a risky time to experiment with extensions of Quantitative Easing. The WG considers that Quantitative Easing in coming years should rule out both cancellation and direct purchasing of national debt.

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CONTENT, CONCLUSIONS AND RECOMMENDATIONS

Safeguards against nationalism and populism in the EU – Subsidiarity, Article 7 TEU and the new “Conditionality” Regulation

The principle of subsidiarity provides that the EU should exercise its law-making powers only if the aim of the measure in question could be better achieved at EU level than at national level. The reason for the innovation was to counter concerns that the EU was making excessive use of those powers which it shared with Member States and progressively removing the scope for national action.

Subsidiarity has had no visible impact on the exercise by the EU of its law-making powers. One reason might be that the EU institutions have shown little enthusiasm for a principle which sometimes seems to them to run against the grain of European integration. Another might be that democratic objections to “too much Europe” have to be balanced against

equally democratic calls for “more Europe” – as in the case of centralised vaccine procurement by the European Commission during the pandemic, and aspirations for the EU to play a larger role in the defence of Europe.

Populism has in any event in recent years challenged EU institutions on a broader front than could ever have been countered by even a strict application of the principle of proportionality. Populists in some EU Member States have objected to aspects of the EU’s immigration and asylum policy, have taken steps to restrict the independence of the national judiciary, and have refused to accept the supremacy of EU law. The possibility of such developments had been foreseen even prior to the 2004 enlargement of the EU, and procedures had been put in place to make compliance with human rights, democracy, and the rule of law, core values of the EU, which could be the subject of action by the [EU institutions, including the Court of Justice](#). It is these procedures, based on Articles 2 and 7 of the Treaty on European Union, which have been invoked to contain threats to the rule of law resulting from the actions of the governments of Hungary and Poland.

The EU has several ways of putting pressure on rule-breaking EU Member States. One is to impose a fine on a member state if it refuses to comply with a judgment of the EU’s Court of Justice. This happened [when Poland was fined one million euros per day](#) in 2021 for failing to withdraw a Polish law intimidating the Polish judiciary. Another is loss of funding under the [new so-called conditionality regulation](#) if it breaches the rule of law in a way that affects the EU budget. In April 2022 the Commission launched proceedings [under this regulation against Hungary](#). Since Hungary is a major recipient of EU funds this might prove effective and [should be pressed hard by the EU](#).

Article 7 TEU places another and potentially more [hard-hitting weapon](#) at the disposal of the EU – suspending some of the EU rights of a member state, including voting rights, for serious breaches of core values. Proceedings to suspend the rights of Poland and Hungary were started in 2017 and 2018 respectively but have not yet come to a vote in the Council.

The European Parliament has accused the Council of [a disorganised approach](#), but the voting rules to impose suspension have suggested the exercise was pointless.

Imposing a suspension of rights requires a unanimous vote of all member states apart from the member state facing suspension. [Hungary](#) and [Poland](#) have in the past stated they

would veto any suspension of the rights of the other. Their divergent responses to the invasion of Ukraine might have changed all that.

Poland might be persuaded not to block the suspension of Hungary's rights if it were offered some sort of accommodation as regards its own serial and serious breaches of the rule of law. This would raise rule of law issues too, but with careful plea-bargaining they might be surmountable. In an imperfect world, legal values and hard-headed political management must go hand in hand if the EU is to be an effective player on the world stage as well as an economic and monetary union.

WGB recommends that the EU takes all steps necessary to uphold the rule of law and human rights and ensure its place as a union of these core values as well as an economic and monetary union.

How to protect senior judges from undue political interference

Populists may want to choose as senior judges only those who have the “correct” attitude, as regards human rights issues, and any other constitutional issues which might obstruct the agenda of a populist government. The other side of this coin is that populists may want to remove judges who are discovered to have the “wrong” attitude on these matters.

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These populist objectives can be secured by various mechanisms (which admittedly may also be favoured by politicians we would not call populist)

- Political involvement in the selection of judges, directly or indirectly
- Short renewable terms of office, allowing politicians to deny renewal to judges suspected of having what politicians regard as the wrong attitude
- Political powers to discipline, remove, or impose early retirement on judges.

It should be noted that the first of these mechanisms occurs in numerous constitutions around the world, including those of a number of European countries, the United States, and Canada. The degree to which political criteria are imposed in the selection process varies widely, with more politicisation in the USA than in, say, Canada.

The selection of judges in some EU countries is subject to political manipulation, as recent experiences in [Hungary](#) and [Poland](#) show. But appointments at constitutional court or supreme court level have also recently caused political controversy in [Croatia](#) and [Spain](#).

The second mechanism referred to above, using short renewable terms of office in combination with political selection to put pressure on judges, does not seem to be a practical problem in Europe, because terms of office are not that short. Apart from Croatia, with 8 -year renewable terms for their constitutional court, the CJEU, with its 5-year renewable terms, seems in theory to be the most vulnerable to this sort of pressure, but the collegiate character of European Court judgments makes it impossible to identify the role of individual judges in decision-making. The views of Advocates-General at the CJEU are of course obvious from their opinions. Since Advocates-General may be re-appointable and in any event are often appointed as judges at the CJEU it is possible that some are influenced in the tone or content of their Opinions by a wish for re-appointment as an Advocate-General or appointment as a judge.

The third mechanism referred to above, involving powers of punishment, removal, or early retirement, is not common in Europe, but has recently caused controversy in [Hungary](#) and [Poland](#).

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It hardly needs saying that judges should be impartial and independent. There is in theory agreement on this that extends beyond the liberal western democracies to a global consensus. There are references to a fair and public hearing by an independent and impartial tribunal in the Universal Declaration on Human Rights (Art.10), and the International Covenant on Civil and Political Rights (Art.14), as well as the European Convention on Human Rights (Art.6).

Political involvement in the selection, re-selection or removal of senior judges poses a risk to judicial impartiality and independence. This risk is two-fold.

First, that judges will not decide cases solely on their merits as they see them, but also on the basis of the sort of outcomes their political sponsors would wish to see.

Secondly, in cases where their political sponsors have a direct interest in the outcome, judges subject to political patronage or the risk of political displeasure may be inclined to reach a decision which favours their political patrons. This is on any view a “bad” risk since it negates

impartiality and independence. The [“hanging chads” Supreme Court judgment of Bush v Gore in 2000](#) suggests that political appointees may in some cases be incapable of acting as impartial referees when adjudicating on an issue which directly affects their patrons – in this case, which concerned a disputed election in Florida, the Supreme Court divided on party lines. As one commentator put it: [“The Bush outcome was not a product of the conservative Justices' political ideologies... The Bush outcome was a product of these Justices' partisan political preference for George W. Bush...”](#).

In the United States uniform laws and model acts have for more than a 100 years been drafted by the [Uniform Law Commission or by independent bodies](#) and offered to state legislatures to accept or reject in whole or in part. In the same spirit, WGB recommends elements of a model statute for an impartial and independent judiciary.

In some countries, even if appointments of senior judges are made by politicians, they act on the basis of advice from independent and non-political judicial appointments committees. Political choice need not be excluded by such processes, but it is limited to appointment from a list of qualified candidates drawn up by the relevant expert and apolitical and independent committee. This may largely insulate the process from political influence, while at the same time encouraging meritocratic appointments.

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It is fairly common for appointments of the most senior judges to be made until retirement age, as is the case e.g., in Denmark, Germany, the UK, and Canada. In the United States appointments to the Supreme Court are made for life. These practices accord with the 2010 Recommendation of the Council of Europe to the effect that “judges should have guaranteed tenure until a mandatory retirement age, where such exists”.

It is in some countries it is very difficult in practice to remove a senior judge from office, e.g., in the UK this requires an affirmative vote in both houses of Parliament (the position is similar in Canada), in Germany, a 2/3 majority in the Bundestag is required. It must be emphasized that no such institutional safeguards can protect judges from vindictive removal by a government with a large majority in the national legislature, such as the 2/3 majority currently enjoyed by the Government of Hungary.

WGB recommends that in a model statute for an impartial and independent judiciary, the first and third of the above characteristics should be present. That is to say

- Appointments of senior judges should be made from candidates whose eligibility and expertise has been confirmed by independent advisory committees comprising serving or retired judges and individuals with no active political involvement and whose independence from political influence is beyond doubt.
- The removal of senior judges should so far as possible be outside the control of the government of the day and be subject to safeguards such as a high degree of consensus in one or more chambers of the national legislature.

If these safeguards are present, it is less important whether judges are appointed for limited terms, or until retirement.

How to protect independent regulators from the mediocrity of party- political control

In Spain today there is a broad social demand for the regeneration of public institutions. One of the recurring debates concerns the politicization that many citizens perceive in those State institutions that are expected to act independently of the democratic institutions - parliaments and governments - in which political action has its natural seat. We are talking about the judiciary and the regulatory and supervisory authorities, such as the National Securities Market Commission, the National Markets and Competition Commission or the Bank of Spain.

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The pathology has been identified: the - at least apparent - colonisation of these institutions through spurious mechanisms for the distribution of posts between political parties. The problem would therefore lie in the political influence exercised over the appointments of the top officials of these institutions, as the corresponding power of appointment or proposal is attributed to democratic institutions. Hence, the solution that is gaining support among those who denounce this situation and call for a radical and urgent overhaul consists of directly eliminating the participation of democratic institutions in this type of appointments or, at the very least, reducing it to a mere formal intervention that is limited to ratifying the result of prior selection mechanisms that - it is believed - could be completely objective and meritocratic.

The above sounds good, but it is a chimera, a democratically dangerous chimera, moreover. Technocratic asepsis is a false myth. It is certainly so even in areas such as constitutional jurisdiction or the governance of the judiciary, but it is certainly so in the case of economic

regulation and competition authorities. A false myth behind which a lot of politics is hidden, but often camouflaged as technical evidence.

Good regulation certainly presupposes highly specialised technical, economic, and legal expertise. But this in no way overlooks the eminently political dimension of all regulation. In any regulatory choice there is necessarily a political choice (or, if you will, an ideological bias) about how the general interest is best served. Therefore, it is a fundamental mistake to associate the idea that certain areas of public management should be separated from the natural and legitimate space for party politics in democratic institutions with the idea that these areas are or should be politically neutral. The regulatory task is not and can never be, by definition, politically aseptic.

In the field of competition regulation, the boundaries separating the judgement of legality from the judgement of expediency are tenuous and fluid. The judgement of proportionality, which is the decisive element in the exercise of the competition authority's functions as a consultative body and, in general, in the field of promoting competition and guaranteeing market unity, takes place in the grey area of transition between the judgement of appropriateness and that of legality, a terrain that is particularly permeable to (inevitable and legitimate) ideological bias. It is therefore not a matter of stigmatising ideological bias but, on the contrary, of making it transparent.

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It follows that - except in the case of those independent authorities whose activity is clearly dominated by a technical component or where decision-making margins are limited (e.g., data protection or fiscal responsibility authorities) - the legislator seeks to ensure a plural and balanced composition of independent authorities through the collegial nature of their governing body and the involvement of Parliament in the appointment of their members.

Indeed, the political (and not only technical) dimension of economic regulation implies that the democratic legitimisation of the activity of regulatory and supervisory bodies cannot arise only from their unquestionable submission to the principle of legality (Rule of Law). On the contrary, it requires a direct link with democratic institutions (government and parliament).

Therefore, the real problem facing independent regulatory and supervisory bodies is not strictly speaking, as is often thought, the politicisation of their activity, but rather - more precisely - the patronisation of their composition, that is, the colonisation and

instrumentalization of these institutions through the appointment of officials who lack the appropriate professional preparation for the exercise of their functions.

Ultimately, the appointment by democratic institutions (Parliament and Government) of the heads of the regulatory and supervisory authorities is a democratic imperative, but it should not prevent (i.e., it should be compatible with) the selection of suitable, duly qualified, and prepared professionals. This is the real challenge for regulators (and independent institutions in general), for there is no better guarantee of independence- not only with respect to party politics, but also and fundamentally with respect to the business interests of the regulated sectors- than the professional competence and proven reputation of those chosen.

The co-existence of political legitimacy and technical competence can be ensured in the field of economic regulation and supervision in a similar way to that suggested for the judiciary.

WGB recommends that where there is selection by politicians, that selection should be from candidates whose expertise has been confirmed by independent advisory committees comprising suitably qualified experts with no leading involvement in political parties and whose independence from partisan influence is beyond doubt.

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POPULISM AND PUBLIC SPENDING

Populism feeds on social confrontation and fuels it at the same time. According to that premise, in the field of public spending populist discourse usually takes two contradictory approaches linked by the social divide they are based on: the right-wing populism claims for a reduction of the budgetary spending to a minimum through a drastic cut in social benefits, as these would be not rightfully deserved by their recipients and would be unfairly funded by the taxpayers. Conversely, the left-wing populism calls for a massive increase in public spending, funded by higher fiscal pressure on the privileged upper classes, as the only way to correct every income inequality and promote wealth redistribution.

Although antithetical conceptions, both may be deemed populist as they share common grounds: left and right populism offer a simplistic but persuasive short-term solution to every complex and long-term economic problem. Likewise, both tendencies coincide in finger-pointing some social groups (different from “the people”) as the only culprits of all

the real or supposed economic injustices, be they migrants who come to benefit from our social advantages, the top one percent who refuses to pay their fair share, etc. On top of that, left and right populists share the usual nationalistic ideology of populism also in public spending matters: they normally reject every aspect of an open free market economy, as their policies need to be implemented in an internal market regulated and protected from “the non- people” (the group on who populists put the blame of all the economic problems).

When the left-wing populist claim for more public spending they seem to forget that public resources are limited and every economical decision has an opportunity cost; on the contrary, the demand for a balanced budget at any cost, usually coming from the right-wing side, seems to disregard social justice.

In periods of economic growth, western democracies based on a welfare state have normally succeeded in building social cohesion. History shows that this virtuous cycle of economic expansion and political stability leaves and keeps populism at bay, because a reasonable level of public spending in social protection and a moderate fiscal pressure are respectively accepted by all social groups in exchange of social peace.

From a legal perspective, that desirable middle ground between social justice and a balanced budget can be found in the principles set out in article 31 of the Spanish Constitution: On one hand it states that “everyone shall contribute to sustain public expenditure in proportion to their financial means, through a just and progressive taxation system”, but at the same time demands “efficiency and economy” while planning and executing the public budget.

Nevertheless, the economy is cyclical, and a period of stability is only the prelude for a new crisis that, depending on the way it is tackled, could be the breeding ground for a populist movement that endangers democracy. For instance, from an economic perspective it is widely accepted that the Nazi regime was, at least initially, a populist response the measures implemented by the Weimar Republic to deal with the consequences of the Great Depression: the severe spending cuts and salary reductions led to a lack of demand, more unemployment and a greater depression; the perfect economic conditions for a simplistic populist solution from the Nazi party, promising more jobs and prosperity in exchange for less freedom and democracy.

As a new case in point, the financial crisis of 2008 has put western democracies again to the test: The need for an increase of public spending, which always seems to have no end in a welfare state, has been even more acute in that period of economic downturn. But, while every citizen wants to maintain their level of social protection, rarely in that situation can be found an easy way to impose more taxes. Again, increasing the public debt has been the usual shortcut used by western democracies to address that situation.

Excessive public debt might result in future uncontrolled inflation and, as a consequence, social and political unrest. This explains, at a European level, the provisions of the Stability and Growth Pact and, as a consequence, the 2011 reform of the Spanish Constitution.

According to its new article 135 no public authorities “shall enter into a structural deficit beyond the limits stipulated by the European Union for its Member States”, “loans to cover the interest and capital of the Administrations public debt shall always be understood as included in the expenditure statement of their budgets” and “repayment of the public debt shall be awarded utmost priority”.

However, it seems European democracies have learnt the lessons of history; because the same regulations provide for a safeguard clause to remove limits on structural deficit and public debt “in the event of natural catastrophes, economic downturn or situations of extraordinary emergency which are beyond the States control”; being the Covid-19 crisis the latest example of these exceptions.

As with the economy, populism is also cyclical and this time, ten years after the onset of the last severe economic downturn and not having overcome the current pandemic, it might be said that so far western democracies have generally succeeded in keeping populism at bay. If we take a look at all the so-called populist parties in the US and the EU countries during this last decade, they have certainly posed some serious problems, but no one has been effectively able to put at risk democracy itself in any of those countries. Furthermore, to say anything positive, those parties have helped to democratically express the existing and many times justified social discontent while making a timely wake-up call to the traditional political parties.

In conclusion, although this time democracy may have succeeded against populism, the economic price to be paid mainly consists of, as usual, more public debt. Therefore, the

difficult economic challenge ahead of us is, in order to safeguard the existing social and democratic rule of law, to manage that debt while keeping social cohesion.

WGB recommends that in the medium-term public authorities should focus on debt reduction since the current levels of debt represent a significant exposure and an area of vulnerability for many EU countries and for the Euro itself. A concerted action on tax reform to preserve competitiveness and to provide additional resources to avoid excess debt is required.

MONETARY POLICIES AND QUANTITATIVE EASING

Modern Monetary Theory (MMT) argues that central banks should fund their governments by “printing money” – electronically, rather than with printing presses - and that taxes and borrowing are not needed to finance public spending. Supporters of MMT on the American left have been described as “new populists”, and they take fierce issue with the elites in government and the media who insist on balancing public accounts as if they were a household budget. Yet some elements of MMT seem to have been accepted by central banks around the world, who have since the financial crisis in 2008 been creating balances to buy back government bonds from investors, in order to reduce the cost of government borrowing. This practice is known as Quantitative Easing (QE), and its effect can in some cases be to cancel government debt, as well as to reduce its cost. A hundred European economists recently called on the European Central Bank to cancel all the debt of eurozone countries held by the Bank, but its President described this as “unthinkable”. Some central banks have gone much further along the road of MMT and used balances they have created to purchase bonds directly from their own governments. In this scenario a country finances some of its public spending by simply creating money and lending it to itself. Would it be “unthinkable” for more central banks to follow this policy, or could it provide a creative alternative to excessively high levels of conventional debt?

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[The declared aim of QE](#) is to lower interest rates on savings and loans, but the Economic Affairs Committee of the UK Parliament’s House of Lords pointed out in July 2021 that the Bank of England is widely perceived to be [using QE to finance the Government’s deficit during the Covid pandemic](#). The Committee noted that the Bank would by [the end of 2021 own UK Government debt to the value of 40% of GDP](#). This had as yet had no proven impact

on inflation. Of course, inflation around the world has since then rocketed, but much of that is due to aftermath of the pandemic and the Russian invasion of Ukraine.

QE looks a lot like MMT, but it is often pointed out that [QE is conceptually different from MMT](#), because “Under QE, the expectation is that the central bank will sell the government bonds it buys before they mature, so that the government will need to raise money (ultimately through taxes) to pay its debt to private holders of that debt. Effectively, central bank assessments of a temporary need for money-creation to address short-run economic circumstances have driven QE.”

That said, central banks do not always sell the bonds before maturity, and in such cases the government debt is effectively cancelled. The Bank of England had by the end of 2020 [effectively cancelled more than £100 billion worth of UK Government debt](#) purchased under QE since 2009. In such cases, the [distinction between QE and MMT is difficult to see](#).

Nevertheless, the credibility of QE is usually said to rest on the perception and understanding of the markets that it [does not lead to a permanent expansion in the money supply](#).

What is stopping governments or central banks (the relationship between the two is different in different countries) from going further and side-stepping borrowing and funding government spending directly by creating reserves for the relevant government departments?

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Perhaps the reason is that such a massive volte face in thinking goes against all the training and instincts of the decision-makers involved. And underlying that outlook is the good practical reason that simply printing money and handing it out to government departments would create inflation, which Kelton admits would be the main constraint on governments seeking to put MMT into practice.

In QE, central bankers have found a framework (central bank purchasing of public debt) for applying elements of MMT in a way which seems to be workable, without leading to the inflation which is always a risk of printing money. QE can be fairly described as MMT in a “lite” form which has helped the developed economies cope with the financial crisis of 2008 and meet the costs of the covid pandemic.

But QE has not quite turned central bankers into populists - not most of them, anyway. When the hundred economists called upon the ECB to cancel the debt of eurozone countries in return for pledges on spending on recovery, [the ECB's President Christine Lagarde described that proposal as "unthinkable"](#). And something the ECB does not do, and cannot do, is purchase the government debt of eurozone countries on the primary market, i.e., [create money to buy bonds directly from governments when they issue them](#). The ECB does, however, buy [corporate bonds on the primary market](#) - in contrast to the Bank of England, which [does not buy government or corporate bonds from their issuers](#).

For central banks to purchase the debt of their own governments, or of bodies linked to their own governments, certainly crosses a line, and represents a closer embrace of MMT. This is because what is happening in such a case is that the state is "printing" money to lend to itself. Unless the central bank proceeds to sell the bonds to investors, government spending is directly funded by an increase in the money supply. Purchasing their government's debt on the primary market is a line which [some central banks have crossed](#), including Hungary's central bank, which recently [purchased bonds issued by a corporate affiliate of itself](#).

At the moment, those central banks which, like that of Hungary or [Indonesia](#), have travelled further along the road of MMT than others, can be regarded as outliers.

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In these days of recovery from the pandemic, the need to finance both state and private action in the battle against climate change, and spiralling energy costs resulting from the invasion of Ukraine by Russia, there could be some changes in view about what we mean by "prudent" levels of debt, and the means used by central banks to support higher than normal levels of state borrowing. At the same time, high levels of inflation make this a risky time to experiment with extensions of Quantitative Easing.

WGB recommends that Quantitative Easing in coming years rules out both cancellation and direct purchasing of national debt.

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I. NATIONALISM AND POPULISM AT THE NATIONAL LEVEL

INTRODUCTION

Denationalization and decentralization have been, in general terms, successful processes since the 70s in Europe. But centralisation of power vested in the European Union and decentralization at a subnational level have changed deeply, in the last years, the constitutional landscape in many of the European Countries.

Those processes have modelled in parallel a common European understanding about how nationalism should be understood in a modern, heterogeneous, and inclusive society. In this concept of moderate nationalism, the idea of cession of powers of the state to the European Union and to the infra state Regions or Federated States has been broadly accepted as positive and a key concept of the current constitutional model in the European Countries.

Nevertheless, today there is evidence that this moderate idea of nationalism has been challenged from different positions. Populist politics have fuelled these challenges. In identifying solutions and giving effect to them, there needs to be an appropriate democratic consensus on how to allocate decision-making powers. There needs to be full protection for the common norms which underpin a pluralist society; for the rights of both sides of a political argument, both at state sub-regional level and at infra sub-regional level; for the rights of those who, like the non-voting younger generation, will live with the consequences of the decisions taken by today's voters.

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DECENTRALIZATION AND EUROPEAN CONSTRUCTION:

Denationalization and decentralization have been successful processes, despite some fault lines, throughout Europe since the 1970s and primarily imply cession of powers from the States to the EU and cession of powers from the states to sub-national authorities. Nevertheless, today we are experiencing a certain level of crisis in this dual process: both from the perspective of European institutional construction and progressive attribution of new powers to the EU and in the resurgence of certain infra-state regional tensions that are calling for independence based on secession and concomitant creation of new states.

In both cases, nationalist movements of double sign have gained strength and have been boosted by populism. The dynamics of these nationalist movements are very similar in their logic: the consideration of a common front, identified with the “oppressive state” - peripheral- or with the supranational authorities or foreign elites -centralist-

In relation to the problems that infra-state decentralization has generated, different situations and degrees of conflict may be identified and classified.

THE IMPACT OF POPULISM IN THE INFRA-STATE NATIONALISM: EVALUATION.

Political decentralization has made it possible to facilitate the rise of peripheral nationalist movements in the institutional framework of the State, often with success but, in the constitutional European landscape of the last 40 years, decentralization with federal or pseudo-federal constitutional structures have proved to be a flexible instrument to develop the integration of these movements.

However, recently we have been witnessing the rise of separatist nationalist movements that no longer accept integration, even if it creates benefits and privileges, but rather defend the rupture.

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With elites frequently defining common objectives, it is true that in some regions very important minorities are in favour of secession from the states to which they belong.

The rational and long-term successful decentralization structures established through federal instruments has been challenged not only by some centralist populism parties, but also by the secessionist movements.

Nevertheless, the differences among movements, the idea that independence will lead the people to a much better future, is an argument common to Catalan, Scottish, Flemish, Basque, Northern Irish, Sud-Tirolean nationalists, etc. Therefore, any analysis and any proposal for political action in the face of secessionism must also involve consideration of populist proposals.

SUB-STATE NATIONALISM IN EUROPE, SECESSIONIST PROPOSALS AND POPULIST INSTRUMENTS.

This new era of infra-state nationalism has boosted other problems that the traditional federal instrument is not able to confront. One relevant new problem relates to the fact that in almost all cases of infra-state pro-independence movements the society is highly divided. How to manage the rights of the minorities who want to remain in the unified state in those infra-state regions which seek to pursue independence?

In all the cases analysed (Scotland, Catalonia, Northern Ireland, Brussels region, Alto-Adigio) there is a relevant minority -- in some cases very close to the majority -- which support the Unionist decision and do not agree with the pro-independence movement.

Populism frequently entails an unacceptable element in a democratic society, namely anti-pluralism, which should not be accepted. The people in the majority should not be in a position to limit individual rights and this is at the heart of our democracy. In the same way no secessionist movement can build a community will that does not respect the individual rights of citizens living in a certain region who do not want to belong to a newly established community.

If all European secessionist processes have, at best, narrow majorities, what democratic constitutional process should be given effect? In deciding on constitutional reforms which are impliedly secessionist in nature, what role should be played by referenda? What role should be given to young people considering that they will bear the consequences of adults' choices?

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PLURALIST INSTITUTIONAL INSTRUMENTS AND PROTECTIONS OF INDIVIDUAL RIGHTS.

In democratic systems, we can define three types of consensuses: Consensus on the commitment to being part of a common political community. The second type is the evolutionary consensus which establishes the "rules of the game" (the processes that control the exercise of power) for example, how should conflicts be solved? In democracy the rule is that government must have a majority to justify the right to legislate. If it does not accept this principle, it will lead to conflict. But even majority rule must be balanced with respect for minorities. The third type is the political consensus, about political action

of governments. Dissent and opposition regarding a proposed political action are, therefore, characteristic elements of democracy.

a) About Referendum

Does the majority rule serve, by itself, to decide the general future of a society and, in particular, independence and the creation of a new state? Certain issues are considered so momentous for a society that they typically require super-majority approval, sometimes in a referendum, before a fundamental change can be made. Absent a super-majority requirement and additionally instruments to protect minorities, a new State proposal might not have the broad legitimacy required for such changes by virtue of a rule requiring no more than a simple majority. Most democratic Constitutions prescribe majority rules for routine issues but require higher majorities or successive majorities for the most important decisions, such as changing the Constitution. A decision to secede is however a decision that not only changes the Constitution but one of its fundamental principles, the state's unity. And who will vote? The people of the secessionist region or the national electorate or both?

As an instrument of direct democracy, it exaggerates the pure majoritarian forces in society and thus can have polarizing effects. A referendum is not compatible with negotiation, and it cannot measure intensities of beliefs or able issues to be worked out through discussion, and it can be more dangerous to minority rights than representative assemblies.

Furthermore, referenda (popular consultations on a prior legislative initiative discussed with publicity and respect for procedure and minorities) should be differentiated from a plebiscite-type consultation. In the latter case, there is less space for reasoned deliberation.

In the referenda, the consultation is sufficiently debated and legally structured, with foreseeable consequences. There is no doubt that at some point in a political conflict that seeks the secession of a part of the state, if it is to be carried out, it must be asked directly. It is a constitutional decision of the first order, but it is not a starting point but a point of arrival.

Referendums require caution to the extent that they are majority instruments incapable of protecting losing minorities and potentially capable of producing destabilizing effects and generating conflicts, in the case of the presence of ethnic, linguistic, religious minorities.

However, the Venice Commission of the Council of Europe has affirmed that the use of the referendum within the legality is a condition of democratic guarantee and subject to an agreed, publicly discussed content and clear content, could be a useful instrument as a constitutional instrument to handle intra-state independence movements.

Regarding Referenda, there are many procedural issues of enormous relevance: First, the question. As the Supreme Court of Canada has held in its doctrine on clarity, it is essential that the question submitted to a referendum be unequivocal, that it allows knowing exactly the will of the people regarding the secession of the territory; Second, the necessary majority. The Canadian Supreme Court requires a clear majority, which does not mean requiring a supermajority, but the results must be conclusive.

b) About Federalist instruments

Considering that the decentralization process has been very intense in the main regions in which the pro-independence movements are stronger, it is not clear if a greater level of decentralization and a more intense federalism could be a solution to find new consensus for the problem of the nationalism and populism at a national level. Indeed, the main pro-independence groups tend to reject this deeper federalism as a solution.

Nevertheless, in the long-term federalist instruments seems to be indispensable for the integration and to reach a new consensus and offer a high grade of flexibility to address the new integration problems that will appear.

c) Consensual democracy instruments

In highly divided societies before trying to reach an agreement at the national level (state – region) building a useful federalism for a long-term new consensus, it would be necessary to reach an agreement on basic consensus at the regional level between the pro-unionist and pro-independence groups. The issue is also that normally rules set at subnational level focus on a static concept of minorities' protection. This type of subnational rules does not normally take into account new actors living in the territory, such as immigrants, bilinguals, new residents.

A new look into democracy is required. Which instruments can be useful to build this basic consensus in highly divided societies? The consociational democracy that Lip hart

theorized could be a useful instrument inside the regions which claim for independence, to balance conflicts between groups before addressing the relation central government-regional government. The pro-British-Scottish or the pro Spain-Catalans, for example, which are a minority inside the “federated state”, deserve some protection of their participation rights or cultural rights inside a Scotland or Catalan federal state.

The split of the power between confronted groups in different aspects of government and the constitutional claim for consensus in relevant decisions are instruments useful to equilibrate those societies with a relevant conflict. The state-region conflict may be, moderated not only through decentralization processes but also sharing the power inside those societies between pro-independence and pro-unionist groups. That means that the majority rule is not always the rule to apply in highly divided societies. There can be regions in highly divided societies without clear majorities in which both groups (pro-independence and unionist) must cooperate, and their rights must be protected in a cooperative way with the rights of the other/other groups.

The inclusion of additional consensus requirements in the decision-making constitutional processes (limiting the majority rule) can be an instrument to handle with populist and the anti-pluralist instruments those movements try to implement. Probably they will lose much of their strength and democracy and individual rights will be much better protected.

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The evolution of the political conflict in Northern Ireland in the last 24 years since the Stormont agreements, despite the recent difficulties, shows that the power-shared constitutional instrument works towards the objective of reaching more broaden consensus in highly divided societies with pro-independence strong movements.

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J. IMPACT OF NATIONALIST/POPULIST POLICIES ON THE FINANCING OF SOUTH AMERICAN PENSION SYSTEMS: CURRENT SITUATION AND PROPOSALS FOR REFORM¹²⁹

ABSTRACT

This conclusions paper argues that the individually funded systems operating in Latin America are better able to cope with demographic change than pay-as-you-go (PAYG) pension systems in the context of long-term sustainability. In addition, unlike PAYG systems, individually funded systems have brought enormous benefits from the perspective of pensions, economic growth, and the corporate governance of the companies in which they are invested. However, like all pension systems, individually funded systems need to adjust their operating parameters to respond to the social, demographic, economic and labour market realities under which they operate. These changes are often hindered by countries' political and institutional conditions. This has been aggravated by the recent crisis caused by the pandemic, and the *ideologization* of the public debate, loaded with populism and emotionality, which in turn has led to some decisions being taken that have moved away from the goal of improving workers' pensions.

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To improve workers' pensions, the following reforms are imperative: (i) strengthen non-contributory social safety nets for workers with limited capacity for saving, using national budget resources; (ii) strengthen funded systems instead of PAYG systems - because, given the sharp fall in the ratio of active workers to older people, the so-called intergenerational contract between the young and the old is broken, and as a consequence, PAYG-based pension systems are not viable; (iii) increase workers' savings in their individual accounts; (iv) optimise pension fund investment regimes; (v) update or index the retirement age in line with growth in life expectancy; (vi) increase pension coverage, especially in countries with high levels of casual working in the labour market

¹²⁹ Contribution updated as of 24 May 2022.

(e.g. Peru, Colombia, El Salvador); and (vii) incentivise more heavily voluntary pension savings, with mechanisms including automatic enrolment as well as others.

Keywords: individually funded systems; individual accounts; pay-as-you-go systems; economic growth; pensions; corporate governance; casual working; life expectancy; population ageing; longevity; contribution rate; retirement age.

INTRODUCTION

Under an individually funded system managed by pension fund administrators (PFAs), pensions that are paid out to members are financed from the savings they have built up in their individual accounts. The benefits provided under this system depend directly on the contributions made throughout working life; the returns obtained by the pension fund managers on investments with the help of international asset managers; the interest rate used for the conversion of accumulated balances into pensions; and changes in life expectancy.

Under a PAYG system, pensions for current retirees are financed only through contributions made by active workers. Normally, under this type of system a minimum number of years of contributions is required to receive a pension (usually 15 years; if this is not met, there is no right to a pension) and the amount of the pension is determined by the established calculation formula and the availability of state funding.

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IMPORTANT FEATURES OF BOTH TYPES OF SYSTEM ARE SET OUT BELOW:

(i) Individually funded contributory systems can provide better and more secure pensions over the long term than pay-as-you-go systems

In Latin America, the resources available for financing pensions have multiplied several times over thanks to individually funded systems. In addition to contributions from workers, employers and the state, these systems are financed by income from investments. By contrast, in PAYG systems only the contributions are available to pay pensions.

It is estimated that the high returns obtained under the Chilean PFA system quadrupled the contributions made to individual accounts by the first generations of workers, whereas

for different generations the accumulated balances more than doubled workers' contributions. In countries such as Mexico and Peru, the returns obtained by fund managers have increased the balances of individual accounts, meaning a doubling or tripling of contributions made by workers, employers, and the state.

In addition, according to studies carried out¹³⁰ for different Latin American countries, individually funded systems drove higher annual GDP growth, generating an increase in labour income and contributions to individual accounts, and increasing the funds available to finance pensions.

The greater ability of funded systems to provide better long-term pensions in ageing countries is supported by several international studies, which have estimated the pensions that can be financed via funded systems compared to PAYG systems. In the long run, since the return on capital exceeds the growth rate of wages and employment, funded systems can provide higher replacement rates than a PAYG system given the same contribution rate. This was concluded by the Global Ageing Institute¹³¹: according to almost 90% of the projections to 2050, the replacement rate of Chile's individually funded system is higher than that of the PAYG system.

This is particularly true in view of current demographic trends. According to CELADE figures, the number of people aged 15-64 as a proportion of the population aged 65 and over will fall from 7.6 in 2020 to 3.4 in 2050 - a drop of 55%. There will be fewer and fewer people actively working compared to those who are not, and this will strongly affect the financial situation of PAYG systems.

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¹³⁰ Sura Asset Management (2013). "Contribución del sistema privado de pensiones al desarrollo económico de Latinoamérica: Experiencias de Colombia, México, Chile y Perú (Contribution of the Private Pension System to Economic Development in Latin America: Experiences from Colombia, Mexico, Chile and Peru).

¹³¹ Jackson, Richard and Nakashima, Keisuke (2015). "Global Ageing and Retirement Security in Emerging Markets: Reassessing the Role of Funded Pensions". Global Ageing Institute.

(ii) Individually funded contributory schemes allow for an increase in the coverage and amount of non-contributory pensions, thus helping to create a support mechanism that acts as a safety net for citizens

Over the medium and long term, individually funded systems allow for an improvement in non-contributory pensions because of their positive impact on public finances. Although in the short term they generate higher fiscal deficits, in the medium and long term they free up public budget resources that previously financed the shortfalls in PAYG systems, and this can be used to build non-contributory pensions and other social programmes. This has been the case in countries such as Chile, where this release of public funds has helped to finance the Solidarity Pension System's benefits. A study¹³² shows that without the reform that created the individually funded system, it is estimated that the deficit of the pre-reform PAYG system would have consumed about 8% of GDP by 2050, even with parametric adjustments.

This contrasts with other countries (such as Colombia), where a PAYG system competes with an individually funded one. Colombian government spending to cover the deficit of the PAYG systems has grown rapidly over the last 15 years and now exceed 3% of GDP. The increasing transfers made to cover these deficits favour sectors with greater labour stability and harm a significant proportion of the population that works casually and is unable to access these benefits due to not participating in the pension system or not meeting the pension requirements.

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(iii) Individually funded systems also have positive impacts on the day-to-day lives of members and the population

Without trying to cover all these impacts, we note that, under the individually funded systems, the growth of pension funds and their long-term investment horizon has caused a profound change in the financing possibilities of families and the different productive sectors. For example, in housing, Chilean pension funds were decisive in the development of a dynamic and deep market for housing finance (mortgages), allowing broad sectors of the population access to credit for the purchase of housing, with a sharp reduction in

¹³² [Pensiones en Chile: ¿Qué Hubiese Ocurrido sin la Reforma de 1981 \(Pensions in Chile: What would have happened without the 1981 Reform, Cerda \(2006\).](#)

interest rates and a substantial increase in credit terms. In Chile, some USD 35 billion is currently invested in housing-related assets (it is estimated that around 1.6 million houses have been built in the country thanks to private pension funds).

Regarding the developing mortgage market, made possible by the individually funded system, we note that interest rates at the start of the 1980s were of the order of 13% real annual interest rates, falling in April 2020 to levels between 2.2% and 3.1%. Meanwhile, regarding mortgage loan terms, these did not exceed 12 years, whereas until just before the three massive pension fund withdrawals that occurred due to populist decisions during the pandemic, these were up to 30 years and were available to large parts of the population.

Lastly, pension fund investment has contributed to the implementing of infrastructure projects at lower capital costs, leading to an increase in the population's quality of life as well as efficiency and productivity gains.

(iv) Pay-as-you-go systems have broken the promise of defined benefits

Although governments need to finance the deficits of PAYG systems, it has not been enough to control the financial imbalances generated by demographic trends and other structural issues. The promise of defined benefits had to be broken, with a lowering of pensions and a tightening of eligibility conditions. According to FIAP¹³³, between 1995 and December 2021, 63 countries decreased benefits, 64 increased pension ages, while 80 countries increased contribution rates. According to estimates by the European Commission, the financial problems of public pension systems in the European Union will lead¹³⁴ to a decrease in replacement rates from 45% in 2016 to 38% in 2060 - in particular in Spain where it will fall from 79% to 46%.

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¹³³ https://www.fiapinternacional.org/wp-content/uploads/2016/01/Parametric_Reforms_in_the_Public_PAYGO_Programs_1995-December_2021_Main_Results.pdf

¹³⁴European Commission (2018) The 2018 Ageing Report.

(v) The experience of Latin America shows that pay-as-you-go systems are regressive and not very socially inclusive

Contrary to certain sectors' proposals to strengthen or return to the pay-as-you-go system in order to have greater solidarity in the pension system, the Latin American experience is very clear to show that these systems have been regressive and not very socially inclusive. Firstly, there is a high percentage of members who reach pension age, do not meet the minimum requirements, and do not receive a pension, and thereby lose part or all of their contributions. The vast majority are lower-income, vulnerable and female workers. Consider the examples of Chile's former pension funds, or the PAYG administered by the ONP (Office for Pension Funding Normalisation) in Peru, or the old PAYG system in El Salvador, under which 50-66% of members do not receive a pension and lose part or all of their savings¹³⁵.

Furthermore, an IDB study¹³⁶ shows that in most countries with PAYG and defined benefit systems, subsidies are granted to members who receive a pension. That is, the benefits actuarially exceed the contributions made. Such subsidies help the sectors that need them least, because they grow with people's income levels - that is, they are regressive. What is more serious is that the state must spend considerable resources to finance these subsidies which do not reach people who do not get a pension or do not participate in the system because, among other reasons, they are in the casual working sector. This is a particularly serious issue.

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¹³⁵Source: [Reversiones: mientras Europa avanza hacia la capitalización individual, en América Latina algunos proponen volver al reparto](#), FIAP, 2020. (Reversals: As Europe Moves Towards Individual Funding, Some in Latin America are Proposing a Return to Pay-As-You-Go)

¹³⁶ Altamirano, A., Berstein, S., Bosch, M., García-Huitrón, M. and Oliveri, M.L. November 2018. "Presente y futuro de las pensiones en América Latina y el Caribe" (Present and future of pensions in Latin America and the Caribbean), Inter-American Development Bank.

(vi) The real reasons behind the reversal of reforms that created individually funded systems in some countries

It is not true that there is a "wave" or "trend" towards reversing individually funded systems. This misconception was particularly prevalent following Ortiz et al's publication (2018)¹³⁷ in the media and encouraged this idea. According to these authors, 18 countries reversed their individually funded systems. However, the truth is that only four countries actually reversed the system (Argentina, Hungary, Poland, and the Czech Republic).

Argentina carried out its reversal due to political and fiscal factors. Poland and Hungary did so mainly for tax reasons. In the Czech Republic, it was in fact a failed attempt to set up an individually funded system, as it operated for only 3 years (2013-16).

Lastly, as shown in Table 1, the number of countries that have incorporated funded systems over time has not decreased. On the contrary, it has grown significantly in recent decades - from 17 in 1999 to 46 in 2022.

Table 1: Countries that have introduced individually funded systems

Year	Single individually funded system	Integrated mixed: funded systems compete with PAYG	Competitive mixed: funded systems supplement PAYG	Total
1999	8	6	3	17
2009	13	24	2	39
2019	13	28	2	43
2022	14	30	2	46

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Source: FIAP based on OECD data, The United States Social Security Agency, and Szczepański, M- and J. Turner (Ed.) (2014). *Social Security and Pension Reform International Perspectives*.

¹³⁷ Ortiz, I., Durán-Valverde, F., Urban, S., & Wodsak, V. (2018). "Reversing Pension Privatizations: Rebuilding public pension systems in Eastern Europe and Latin America".

KEY POINTS

II.1 Trends in Latin American Pension Reforms

While funded systems ensure financial sustainability and require little or no state resources to operate, it is also true that the transition from a PAYG system to an individually funded system represents a challenge for countries, as they have to allocate fiscal resources to cover the liabilities of their previously unfunded public PAYG systems¹³⁸.

This situation has led critics of funded systems in Latin America to point to transition payments¹³⁹ as a disadvantage of the model. This short-term perspective contrasts with the medium- and long-term advantages for the state's fiscal accounts: as the liabilities of the old system are paid off, the state has more resources available that can be used for other purposes, including the strengthening of welfare or non-contributory pension programmes that help the most vulnerable sectors with insufficient savings capacity.

That said, it is also true that the success or failure of a pension system cannot focus solely on its financial sustainability or ability to cope with demographic risks, because ultimately the key variable by which members and society assess the performance of the system is the degree to which the objective of reducing the risk of poverty in old age is met.

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Fulfilment of this objective will depend therefore on whether members in individually funded systems are able to build up sufficient savings to self-finance pensions of sufficient amounts to cover their post-retirement living requirements. This of course depends very much on the conditions in each country in which these systems operate. In countries with

¹³⁸ References on this issue can be found in the following document: [“Notas de Pensiones No.41 – Reforma a los sistemas de pensiones y su efecto sobre los déficits de los programas de reparto y financiamiento del presupuesto público”](#) (Pensions Note 41 - Reform of Pension Systems and its Impact on PAYG Programme Deficits and Public Financing)

¹³⁹ To all intents and purposes, the transition is the period in which the state must continue to pay the pensions of workers who retired under the old pay-as-you-go system, while the new contributions go into the workers' individual accounts. The transition has been financed mainly through fiscal spending. Thus, in Latin America, some countries (Chile, Colombia, El Salvador, and Peru) have issued "recognition bonds" to workers who switched from the old pay-as-you-go scheme to the new system with a mandatory individually funded component. Under this option, active workers must keep these recognition bonds until retirement, at which point they present them to the government to claim an annuity based on the amount of the bond (plus a rate of return set by the government). Another group of countries has preferred to set out a new formula promising defined benefits for pay-as-you-go for any accrued rights of people moving from PAYG to the funded scheme (Argentina, Bolivia, and Uruguay).

higher levels of cover, lower rates of casual working¹⁴⁰, higher contribution rates, investment regulations that allow for savings multiplication, and retirement ages that align with life expectancy at retirement, pensions may be higher than in countries where one or more of these conditions present(s) significant challenges.

When analysing the question of pension amounts, we need to consider which factors in a funded system determine the amount that a member will receive when they retire. Since there is no "defined benefit" formula that guarantees a specific replacement rate, the factors that have an impact are those that contribute to a person accumulating more savings: effective contribution time, contribution rate, long-term return on savings, retirement age, and life expectancy at retirement.

Although there are several studies that support the need to focus on these aspects if pension payment amounts are to be increased, decision-making in the political sphere has not always been aligned with what the technical studies suggest. Indeed, in many cases, far from addressing these reform needs, the discussion focuses on comparing the individually funded model with the "defined benefit" PAYG model, with ideologically charged debates that are far removed from the technical discussion that ought to prevail in this case.

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Pension systems operate in dynamic economic and social situations that demand a constant review of their operating parameters. The situation across Latin American countries is not uniform. However, to put into context the challenges involved in improving the size of pensions in the region, a review is carried out of the main parameters, compared with those of OECD countries. This shows that in most cases the level of these parameters has a negative impact on achieving the objective. The main ones are as follows:

¹⁴⁰ The casual working referred to relates mainly to those forms of work where there is no employer - self-employed workers that one could call "forced", i.e., people who lost their job (or never had one) and have no choice but to develop their own professional activity, with an income close to the minimum wage. An example of such workers are street vendors. In all pension systems, casual working creates problems. Under the funded model, it means that the affected population does not have sufficient contributions to self-finance their pension. Meanwhile, under PAYG systems, the number of active workers for each person who is not working is worsening, which results in defunding the system and generating fiscal pressures.

1. In terms of contribution rates, the average for the nine Latin American countries in which funded systems operate is 9.1% of wages while the average for OECD countries is double that, at 18.2%¹⁴¹.
2. There is no regional statistic comparing the contribution density variable, but the pension coverage indicator gives an idea. In the case of Latin America, pension coverage amounts to 33.8% of the Economically Active Population (EAP) while in OECD countries it is 72.1%. This difference shows that currently only 1 in 3 workers on average are contributing to the pension system in Latin America, a phenomenon that is directly related to the casual working in the region, which as mentioned above is a heterogeneous reality, with countries with low percentages such as Uruguay, Chile and Costa Rica and others where it is a major challenge, such as Colombia, Peru and El Salvador, where it reaches proportions of between 60% and 70% of the EAP¹⁴².
3. The average retirement age in OECD countries is 63.4 years for women and 64.2 years for men. In the nine Latin American countries with individually funded systems, it is 60.5 years for women and 62.2 years for men¹⁴³. Women's earlier retirement age - which is justified as a privilege or special treatment - under an individual savings system does not really benefit them, as they have a shorter savings period and a longer life expectancy at retirement compared to men, which results in their average pensions being lower than men's.
4. According to World Bank figures, between 1980 and 2019 the average life expectancy at birth in Latin America increased by almost 11 years. It increased by 8 years in OECD countries in the same period. An increase in life expectancy is undoubtedly good news, but it implies a challenge for traditional PAYG pension systems as well as for individually funded systems, insofar as in the latter, the amount of the pension is a function of the savings the person has accumulated during their active working life and their estimated survival time after retirement.

¹⁴¹Source: FIAP and "OECD Pensions at Glance 2021".

¹⁴²Source: ILO: The figure for Uruguay is 23.9%, Chile 25.3%, Costa Rica 36.6%, Colombia 62.1%, Peru 68.4% and El Salvador 69.1%.

¹⁴³Source: OECD and FIAP.

Therefore, if this survival period increases and the person has not built up sufficient savings because the contribution rate is very low, or because of a low contribution time due to working in the casual working sector, or because the retirement age is not increased as life expectancy increases, then the amount of their pension will be less than what they would have received if those parameters were better aligned to those objectives.

With this in mind, decision-makers would be expected to promote reforms aimed at making the necessary changes to these parameters in order to increase the pension amounts that workers receive upon retirement. Specifically, public policies would be expected to be oriented towards:

- Raising contribution rates and optimizing pension fund investment schemes.
- Updating or indexing the retirement age in line with the growth in life expectancy and addressing the challenge of increased longevity.
- Increasing coverage, especially in countries with high levels of casual working (Peru, Colombia, El Salvador).
- Strengthening non-contributory social safety nets to supplement the self-financed pensions of workers with low savings capacity (casual working sector).

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Some countries in the region - such as Mexico - have implemented recent reforms aimed at increasing the contribution rate, establishing a higher social protection floor, and reducing the minimum time required to access a pension. In recent years there have also been positive reforms that have promoted more open investment regimes in Chile, Colombia, Peru, and Mexico. Meanwhile, in El Salvador there was also a reform aimed at mitigating the longevity risk of members, with a new mechanism to ensure the continuity of pension payments in the event of depletion of own savings (*longevity insurance*¹⁴⁴).

¹⁴⁴ For references on the longevity insurance proposal, please see the following documents: "[The Role of Longevity Insurance in Latin America: Cases of Chile, Colombia, Mexico and Peru; October 2015](#)"; "[Nota de Pensiones No.18 – Un Seguro de Longevidad para contribuir a financiar las pensiones de vejez en los Sistemas de Capitalización Individual](#)" (Pensions Note 18 - Longevity Insurance to Contribute to Financing Old-Age Pensions Under Individually Funded Systems).

POPULIST POLICIES

In FIAP's view, populist policies are mainly of two types:

1. Massive withdrawals of funds for purposes other than pension funding

The measures described above are all positive, but contrast with other policies that have also been implemented in the context of the Covid-19 pandemic, whereby members in some countries have withdrawn part or all of their pension savings to use them at their discretion for other needs¹⁴⁵.

This type of measure had already been approved in Peru prior to the crisis caused by the pandemic but went further with that shock: between 2020 and 2021, five withdrawals were authorised, amounting to 37% of the assets under management and leaving 2.3 million workers without pension savings. Unfortunately, without considering these harmful effects, the Congressional Economic Committee recently re-approved a new early withdrawal mechanism: four Tax Units (approx. USD 4973) for all members of the individually funded system, without any targeting of those who really need it. With this new withdrawal, it is estimated that 5 million workers - 60% of affiliates - will be left with a zero balance in their accounts. In addition, total pension savings would be reduced by about USD 25.2 billion (10.7% of GDP). In Chile, three massive withdrawals of 10% of the funds each have been approved¹⁴⁶, with the result that the assets of the pension funds have been reduced by about 30% and about 4 million workers have been left without savings to cover their pensions¹⁴⁷. Fortunately, the Chilean Congress rejected the fourth and fifth early withdrawal of pension funds (if a new withdrawal of up to 10% of the funds had been approved, there would have been a further USD 17bn in outflows, meaning pensions would have fallen by

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¹⁴⁵ References on this issue can be found in the following documents: "[Notas de Pensiones FIAP No.58 – Impacto de los retiros de los fondos de pensiones chilenos sobre la economía y las personas](#)"; "[Notas de Pensiones No.51 – Retiro de fondos: Desnaturalizando los Sistemas de Pensiones. Una mirada a los efectos de esta política pública](#)"; "[Notas de Pensiones No.48 – El retiro de fondos de pensiones por Covid-19](#)"; "[Retiro de fondos: Desnaturalizando los Sistemas de Pensiones Una mirada a los efectos de esta política pública; Enero 2021](#)".

¹⁴⁶ These three withdrawals were massive and were not targeted at those who lost their jobs or saw their incomes significantly reduced.

¹⁴⁷Source: Peru's SBS (Banking and Insurance Supervisory Agency) and FIAP.

an average of 40%, and 5.8 million people would have been left with zero balance in their accounts).

This is a very serious situation from a social welfare point of view, as the measure goes in the opposite direction of improving pensions. It also has other negative effects that have been identified in the case of Chile and which can be replicated for the other countries:

- To recover their pension savings, workers will need to defer their retirement by about 6 years.
- Increased inflation, which is a regressive tax.
- Negative impact for families who want to access mortgage loans as the number of dividends increases.
- Impact on capital markets due to the liquidation of assets to meet the authorized disbursements. This has a further negative impact on the profitability of the more conservative pension funds, where workers are closer to retirement.

1. Return to unsustainable systems such as pay-as-you-go [see point (vi) on page 138]

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2. Strengths of the Individually Funded System for coping with population ageing

(i) Pay-as-you-go systems are pyramid or Ponzi schemes

PAYG pension systems are pyramid schemes for the following reasons: a) people have started to live longer, life expectancy has started to rise; b) the population has started to age; c) the total population has stopped growing. As a consequence, the number of active workers for every retired person has started to fall today, in Chile the ratio is 4:1; in 2050 it will be only 2:1; and by the end of the century, it will be 1:1.

This means that when today's young people are grandparents, there won't be enough young people to pay their pensions. Thus, the so-called intergenerational solidarity does not exist; it is a farce. For this reason, we can argue that PAYG systems are in fact true pyramid or Ponzi schemes. Moreover, in many countries - such as Colombia - PAYG systems

are very regressive because those who retire are those who contribute the most; and those who contribute the most are those with the highest incomes.

PAYG systems are also unsustainable because of casual working and society's increasing digitalisation. This is replacing active workers with robots, algorithms, and the Internet of Things.

(ii) Funded systems offer higher returns than pay-as-you-go systems

Funded systems are also superior to PAYG systems because their returns are higher. The profitability of funded systems is the return on capital, whereas the "profitability" of PAYG systems is equal to the growth of the working population plus growth in productivity per worker, or wage growth. The difference is Piketty's well-known $(r - g)$ in his book *Capital in the 21st Century*.

In his book, Piketty accepts that funded systems are superior to PAYG systems in this regard, but that in many countries they are already impossible to dismantle because the cost of transition would be too great. Of course, this was not the case in Latin America. But it is also well known that a growing number of countries around the world, many of them European, are adopting funded elements in their pension systems.

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(iii) Pay-as-you-go versus funding - in the long term

It is rightly said that both PAYG systems and funded systems are impacted by population ageing and falling interest rates. This is true. However, even under these conditions, funded systems are superior to PAYG alternatives.

A study¹⁴⁸ simulated the long-term effects for a number of countries and found that only in countries with very young populations can PAYG systems give replacement rates similar to those of funded systems.

¹⁴⁸Source: "Transición demográfica, Tasas de retorno y Tasas de reemplazo de sistemas de pensiones de capitalización versus sistemas de reparto" (Demographic Transition, Rates of Return and Replacement Rates of Funded vs Pay-As-You-Go Pension Systems.). Document CEDE #15, Universidad de Los Andes, 2019.

(iv) Policy considerations

In addition to making pension systems unsustainable, eliminating individually funded pensions would have a very negative impact on savings, investment, capital markets, allocation of the economy's resources, and generation of growth and employment.

What should be done? The debate is between a system that works and one that does not.

The debate should not be between who manages the system; it should not be between the public sector and the private sector. There needs to be competition between different public and/or private administrators operating under the same rules of the game. There should be a socially inclusive pillar that is financed from national budget resources and a contributory pillar that goes into individual accounts, not to PAYG. There should be no pyramid scheme. Because, as argued above, given the sharp fall in the ratio of active workers to older people, the so-called intergenerational contract between the young and the old is broken. As a consequence, PAYG pension systems are not viable. This is why, for example, in the case of Chile, the Bravo Commission of 2015¹⁴⁹ set out a series of proposals, one of which (global proposal C) established a return to a pure PAYG system but was rejected due to the enormous costs that this scheme generated for society.

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Savings and funding should be the basis against risks in old age. In addition, given the high levels of casual working, anyone who is unable to save enough to finance a pension should receive a guaranteed minimum income that takes them over the poverty line.

¹⁴⁹ Please refer to "[Comisión Asesora Presidencial sobre el Sistema de Pensiones. Final Report](#)" (Presidential Advisory Committee on the Pension System), Sept 2015.

II.3 40 YEARS THE LATIN AMERICAN INDIVIDUALLY FUNDED SYSTEMS HAVE BEEN OPERATING: LIGHTS AND SHADOWS

From 1981, Latin America began a process of reforming its pension systems. This consisted of replacing the PAYG mechanisms with an individually funded system, whereby workers deposit their mandatory savings in individual accounts managed by private single-purpose companies.

The reason for this process that began in Chile was the profound crisis that PAYG systems were experiencing, due to their inability to cope with the increase in life expectancy, the fall in birth rates and their strong regressive element.

After all these years, practically all Latin American countries have implemented individual account systems. The system in Peru was reformed in 1993; the one in Colombia was reformed in 1994; Uruguay, 1996; Mexico, 1997; El Salvador, 1998; Costa Rica, 2000; Panama, 2002; Dominican Republic, 2003; and Honduras, 2016.

The new system under which these single-purpose companies invest the resources accumulated in workers' accounts according to profitability and security criteria, has brought enormous benefits from the perspective of pensions, economic growth, and the corporate governance of the companies in which they are invested.

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From a pension perspective, the resources available to finance pensions have been multiplied by the returns on investments. In the case of Chile, these resources quadruple the contribution made by the initial generations. In the case of Mexico and Peru, balances in individual accounts are double or almost triple the contributions made.

In other words, unlike PAYG systems, in which the only source of financing is workers' contributions, in funded systems these sources are supplemented by the returns on investment.

The historical real annual return of pension funds since the funded system was implemented has been 8.03% in Chile, 7.98% in Colombia, 5.58% in Mexico, 7.24% in Peru and 7.48% in the Dominican Republic.

In addition, this system has enabled a sustainable mechanism to exist in which the members themselves finance their pensions. This has given the state sufficient financial

leeway to have an initial non-contributory pillar to help the most vulnerable segments of society, who for reasons of poverty or casual working have not been able to finance their own pensions.

In addition to the above, and because they are financially sustainable, individually funded systems have been conducive to economic growth in those countries that have implemented them. This has been achieved through a sustained accumulation of funds under management, which in turn has greatly favoured the development and deepening of capital markets.

Before early withdrawal, Chile had the equivalent of 76% of GDP accumulated in workers' accounts; Peru had 22%; Colombia 25%; and Mexico 14%. These significant amounts of resources - invested according to profitability and security criteria in the sectors with the greatest economic potential - explain these countries' high rates of growth.

Studies show that pension reform in Chile accounted for 8.1% of annual GDP growth during the period analysed. In Colombia and Mexico, it was about 13%; in Peru, 6.22%¹⁵⁰, and in the Dominican Republic, 22%¹⁵¹.

At the same time, this system has contributed to the improvement of the corporate governance of the companies in which the resources are invested. Indeed, trusteeship has enhanced good corporate governance practices by enhancing the integrity of companies, financial institutions, and markets. There is evidence that the companies in which Pension Fund Administrators (PFAs) invest are worth 14% more than those in which they do not¹⁵².

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¹⁵⁰ Source for Chile, Colombia, Mexico and Peru: "[Contribución del sistema privado de pensiones al desarrollo económico de Latinoamérica: Experiencias de Colombia, México, Chile y Perú](#); Sura Asset Management. Agosto, 2013" (Contribution of the Private Pension System to the Economic Development of Latin America: Experiences of Colombia, Mexico, Chile and Peru).

¹⁵¹ Source for the Dominican Republic: Presentation by David Tuesta of the book: "Prosperidad y pensiones: veinte años de seguridad social en la República Dominicana; 9th edition Global Pensions Programme" (Presentation by David Tuesta of his Book: "Prosperity and Pensions: 20 Years of Social Security in the Dominican Republic).

¹⁵² Further references on the role of pension funds in improving the corporate governance standards of investee companies can be found in the document "[Nota de Pensiones No.13 – El rol de los fondos de pensiones para promover mejores estándares de gobierno corporativo](#)" (Pensions Note 13 - The Role of Pension Funds in Promoting Better Corporate Governance Standards).

Notwithstanding the clear benefits outlined above, the features of the labour market have generated a number of effects that somewhat overshadow the results of the system.

The first is the low density of pension contributions, associated with high levels of casual working in the region. The reality of labour markets in the region indicates that the percentage of workers covered by social security is very low in some cases.

Another effect that overshadows the results of this system is the rapid growth of real wages in the region. This news, which should make everyone happy, has a negative effect from the point of view of the image of the system - as workers aspire to a pension similar to their latest salary, even though they have saved throughout their lives with very different salaries.

Given the marked increase in life expectancy in the region, the contribution rate has remained unchanged at 10% since the systems were created, which is almost half the OECD average.

The same applies to the fact that the pension age has not been altered despite changes in life expectancy and the consequent need to finance an increasingly longer period of workers' lives.

The fall in interest rate levels, from averages of 5.5% in the 1980s to just over 0.3% today, has also had a negative effect on how the system is perceived. This variable, which is key to transforming savings into pensions, is detrimental to the amount of the pension.

Finally, it is common for pension averages to be displayed, comparing people who have contributed all their lives with others who have contributed for only a few months or years. It should be borne in mind that under individually funded systems, because the worker owns their fund, they are entitled to a pension, even if their fund is very small.

This is different under PAYG systems, where they are entitled to a pension only after 10 or 15 years of paying in contributions, according to ILO criteria.

What would be ways to counteract these negative effects, or at least mitigate them? The first step is clearly to update the parameters of the system as demographics change. Only Mexico has made changes in the right direction, increasing the contribution rate from 6.5%

to 15%¹⁵³, while all other countries have remained at 10% savings rates and some countries have even encouraged early withdrawals, as is the case in Chile and Peru.

Another way is to encourage voluntary pensions saving, which has been under-utilised in the region, but which elsewhere has had a very significant effect in supporting forced savings with mechanisms such as automatic enrolment.

The most common incentives for voluntary savings have been tax-related; providing greater liquidity by allowing early withdrawal of funds; encouraging competition between different providers; automatic enrolment and the matching contribution through which employers make joint contributions with workers¹⁵⁴.

Another formula that has begun to be explored is the collection of contributions through¹⁵⁵ consumption. Traditionally, this is done in relation to remuneration. However, due to changes in forms of working and given the levels of casual working, a shift in this direction has begun to be explored.

However, as can be seen, the positives outweigh the negatives. Over the years, the systems have demonstrated their strength, which is much greater when compared to the PAYG systems that still exist in many parts of the world and which have proven to be financially unsustainable.

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As we acknowledge, it is true that there are some problems that have not been corrected in time and that have had an impact on workers' pension amounts and consequently on the scheme's reputation. But it is also true that measures are in hand to correct or at least mitigate these shortcomings.

¹⁵³ For references on the changes implemented in Mexico, please see the document "[Notas de Pensiones No.54 - Reforma al sistema de pensiones mexicano](#)" (Pensions Note 54 - Reform of Mexico's Pension System).

¹⁵⁴ For references on voluntary savings and automatic enrolment, please see the following documents: "[Notas de Pensiones No.49 – Enrolamiento Automático para complementar las pensiones: El exitoso caso del Reino Unido](#)" (Pensions Note 49 - Automatic Enrolment to Supplement Pensions: The Successful Case of the United Kingdom); "[Nuevas tendencias para incentivar el Ahorro Previsional Voluntario](#)" (Pensions Note 37 - New Trends to Encourage Voluntary Pension Savings).

¹⁵⁵ For references on saving through consumption, please see "[Notas de Pensiones No.56 – El ahorro través del consumo como una fuente complementaria para financiar las pensiones](#)" (Pensions Note 56 - Saving Through Consumption as a Supplementary Source for Financing Pensions".

In any case, it is clear - as we have sought to demonstrate in this brief article - that the comparison is beyond doubt. The strength of the individually funded system, in terms of financial sustainability, expansion of the sources of funds for financing pensions, contribution to the economic development of countries and improvement of corporate governance of companies, is both solid and ongoing¹⁵⁶.

This is confirmed by the fact that countries (especially in Western Europe) that still have PAYG systems, are beginning to incorporate individually funded mechanisms to improve pensions, given the shortcomings of PAYG.

Given this evidence, it is worth asking why many Latin American countries are interested in a partial, or in some cases total, return to the PAYG system, given that the cost of the transition has already been fully assumed, which is usually the drawback of making this imperative change. Indeed, the need to continue paying pensions to retirees, while contributors deposit their savings in their individual accounts without contributing to funding retired people's pensions, represents a very high financial burden for countries that have high rates of population ageing.

Latin America has already taken this on board and has been able to carry out this reform, although in some cases - like Peru and Colombia - only partially.

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We wanted to find out the reasons for this reformist wave where emotion was put before reason, without calculating the damage being done to future pensioners. As we have been able to conclude¹⁵⁷, the reason lies in the perseverance of English-speaking countries maintaining institutional nature and rules, upon which they base the success of their public policies and the solidity and stability of their institutions. In Latin America, on the other hand, this lack of perseverance is explained by the fact that we are often impacted by hastiness, and the need to show immediate results without looking at their future

¹⁵⁶ For a comprehensive analysis of the strengths of individually funded pension systems and the shortcomings of pay-as-you-go alternatives, please see the document "[REVERSIONES: Mientras Europa avanza hacia la capitalización individual, en América Latina algunos proponen volver al reparto](#)" (REVERSALS: While Europe Moves Towards Individually Funded Pensions, in Latin America Some Propose Going Back to PAYG).

¹⁵⁷ This is based on conclusions from talks given at the FIAP 2021 Seminar. If you would like to see the videos from that seminar, please visit this FIAP YouTube channel: <https://www.youtube.com/user/FIAPORG/videos>. And if you would like to download the presentations, please see: <https://www.fiapinternacional.org/seminario/xviii-seminario-internacional-fiap-madrid-espana/>

sustainability. It seems to us that this characteristic is at the root of populism, which means we end up thinking more about today than tomorrow.

PROPOSALS TO IMPROVE PENSIONS UNDER INDIVIDUALLY FUNDED SYSTEMS

Individually funded models are not "one-size-fits-all" and so, according to FIAP, the following reforms are imperative to improve workers' pensions:

1. **Strengthen non-contributory social safety nets for workers with low savings capacity.** Given the high levels of casual working, anyone who is unable to save enough to finance a pension should receive a guaranteed minimum income that takes them over the poverty line. This non-contributory socially inclusive pillar should be financed with resources from the national budget.
2. **Strengthen individually funded systems rather than pay-as-you-go systems.** There needs to be a contributory pillar that goes to individual accounts, but not to PAYG, because given the sharp fall in the ratio of active workers to older people, the so-called intergenerational contract between the young and the old is broken. Consequently, PAYG-based pension systems are not viable in the medium to long term.
3. **Increase the savings workers have in their individual accounts,** either by increasing the contributions made by workers, companies or the state, without affecting the competitiveness of the economy and taking care to avoid incentives to casual working.
4. Optimise pension fund investment schemes.
5. Update or index the retirement age in line with the growth in life expectancy.
6. **Increase coverage,** especially in countries with high levels of casual working (e.g., Peru, Colombia, El Salvador).
7. Encourage voluntary pension savings more strongly, with mechanisms such as automatic enrolment.

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K. EU, COVID-19 AND NATIONALISM: LEGAL ASPECTS

ABSTRACT

Covid-19 turned the world upside down and thus calls for self-reflections. In light of that, the present paper takes a European legal perspective and unpacks the main responses of the EU to the Covid-19 crisis during the first two years. Also, the closures of borders in the three Nordic EU Member States are analysed as a concrete example of actions and responses. It concludes that within the prevailing limits and in general terms, the EU, after all, did quite well in relation to the handling of the pandemic. The reactions were at first far too slow with extremely tragic consequences. However, that the EU eventually was capable of setting up a series of actions including in particular the common EU strategy for COVID-19 vaccines and a Recovery Plan appears to be a historically outstanding achievement. Also, the conditionality mechanism - which was encompassed as a kind of side-effect - might hopefully prove to be an extremely important tool in combatting the current rule of law challenges in certain Member States. On the other side of the coin, the internal market and free movement were severely challenged (both in letter and in spirit) and were not handled fully satisfactorily.

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INTRODUCTION: A DWARFENED CHALLENGE, YET STILL OF RELEVANCE

“We are more united than ever, and we will stand up in this war, that is for sure that we will overcome, and we will prevail. We are united and we stay united.”¹⁵⁸

As this quotation from the speech by President von der Leyen at the European Parliament Plenary on 1 March 2022 clearly puts into perspective, the recent Russian invasion of Ukraine and the terrors currently taking place there have severely altered the issues of

¹⁵⁸ Speech by President von der Leyen at the European Parliament Plenary on the Russian aggression against Ukraine, 1 March 2022, available at [Speech by the President: Russian aggression against Ukraine \(europa.eu\)](https://www.europa.eu/press-room/en/infographic-speeches/19223).

nationalistic forces in Europe. The continent has witnessed shock after shock over the last decade or so, and once again, but even more fundamentally, Europe changed radically on 24 February this year. It seems that, as the old aphorism declares, there is nothing like a common enemy to unite forces, and thereby in this case may have diminished the otherwise strong nationalist forces within Europe.

Thus, currently, Europe appears to be more united than ever, in contrast to the situation two and a half years ago. Thereby, the relevance of the Covid-19 crisis and the related problems of increased nationalism in the wake thereof, has largely lessened (although nationalism in many other regards is still strongly alive). The size of this new challenge is more than gigantic even in comparison with the Covid-19 crisis, and at least in Europe the pandemic for the time being seems under control due to e.g., efficient vaccinations and largely attained herd immunity, leading to glimmers of light in the very long pandemic tunnel.

Nevertheless, as one of the largest challenges, which the EU has faced in recent times, and in spite of the new dark chapter, which painfully has been opened up by the invasion, it is still of value to take a bird's eye perspective to reflect upon the role of EU law in the context of the Covid-19 crisis, nationalism, and solidarity.

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Against this backdrop, this paper will unpack the main responses of the EU to the Covid-19 crisis during the first two years. Also, the closures of borders in the three Nordic EU Member States will be analysed as a concrete example of actions and responses. On that basis, some final key points are identified.

CHANGE OF BEHAVIOUR: FROM NATIONALISM TOWARDS SOLIDARITY

The flaws of human nature during crises such as pandemics is not something new, as they inevitably permit a large amount of selfishness to develop and embed itself as a new normal. Somehow confirming such a depiction, we witnessed in Europe, particularly at the beginning of the Covid-19 crisis, on the one hand, for instance, individuals hoarding food and thefts from hospitals of essential protective equipment. On the other hand, we saw near unsuccessful pleas for exports of doctors and ventilators from the more privileged countries to the most wounded ones, as well as little success in requests to take Covid-19 patients from the latter kinds of Member States to those countries estimated to have a higher capacity in the health sector. In addition, we witnessed unsympathetic ‘competition’ between Member States in the purchase, for instance, of ventilators and personal protective equipment such as masks, and Member States’ surprising confiscations and export bans of such items, and more. Furthermore, we continuously experienced closures of borders internally in the EU likely to be in conflict with all otherwise prevailing free movement principles, apparently leaving the EU level completely pacified and largely acquiescent; a development, which may be viewed as closely related to a strengthening of the Nation State at the cost of the EU.

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The EU has in the context of the pandemic often been criticised for its lack of action as well, when finally taking action, doing so insufficiently. The initial difficulties in reaching common solutions to developing economic help packages, in particular, have continuously been highlighted. Generally, solidarity amongst Member States was continuously called for, especially when the crisis first exploded, at a time when the increase in the preservation of self-interest appeared rather shocking.

However, undoubtedly, the law – if there is a will - can to a large extent compensate for selfish human and State behaviour, and solidarity has long served both as a profound value of and a dominant aim to be pursued by the EU (as expressed in Articles 2 and 3 TEU). Thus, criticism of the EU in that regard is indeed quite strong, as solidarity among the Member States has been viewed as a kind of binding glue from the very beginning, playing a fundamental role in defining the identity of the EU and in ensuring the internal coherence of the EU. The principle of sincere cooperation, as enshrined in Article 4(3) TEU, constitutes, together with the principle of unity, the cornerstone of European integration; or the ‘pillar

of our Union'.¹⁵⁹ In consequence, solidarity is viewed as a special and important value and virtue of what Europe – including both the EU as such and the individual Member States – is about; something which apparently is viewed as positively distinguishing it from other continents.

Yet, the question how to transform the general visions of solidarity into concrete action has always been the Achilles heel of the EU, and therefore it is easily a target for criticism. In relation to the Covid-19 crisis, the EU at least at first was - once again - proven to appear as very fragile in this regard, which at the very worst could give rise to further Euroscepticism and endangering the entire project.¹⁶⁰

Later on, the EU did after all reach certain compromises regarding most importantly common economic help packages, but also adoptions of e.g., a range of recommendations and communications, for example to keep essential border crossings open and a common EU strategy for Covid-19 vaccines. Thus, little by little a growing degree of action has taken place at the EU level.

As it has turned out the three most pertinent, ultimately interrelated, dimensions became: the health dimension, the rule of law dimension, and the economic dimension. Thus, the handling of the covid-19 crisis essentially took place in three rather different respects, namely the saving of lives, the saving of economies, and the saving of essential democratic values and rights. These three points are all delicate, complex, and permeated by challenging dilemmas. Serving as an overview, Europe's responses to the crisis may be graphically depicted in the following manner:¹⁶¹

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¹⁵⁹ See European Council, 'Letter by President Charles Michel to the President of the Italian Republic, Sergio Mattarella' press release of 20 March 2020.

¹⁶⁰ See further e.g., the paper drafted by the group handling the "Future of the European Project".

¹⁶¹ See further e.g. [Timeline of EU action | European Commission \(europa.eu\)](#) and [Overview of the Commission's response | European Commission \(europa.eu\)](#).

The health dimension:

Securing safe and effective vaccines for Europe and the world – e.g.:

- Help companies ramp up their manufacturing capacities at scale and at speed
- Ensure sufficient supplies for its Member States through Advance Purchase Agreements with vaccine producers
 - Ensure flexibility of rules to speed up the development, authorisation and availability of vaccines
 - Supporting research on vaccines (and diagnostics and treatment)
- Coronavirus Global Response (universal access to treatments, tests, and vaccines)

Issuing guidelines on measures to stop the spread of the virus including testing strategies

“First bricks” towards a European Health Union (COM(2020) 724 final):

- A stronger health security framework
- More robust EU agencies (including The European Health Emergency preparedness and Response Authority (HERA) aiming at preventing, detecting and rapidly responding to health emergencies)

Ensuring the working of the internal market – e.g.:

- Ensuring workers’ mobility
- Protection of cross-border trade
- EU Digital COVID Certificates

Repatriation of EU citizens stranded abroad

Helping ensure supply of medical equipment, tests and personal protective equipment

Rule of law dimension:

Regulation 2020/2092 of the EP and Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget

Fighting disinformation:

- Contact with social media platforms regarding measures to promote authoritative content, improve users’ awareness, and limit coronavirus disinformation and advertising related to it
- Deploying all available tools and to help in the fight against coronavirus-related misinformation and disinformation

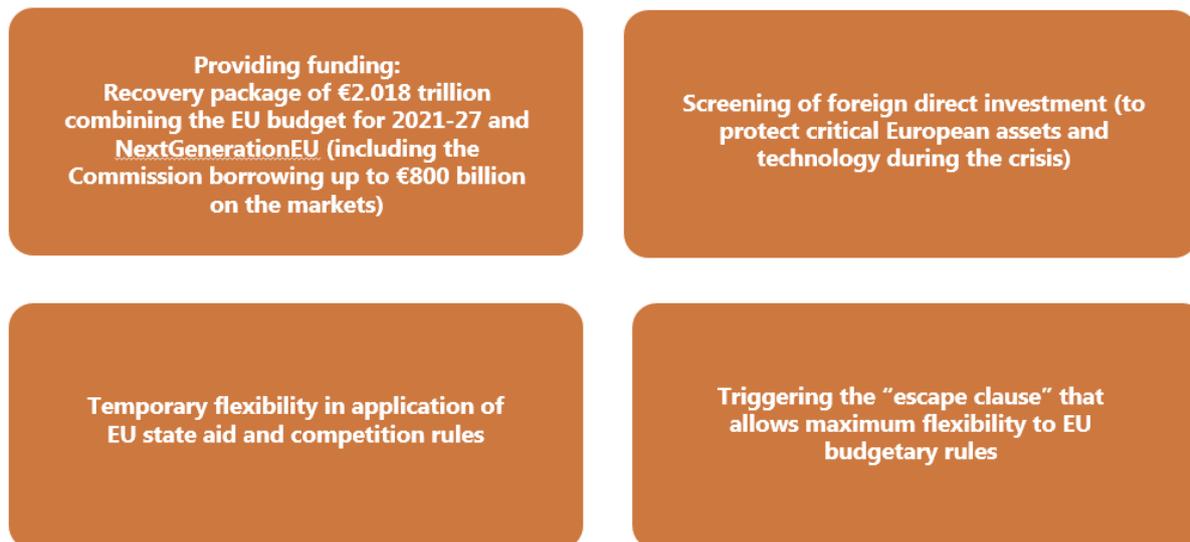
European Parliament resolution of 25 March 2021 on the application of Regulation 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP))

Proposal for a Digital Services Act:

- Setting out rules to ensure greater accountability on how platforms moderate content, on advertising and on algorithmic processes

Proposal for a Democracy Action Plan:

- Protecting free and fair elections
- Strengthening media freedom and pluralism
 - Countering disinformation

Economic dimension:

Among the most significant accomplishments, the common purchase of vaccines, some of the initiatives to protect the internal market, the conditionality mechanism to protect the rule of law and the recovery package should, in particular, be highlighted. Beyond any doubt, an impressive number of responses have been formulated and implemented, several nearly revolutionary in the sense that beforehand not many would have expected such levels of collaborative action. In that respect, solidarity in the shape of common action has indeed been present.

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Nevertheless, flaws are also detectable. The following example of interest to the difficulties in the protection of the internal market and free movement is thus intended to give an impression of them.

An example: Closures of Borders in the Three Nordic EU Member States during the COVID-19 Pandemic

With the outbreak of the COVID-19 pandemic, disorder arose. On an unprecedented scale, Member States introduced drastically different responses with respect to travel bans and limitations, border closures and controls, requirements of testing and quarantines, etc.; actions claimed to have been taken to possibly limit the spread of the virus, but presumably

also implemented due to their symbolic nature. At times, it was made almost impossible to cross borders in Europe.

Although in many other respects having pursued rather different approaches to the handling of the pandemic internally in their countries, the Nordic Member States (Denmark, Sweden, and Finland) have in common that they all developed rather strict, yet not identical, approaches regarding their borders. Thus, they all clearly pursued the same kind of pattern of unilateral behaviour, introducing border-related measures and, in fact, seemingly often to a much stronger degree compared with most other Member States. As an example, Danes were from just before Christmas 2020 until Easter 2021 – with a few exceptions – not permitted to enter Sweden through the Danish/Swedish border, but could do so if entering Sweden from e.g., Germany (which would then extend a journey from e.g., Copenhagen by car by about ten hours). As a result, the development of the so-called “Resounds-region” with the bridge between the Danish capital Copenhagen and the Swedish city Malmö as its central anchor, was severely put on hold. As is also the case with many other neighbouring countries, which in earlier times may have been engaged in wars with one another, such measures can be the cause of reintroducing otherwise historical, nationalist tensions and myths that previously had been nearly buried and only kept slightly alive in for instance football matches. This development may have led to a strengthening of the Nation State at the cost of the EU and good neighbourhood and is, in fact, not limited to the Nordic Member States alone.

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Open borders and free movement in the Nordic countries and in the EU had become such a common reality that it today appears nearly unnatural to have had these rights suspended.

Thus, this raised the question why the Commission did not react to the numerous kinds of border measures enacted by Member States throughout, especially the first pandemic year.

Eventually, even citizens started to send complaints, begging it to take action. Then, on 22 February 2021, the Commission finally took the initiative, as it sent administrative letters to six out of twenty-seven Member States, namely Belgium, Denmark, Finland, Germany, Hungary, and Sweden, putting them on notice over curbs to free movement.

None of the three Member States accepted the criticism of the Commission. At the time of writing, the Commission has seemingly not taken any further steps in a potential infringement procedure towards any of these three Member States, and it is very unlikely that it ever will.

The border-related actions of Member States have been taken at the cost of severely disrupting free movement. Thus, the viability of the Internal Market was strongly challenged. Indeed, many of the steps taken by the Member States have been contrary to what EU Law has traditionally been conceived of as allowing, and significantly, the Commission has appeared to be much more tolerant than what would have been expected, perhaps comforted (in its failure to act) by the seriousness of the situation. Along with that, the pandemic has also served as a kind of stress-test for the foundational principles of free movement, which has revealed a fragility in the theoretical foundation of the EU free movement principles and in the willingness to seek them upheld.

The Commission, being the primordial guardian of respect for EU law, through having sent the abovementioned administrative letters, did eventually demonstrate some action. Under all circumstances, there is a profound need for coordination and cooperation, which are aims which have already (to some degree) been expressed in e.g., Recommendation 2020/1475 (as amended), which could constitute a good point of departure, if only respected and developed. The price of diversity of approach otherwise risks becoming too high. Free movement together with a genuine spirit of cooperation and mutual – but definitely not blind – trust, has of course to be balanced against the protection of the health of Europeans as far as this is reasonably done.

CONCLUSION: MANY ACCOMPLISHMENTS, BUT ALSO IMPORTANT LESSONS

Covid-19 turned Europe upside down. Nevertheless, in the event, one could vest a lot of hope in the EU, as it has, within the prevailing limits, already done quite well in relation to the handling of the pandemic. It is true that the EU's reactions were at first far too slow, which had extremely tragic consequences in some of the Member States and could have been avoided. Subsequently, the necessary reactions came little by little and often in a piecemeal manner and were severely hampered by certain legal powers which were, and in future are, likely to be far too limited for the necessary action to be taken. At the political level, the existence of rather opposing views as to the way forward will not help. Some credit should be afforded to the EU in that, in the event, the EU had been capable of setting up a common action programme in relation to the common EU strategy for COVID-19 vaccines. Also, the Recovery Plan appears to be quite an achievement - some would even say that it is historically outstanding. Furthermore, the conditionality mechanism might prove to be an extremely important tool in combatting the current rule of law challenges in certain Member States. On the other side of the coin, one may wonder why the Commission appears not to have reacted very much to the many extremely wide-reaching restrictions, not least border closures and other limitations, implemented by Member States, strongly impinging on fundamental EU legal principles and rights. This eventually led to the creation of new frontiers in the shape of EU-initiated sanitary passports and new kinds of frontier controls also to some degree against the spirit of the internal market and with certain disruptive effects on its functioning.

Thus, it does not seem fair to say that solidarity in the shape of action has not been there at all. Some of the problems which were seen are to be understood in light of the fact that Member States had formerly not been willing to transfer the necessary competences. That framework will in due course have to be reconsidered but may require fundamental Treaty amendments.

The current war has once again become a gamechanger perhaps also in relation to the pandemic. As a result, the relevance of the Covid-19 crisis and the related problems of increased nationalism, which many until so recently were all quite preoccupied with, have largely lessened. The size of this new challenge is in all likelihood more than gigantic even in comparison with the Covid-19 crisis and, at least in Europe, the pandemic for the time being seems under control due to, for instance, efficient vaccinations and largely attained herd immunity, leading to glimmers of light in a very long pandemic tunnel. But maybe the handling of the pandemic after all can bring hope about the future of Europe because it was capable of handling this new challenge well. In part at least, this seems to be because Europe indeed appears to be more united than ever, in contrast to the situation two years ago.

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* The paper is partly based on Ulla Neergaard's previous co-authored works (where the analysis and conclusion are further developed and independent from), in particular: *"Whatever is necessary... will be done" - Solidarity in Europe and the COVID-19 Crisis*, Together with Sybe de Vries, In Dolores Utrilla & Anjum Shabbir (eds.): "EU Law in Times of Pandemic", EU Law Live Press, 2021, pp. 75-93; and *"Broken Wings: Closure of Borders in the Three Nordic EU Member States during the COVID-19 Pandemic"*, Together with Jaan Paju & Juha Raitio, EU Law Live, 2021, pp. 1-20.

L. NATIONALISM AS IT AFFECTS THE COVID-19 PANDEMIC

Nationalism, EU, and health: from common framework to language through the experience of the pandemic, and Knowledge, science, and data in times of Coronavirus

ABSTRACT:

The current Pandemic has showed the convenience of having a common framework for public health and healthcare at EU level. The different common decisions and measures adopted during these difficult times by the EU institutions, such as the Covid EU card or central purchases of vaccines, have been the proper way to try to solve the dramatic situation we were living under.

These common actions and decisions of EU in health are important not only for the proper area of health, but for democracy. A common policy not only strengthens the EU itself and its institutions, but also could allow for certain populist and nationalist movements to be silenced. A common policy and framework for relevant decisions in health would strengthen the adherence of EU citizens to its institutions, and to the project. Given the direct link between populism and nationalism and a fear for the future, a fear of losing everything, such a common policy would also help to assuage one of the key motivating factors behind the support for such movements.

In the first part of this paper, we analyse the convenience of a common framework from different perspectives and the main problems for such proposal, where the lack of a common healthcare model in the State members is relevant.

In the second part, we analyse the lack of a common ethical proposal for the vaccination campaign against Covid at EU level. A common framework in health means also sharing not only models and structures, but ethical and legal values and principles.

The challenge we are addressing in our paper is not easy and because of it we finally propose a sort of harmonisation through EU minimum standards, not the implementation of a full harmonised system. We are not calling for wholesale change, but rather a step-by-step approach to a new common health policy framework.

The availability of data in sufficient quantity and quality is now the basis for much of Artificial Intelligence and its applications. Its impact on all kinds of fields is being very great, and among them there are some from which we will benefit especially if we do things right.

The field of health is paradigmatic in this regard. If there was any doubt about this, COVID-19 has removed it. But not everything is a smooth ride, and this has also manifested itself during the pandemic. We have faced many difficulties in obtaining data. They are apparently within reach of our computers, but only apparently. The difficulty of sharing this kind of highly sensitive data, and the general lack of interest in it by companies and even public organisations and even governments, makes almost impossible gathering sufficient and good quality data to tackle complex health problems. Just as we cannot navigate thousands of small streams, no matter how much water they may together contain, there is little we can do when the data is siloed.

Beyond the data, there have also been serious difficulties in accurately conveying to society the course of the pandemic and the decisions that have been taken along the way. We tend to take it for granted that what has scientific support does not need to be explained in a special way, nor will it be controversial, let alone rejected. But once again this has happened.

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It is clear that there has been ignorance, disagreement and even negation about the causes of the pandemic and about its very existence. Also, about the usefulness of vaccines and even their purpose, among a long list of other nonsense, at least for those of us who believe we are well informed and give science and scientific and technological advances decisive weight in the search for solutions to the problems that afflict us. But neither can we fall into the error of ignoring the existence of this type of unfounded or clearly mistaken opinions, which are nevertheless held by a significant part of society.

In this paper we look at these and other issues of particular relevance and, more importantly, try to provide some keys to making things better. Machines and people need abundant, quality data and information to make the best decisions. Ensuring that this happens is everyone's responsibility, and that of governments in particular.

Nationalism, EU, and health: from common framework to language through the experience of the pandemic

Citizens across Europe are pessimistic and anxious about the future, and a significant minority of people feel 'left behind' by the current system. National and EU-level governments need to promote policies and political discourses that seek to allay fears, address concrete concerns, and more proactively foster social cohesion. This requires moral and principled leadership on the part of political leaders, and targeted policy interventions to address the economic, social, and cultural factors driving insecurity and dislocation

Nothing to fear but fear itself, DEMOS Report, p. 424.

"We cannot wait for the end of the pandemic to repair and prepare for the future. We will build the foundations of a stronger European Health Union in which 27 countries work together to detect, prepare, and respond collectively"

Ursula von der Leyen, President of the European Commission, speaking at the World Health Summit (25 October 2020)

"We are more united than ever, and we will stand up in this war, that is for sure that we will overcome, and we will prevail. We are united and we stay united"

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Ursula von der Leyen, President of the European Commission, speaking at the European Parliament Plenary on the Russian aggression against Ukraine (1 March 2022)

The construction of common health policies as the "vaccine" against populism and nationalism

- i. Directive 2011/24/EU, of the European Parliament and of the Council of March 9, 2011, on the application of patients' rights in cross-border healthcare represented a very important advance in the development of a common healthcare framework in the European Union so that the principle of free circulation does not only apply to medicines and medical devices and health professionals, but also to the patients themselves.
- ii. There are some specific risks and difficulties for the development of this common framework in the specific area of health. However, it is not easy to imagine a

European Union that proclaims freedom of movement as a founding principle without this principle being developed in the sphere of citizens as patients. This has been proclaimed by the Court of Justice of the European Union in a well-established jurisprudential doctrine, which has been, precisely, the one that determined the enactment of the Directive (cases Kohll, Decker, Kroll, Geraets-Smits and Peerbooms, Ioannidis and Descamps, Inizan and Keller).

- iii. The Court of Justice has considered that the development of common health policies constitutes one of the aims of the European Union that is not limited to a mere single economic market. It recognizes this at *United Kingdom v. Commission*: "furthermore, none of the documents before the court supports the argument that the commission's exclusive or main purpose was of an economic nature rather than to protect health". It can therefore be said that for the Court, the promotion of common policies in the field of health protection and health care would constitute a true expression of European citizenship.
- iv. On the other hand, it is difficult to promote true an EU citizenship without having a common policy in the field of health, and this, beyond the recent experience of the Covid-19 pandemic, which is still present. European citizens consider health protection to be one of the most important public policies for their own well-being and safety. If there is a public benefit that citizens have assumed as inalienable, once the welfare state has been developed, this is precisely the protection of health. The European Union itself must be aware that its progress towards a more homogeneous political and economic framework passes, inexorably, through health policies.
- v. Even a common policy not only strengthens the EU itself and its institutions, as we have been shown, for example, by the centralized purchase and proportional distribution of vaccines against Covid-19, but also allows certain populist and nationalist movements to be silenced. A common policy and framework for relevant decisions in the area of health would strengthen the adherence of EU citizens to its institutions and to the project. There is a direct link between populism and nationalism and fear of the future, fear of losing everything.

- vi. In our opinion, the main problem is not about that the national healthcare systems of the Member States are failing or falling short, but to strengthen the cooperation and collaboration among Member States and EU Institutions as a way to show that health for the EU Institutions matters. On the other hand, a common market and freedom of circulation of citizens and companies are not really understandable without a common framework in the area of health.
- vii. The phenomenon of globalization brings with it the fear of losing one's identity, one's own culture, but above all, of losing everything. Globalization moves the elements of production, not its products, beyond our borders. Capital has become extraordinarily mobile, organizing production globally. And this generates distortions and difficulties in the solvency of our robust social States and the effect of what have been called, metaphorically, Left Behinds. The report of the British Institute Demos, under the title, nothing to fear but fear itself? which incorporates and explains in detail this concept of those left behind, points out that the problem of the crisis of our contemporary democracies essentially lies in the fact that the citizens of all over Europe are pessimistic and anxious about the future, and a significant minority of people feel "abandoned" by the current system. National and EU governments need to promote social cohesion, and, among these policies, health occupies a leading role.
- viii. As the German philosopher, Markus Gabriel, reminds us, the problem is deeper and affects the ethical behaviour of individuals, since moral demands can only be satisfied when we create the necessary economic conditions for this purpose. We cannot start from the premise that all people will behave as moral heroes in all circumstances. It is the task of the economy to create the necessary conditions to act morally without heroism.
- ix. As Norman Daniels and other authors explain following the John Rawls ideas about justice, right to healthcare is not only related to Social State, as one of the main social rights, but to democracy. The principle of democratic State requires the active participation of all citizens. Therefore, they should enjoy a minimum of living conditions that make such participation feasible. If the notion of procedural democracy requires respect for the effective political participation of all members of the body politic, they must be in material conditions exercise that right. So, the

constitutional proclamation and guarantee of a first level of social rights, such as right to healthcare, is a premise of the democratic process. Citizens should enjoy a vital minimum that preserves their dignity and allows them to participate at the democratic framework. Those who have less opportunities to overcome a disease, groups in worse economic condition, usually have less opportunities for a real political participation. Guaranteeing certain material preconditions, and among them, healthcare, supposes, also, to protect the right for political participation¹⁶².

- x. This objective of a common European framework is not easy to be developed, even, considering the robust doctrine of the EU Court, mainly, because, organization and management of health care systems is a responsibility of the Member States, as it is recognized in the founding Treaties, limiting the powers of the Union in this matter to mere coordination and cooperation (art. 168 Treaty of the European Union).
- xi. However, the principle of sincere cooperation, as enshrined in Article 4(3) TEU, and which entails solidarity, to which the Commission refers, constitutes, together with the principle of unity, the cornerstone of European integration; or the 'pillar of our Union'¹⁶³.
- xii. Therefore, we are calling for a sort of harmonization through EU minimum standards, not a full harmonized system. We are not calling for wholesale change, but rather a step-by-step approach to a new common health policy framework.

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¹⁶² L. Morales, *Derechos sociales constitucionales y democracia*, Marcial Pons, Madrid, 2015, p. 303; and Ponce Solé, «Reforma constitucional y derechos sociales: La necesidad de un nuevo paradigma en el Derecho público español», *Revista Española de Derecho Constitucional*, n.o 111, 2017, p. 70.

¹⁶³ See Professor Neergaard's Paper on 'EU, Covid-19 and Nationalism: Legal Aspects' starting on page 155

Towards a common bioethical framework in the EU: the missed opportunity of prioritizing access to vaccines by citizens of the Member States

- i. The common purchase and distribution of vaccines against Covid disease by the EU, avoiding situations such as those experienced at the beginning of the pandemic with the shortage in international markets of certain health resources (masks, diagnostic tests, respirators, means of life support, ...), constitute, perhaps, the greatest success of the EU institutions in recent decades. This makes possible to mitigate certain criticisms of EU project. All EU citizens felt equally protected by EU.
- ii. However, it has not been accompanied by a common framework for prioritizing vaccines at the internal level, which would have made it possible to further complete that achievement. The context in the different Member States is, certainly, not identical. But it is also true that the characteristics of the European population are not so unequal. In addition, the Member States have a common ethical-legal framework for decision-making in the field of health through the Convention of Oviedo of Council of Europe, ratified by all of them, and the rights enshrined in the EU Rights Charter. However, these regulations contained in the Convention and the Charter were not developed for a specific situation of health catastrophe.
- iii. In a context of "catastrophe medicine" such as the one we have experienced during this pandemic, the use of resources must be planned, based not only on scientific criteria, but also on ethical principles and the rule of law, avoiding utilitarian decision-making, where the most vulnerable are the ones who usually end up losing. This has, also, a direct impact on criticizing the EU from a populist and nationalist perspective. Utilitarianism is insufficient for the solution of complex ethical issues related to right to life and healthcare. For the utilitarian perspective, human dignity is not a relevant value for the decision-making process. Jeremy Bentham stated that "natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense-nonsense upon stilts". It is a mere pragmatic solution that would allow quantify numerically, based on empirical data, with the plausible aspiration of achieving the greatest happiness and well-being for the greatest number of citizens. Utilitarianism offers a pragmatic and procedural solution where ontological value of the human being has been removed. A space in which an ethics

without truth is promoted. As professor Gustavo Zagrebelsky says principle of justice speaks, fundamentally, not of the greatest benefit for the greatest number of people, but rather the least number of those excluded from happiness. The utilitarian approach falls into the fallacy of the absence of moral separability of people, that is, it assumes that the moral value of people is interchangeable: the health that some gain compensates for the health that others lose, as long as the result is a positive sum. The interpersonal compensation of human lives against each other, in order to maximize presumed collective benefits, is incompatible with the primacy of human dignity.

- iv.** As the German Ethical Council pointed out at the beginning of the current pandemic, the State has the moral and legal duty not only to save as many human lives as possible, but also, and above all, to safeguard the foundations of the legal system, and this is key if we want the EU project to move forward.
- v.** This pandemic has offered us the opportunity to continue advancing in the EU project in a robust manner, silencing the criticisms against it coming from populist and nationalist movements. Opportunity achieved with the centralized purchase and distribution of vaccines, but not with the determination of common ethical criteria in prioritizing access to vaccines by citizens of the Member States. Moving towards an EU with shared ethics in a field as sensitive as health is moving towards an EU with “good health”. Subsidiarity principle usually plays a relevant role in such difficult cases of scarcity, but the EU vaccines experience during the pandemic offers the opportunities of working together in the area of public health and healthcare, beyond that principle.
- vi.** Finally, it is also important to broaden the focus and to consider prioritization not only for EU citizens but the World, specially, developing countries. To develop an EU model based on bioethics and human rights should also mean to attend the needs of the world and not only Europe. Experiences such as COVAX have been very stimulating but not enough.

A short comment about science and language and communication as an introduction for the following chapter

- i. The pandemic has showed also that we are not living under a framework of rationality as many of us expected. The proper concept of sentimental democracy, developed by Manuel Arias Maldonado in Spain, is a good example of this trends. The rational interpretation and explication of reality has been substituted by emotions. The example of vaccines against Covid-19 and anti-vaccination movement is a good example of this. The more effective and safety those vaccines are, the more the anti-vaccination movement question them. Following the explanation of Arias Maldonado about this concept, it seems desirable that democratic government now be based on affective seduction and not on rational persuasion.
- ii. And perhaps, one of the problems comes from using the same language that we were using for a rational dialogue and debate, instead of adding emotions to the messages. It is not about transforming the scientific language in a merely emotional one, which goes against the proper concept of science. It is about considering the characteristics of scientific message when it is addressed to common people, to establishes a link between the people to whom the message is addressed and the content of it.
- iii. The pandemic has showed everywhere and, mainly, in Europe that we need to reconsider the way and the form we express our scientific messages in a context of emotions, nationalism and populism.

CONCLUSIONS OF THIS CHAPTER:

1st There is a closed link between nationalism and populism and healthcare as a social right (Brexit Campaign is an example of it)

2nd There is a need to develop a common framework for healthcare at EU

3rd If we consider the concept of the left behinds and the need to develop a new social agenda for the EU as a real way to maintain our democracies, we should achieve it through a common healthcare system or, at least, an increase of the common policies in the area of health

4th This common framework should consider the differences among State members, such as the proper characteristics of the healthcare system (Beveridge, Bismarck, etc.)

5th The experience of the pandemic has showed us the opportunity and possibilities to achieve it

6th We should think about the form and ways to communicate scientific conclusions or recommendations when the messages are not addressed to the scientific community, but to the common people. Now emotions play an important role

Knowledge, science, and data in times of Coronavirus

Knowledge and technology society

- i. The pandemic has highlighted the importance of science and the technological development that emanates from it. Where else have the vaccines come from that allow us to face it with more hope than fear? At the same time, we have seen the importance of collaboration in addressing solutions to our most complex and pressing problems. Having shared the genetic information of SARS-CoV-2 from the beginning allowed us to detect it and fight it with unusual speed. Having quality data, sharing it and having the ability to properly compute it is increasingly important even for the progress of science and technology.
- ii. The world can never protect itself completely from a pandemic, any more than from a hurricane or cyclone. COVID-19 has taught the global healthcare community priceless lessons. It is our responsibility to use them to make our defences against the next pandemic more nimble, more robust, and more equitable.
- iii. One of the first weaknesses identified during the pandemic was the shortage of some raw materials, finished products and even scarcity of certain technologies. In the biopharma industry this was translated in the need to supply unprecedented large quantities of some products that were needed during the pandemic. This put a lot of pressure in Eu countries and companies to supply the essential required products. Spain and Europe have lost part of their biopharma production capacity in favour of third countries where manufacturing costs are much lower. Both Europe and Spain should support biopharma companies and promote the manufacturing of essential drugs in our territories.
- iv. Another important factor was the fact that shortages of raw materials and intermediate products were made worse by trade restrictions and competition for and among vendors which resulted in inefficient allocation of available supply, leaving most developers less capable of

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rapidly testing, manufacturing, and delivering COVID-19 vaccines and therapeutics. Proposed investments to expand manufacturing capacity must also build capacity for sufficient and rapid supply of critical commodities and raw materials.

- v. Paradoxically, at the same time that we are heirs and beneficiaries of centuries of scientific advances, we are also witnessing an increase not only in scepticism around certain advances in science but even in their denial. The so-called negationist not only appears in areas where there is still some scientific controversy, such as climate change, but also in issues where there is no possible discussion, such as the existence of covid-19 or the AIDS virus, which has been with us for decades. Negationist is dogmatic, not scientific. Paradoxically, it is even possible that it will find some oxygen to develop in the caution with which scientists present and defend scientific knowledge, considering it potentially falsifiable, to use the words of Karl Popper.
- vi. Without going to the extreme of the negationist, there is also a growing disaffection with science and technological development in a significant part of European society. The number of anti-scientists also seems to be increasing. The causes are manifold: information saturation, lack of education, failures in the communication and dissemination of science and technological advances, perceived abuses of power by governments and companies. The often-inadequate communication of scientific and technological advances, together with an information overload, which saturates us and often prevents us from separating dust from straw, undoubtedly contributes to this.
- vii. We should not confuse these phenomena, in any case, with the reasonable questioning of the intrinsic value of any technological progress. We have known since the origin of the first tools that the axe used to defend against a predator can be used to kill another human being.

- viii. Perhaps as never before, Artificial Intelligence, and in particular big data to learn how to solve a myriad of problems, embodies this ambivalence between the potential benefits and harms of technology. In 2013 David Brooks coined the term *dataism* to great acclaim,¹⁶⁴ and since then this phenomenon has gone from strength to strength, to the point where we can think of data as both the Oracle of Delphi of the 21st century and Pandora's box.
- ix. Indeed, the future of Europe, or any other country or region of the world, cannot be good unless it is fundamentally underpinned by progress in science and technological development, and the innovation that flows from it. These, moreover, are increasingly data-dependent, as we have already indicated. However, while there is some consensus on this, doing so requires political decisions on what and how to invest, an equitable distribution of wealth, and a commitment to social, economic, and environmental sustainability. It also depends on overcoming many inertias and barriers, not least local visions, and interests, fostered by nationalism and corporatism.

The paradoxical coexistence of reverence for knowledge and technological development and the rejection and denial of both

- i. European societies are facing problems and crises that will require a great mobilization of knowledge and a great technological impulse. We need the best knowledge and technology to be used to make the appropriate collective decisions. This reality introduces us to the debate about what is the correct relationship between science and people, between knowledge and power, between experts and politicians. This debate does not take place with all the time in the world and in the midst

¹⁶⁴ Brooks, David (4 de febrero de 2013). «The Philosophy of Data». The New York Times. ISSN 0362-4331.

of a stable reality, but in the face of the urgency of very serious problems, with sometimes contradictory requirements of the different social subsystems and conflicting visions of what is at stake.

- ii. As if that were not enough, there is the circumstance that this enhancement of knowledge must be carried out at a time when science is also the object of distrust and controversy. It is a problem that cannot simply be explained as irrational ways of thinking but is telling us something about the nature of our societies. Only by understanding those who distrust science can we understand the society in which we live and the role that knowledge plays in it. Understanding does not mean here to give reason to those who seem to lack it, but to explain the circumstances from which this resistance arises because then we will have a more precise idea of the rationality they reject.
- iii. Our chaotic digital environment has, from the outset, objective causes. It is true that disinformation often has specific responsibilities that can be identified. But it is not this intentional disinformation that should concern us the most but that ignorance that has no guilty subjects but objective circumstances that make it inevitable, in whole or in part.
- iv. The greatest complexity in the world, the mistakes of scientists and experts, the accelerated technology that creates new areas of ignorance, all produce perplexity and bewilderment. Complexity here means disconnection with immediate evidence, unintelligibility, information that disorients. There are also causes that refer to an overloaded subjectivity, which can be relieved by a conspiracy theory or by the denials that arise in a context of fear, anxiety, distrust and feeling of helplessness. For those who feel that everything is out of control, a narrative that explains their feelings and enrols them in a safe community of believers becomes a reassuring relief.
- v. Since the mid-twentieth century various analyses of this dialectic have been formulated, but almost always as if ignorance were the opposite of rationality; we have hardly reflected on the mix of knowledge and

ignorance that characterizes us. In the coming years, with great probability, we will witness great scientific discoveries and we will see how some technologies will develop that will radically modify our environment. All this will imply new ignorance (about, for example, the side effects of certain technologies or the regulatory uncertainty they generate) and will set in motion intense debates, since discussing is what we humans do in democratic societies when we ignore something and want to generate the corresponding knowledge about it. As always, the advancement of knowledge makes us both wiser and more ignorant. There is no scientific discovery or technological invention that does not carry, like its own shadow, a new ignorance.

- vi. At the same time, we are aware that the most important political and social problems require a great deal of scientific knowledge and those who lead political institutions do not have it, so they have to be advised appropriately. Politics is not practicable today without a continuous recourse to expert knowledge.
- vii. We need to think about the conditions under which knowledge can and should be present in the political process. The dissent of experts, the questionable scientific assessment of the risks and the threatening potential of some scientific innovations, have contributed to questioning the traditional image of science as an instance that provided objective, safe and universally valid knowledge. Faced with the technocratic dream, the truth is that science is one more voice in the concert and political, ethical, or ideological logics are also asserted as legitimate points of view when making decisions. Science advises, but it does not replace politics.
- viii. We should think of the relationship between science and politics not as submission from one to the other but as an argumentative process. Political problems must be translated into the language of science, but in turn the answers of scientists are not applicable to politics as long as they have not been poured into the format of political decisions. There is

no immediate translation of scientific judgments into political decisions, nor is there a scientific justification for previously taken decisions.

- ix. Final decisions on issues beyond the local level, such as vaccination, although to be taken by the national competent authorities in each country, must not only take into account scientific advice, but also the interests beyond their borders, including those of the world population. For example, not to cooperate with vaccination at the global level, also in the interest of national health, would be another form of self-limiting nationalism
- x. An important positive advance coming from the pandemic was the cooperation and sharing of data by scientists, academia, start-ups, biotech, and traditional pharma of data on the virus and on the vaccines and therapeutics. Chinese scientists¹⁶⁵ quickly posted the genomic sequence of the SARS-CoV-2 virus on GISAID (2), a widely available data-sharing platform: this should be both the scientific norm and the legally binding obligation that every nation owes to every other nation. The approval of the first vaccine in just 326 days after that genome was published was an unthinkable feat and it was based in R&D previous years, decades of robust research and the cooperation of all public and private sector agents involved.
- xi. As well we have seen work done by the world's healthcare regulators during the pandemic, which saved millions of lives. Regulatory flexibility and collaboration among the leading agencies proved invaluable, from fast-tracked approvals and e-signature authorizations to expedited scientific guidance and rolling review processes. The EU has a new programme that will support all areas of research and innovation, based

¹⁶⁵ See <https://www.science.org/content/article/chinese-researchers-reveal-draft-genome-virus>

in excellent science and we need voluntary partnerships to continue of all parties involved in R&D, face global challenges and industrial competitiveness, increase manufacturing capacity, facilitate technology and knowledge transfer, and drive rapid R&D. Governments priority is to ensure the safety of their people. But narrow understandings of that duty have led to the rise of "vaccine nationalism." Policies like export restrictions and vaccine hoarding, regardless of global public health need, have intensified and likely prolonged the COVID-19 pandemic. Refining the concept of "national health security" in a global context will be essential to build a different framework to be prepared for a new pandemic

The omnipresence of data: opportunities and threats in times of pandemic

- i. Turning back to the pandemic, it is necessary to consider some of the issues that the pandemic has brought to light and others that it has changed or helped to change in an accelerated way. Among the first is Europe's dependence on the outside world, particularly in certain critical industrial sectors: from chips to masks, respirators, and diagnostic tests. For its part, everything that has to do with the digital economy and society has accelerated enormously during the pandemic: Automation, teleworking, telemedicine, tele-education, digital transformation in general.
- ii. During the pandemic, it has become clear how the collaboration of EU Member States is essential. For example, we have seen it in the purchase and distribution of vaccines.
- iii. The importance of data to face the pandemic has also been highlighted, both in epidemiological analyses, as well as in the processes of diagnosis and contact tracing, or even in the planning of the necessary economic recovery. In fact, the large quantity of data generated and analysed about the virus and its effects make this crisis the first "data-driven

pandemic", as Daniel Innerarity points out.¹⁶⁶ This collaboration has not been frictionless, at some instances politicians have suggested to exacerbate nationalisms over collaboration that have had an impact in how institutions have managed the pandemic¹⁶⁷.

- iv. It is not an exaggeration to talk about the data economy and society, and if Europe wants to occupy vanguard positions in it, it must avoid hyper-protectionist policies, often fostered, or supported by nationalisms. In this line, the European Commission presented in March 2020 the "Digital compass for 2030: the European way for the digital decade" that forms the roadmap for the digital transformation of the European Union¹⁶⁸ until 2030. Its objectives include the reference to European digital sovereignty and the need to reduce its dependence on other countries outside the European framework.
- v. The phenomenon of Digital Sovereignty and its regulatory derivatives represent one of the greatest challenges for the European Union, since the approach to technologies such as Artificial Intelligence or even cloud computing, are often perceived as negative, showing them as technologies that should be feared and, therefore, subject to restrictions, instead of promoting their adoption and development. The most recent examples of such protectionist measures are those implemented by France's NISSA (Cybersecurity Agency) in SecNumCloud (National Certification for public cloud services) and Germany's BSI agency on C5 (National Certification for public cloud services), which, based on their interpretation of the current international data transfer regime, have decided to impose sovereign models for their public sector data (which may include health care data). These initiatives will clearly have an

¹⁶⁶ Daniel Innerarity, "The Data-Driven Pandemic: A New Conceptualization of the Data Society," May 2021.

¹⁶⁷ <https://www.bbc.com/news/health-60259302>

¹⁶⁸ https://ec.europa.eu/info/sites/default/files/communication-digital-compass-2030_en.pdf

immediate effect on the transatlantic relations and are likely to lead to further fragmentation in the region.

- vi. Obviously, the risks posed by the inappropriate use of technologies should not be ignored, as we have already said. The fact that negative prejudices about technological developments and their applications are installed in society can bring us many problems as well. These include the erosion of the European single market and the dissonance of policies and regulatory frameworks, the impact of which is felt from universities to the market.
- vii. Perhaps the paradigm of what we are saying is in the realm of medicine and health. The report of the [Centre for Data Innovation](#) called "Who is winning the AI Race", analyses the evolution of this technology in the United States, China and Europe. In the case of health data, the report states that more and more researchers are using this type of data in the design of AI systems to help identify, prevent, and predict the development of diseases. In fact, one of the indicators being analysed is the capacity of each region to collect and exchange health data.¹⁶⁹ In this sense, at the European level the health sector faces a high level of fragmentation, which includes the different ways of interpreting and applying the General Data Protection Regulation or GDPR. Issues as basic as the ownership of health data have different solutions in countries such as Finland, Denmark, The Netherlands, Spain, and Italy.
- viii. Fragmentation remains in many areas that are critical for data-based research, and that concern the sharing and use of data, as well as data governance and ownership and the responsibilities arising from its misuse. A recent study by ICLG comparing regulatory frameworks in different EU countries clearly shows the need for greater harmonisation around data in the region¹⁷⁰. Ways of dealing with this data

¹⁶⁹ <https://www2.datainnovation.org/2021-china-eu-us-ai.pdf>

¹⁷⁰ <https://iclg.com/practice-areas/digital-health-laws-and-regulations>

fragmentation at EU level are being explored, such as the application of federated learning models, which avoid data sharing, or data anonymisation techniques. But these are not definitive solutions, and, in the meantime, they risk stifling innovation and delaying or preventing applications that can save lives and improve people's lives. Indeed, many research projects in critical areas have been discontinued or abandoned, as highlighted by Professor Heidi Beate Bentzen and other researchers who are assessing the barriers to data sharing and their consequences¹⁷¹.

- ix. This situation that we have been commenting on has at least a triple effect. First, researchers must comply with the requirements established by national regulations. Secondly, if it is a project involving other countries in the European environment, then you will need to add to your analysis the regulatory requirements that come from those countries. Finally, if the project has implications beyond the European Union, then it will have to consider everything related to international transfers. While it is logical and desirable that there are controls that guarantee the prevalence of fundamental rights in the face of the undesirable consequences of an inappropriate use of technology, the truth is that it is necessary to reflect on a fragmentation that may be unnecessary and, of course, is certainly limiting.
- x. As can be seen, achieving true integration and a single European digital market is a major and extraordinarily complex challenge, and even more so if we introduce into the equation issues related to the possible nationalisms and claims of digital sovereignty of the different countries of the Union.
- xi. Of course, we are not suggesting an unregulated or uncontrolled use of data, particularly data that directly affects people, such as health data.

¹⁷¹ <https://www.nature.com/articles/s41591-021-01460-0>

Indeed, there are many regulatory measures that can be taken, such as the European Commission's recent proposal on the AI Act. But it is necessary to distinguish the essential from the recommendable or even from the ancillary. Regulations "just in case" may particularly affect pan-European and transatlantic research, with clearly undesirable consequences.

- xii. Data, especially personal data, must be protected by privacy and security laws and practices. No one disputes this. But taking this to the extreme and keeping data in silos, which cannot be expanded either in space (sharing data across organisations and countries) or in time (using data for new purposes), undermines its public, not just private, value.
- xiii. In any case, the pandemic has made more evident what we already knew: we need more science and technological development, but at the service of the common good. We need more and better data and information, and this will not be achieved without sharing it efficiently and effectively. The pandemic is not the only global problem we face. Climate change is in the medium term something that can have even more serious and even irreversible consequences, at least if action is not taken in time. Once again, we have to recall the Lisbon European Council in 2000, where it was set as a strategic objective to turn the Union's economy into 'the most competitive and dynamic knowledge-based economy in the world, by 2010, capable of lasting economic growth accompanied by a quantitative and qualitative improvement in employment and greater social cohesion'. It is obvious that we did not achieve that task in 2010, and neither have we achieved it in the present. If we do not want to give up on achieving it in the more or less near future, it is absolutely necessary to understand and cooperate between the countries of the Union, also in everything that is relevant in the so-called data economy, where there is no room for nationalisms and digital sovereignties at all costs or paralysis due to analysis.
- xiv. We are living through the first "data-intensive pandemic", and it is further highlighting the dichotomy between the protection of individual

data and the potential collective benefit of having it available, particularly in the field of health. Failure to properly resolve this dichotomy may affect scientific progress and technological development. This situation may also be worsened if countries go to extremes in defending the sovereignty of "their data", preventing them from being used even for the general interest. In the case of Europe, in particular, if this leads to data being isolated in isolated compartments or silos, within each country of the union, we may put a significant part of our competitiveness and our future at risk.

Secondary use of health data: should EU change the Helsinki paradigm in the area of research through data

- i. Big Data offers new opportunities for the development of our societies and for solving many of our current economic and social problems in general, but most specifically in the field of health research. The extensive use of conventional health data and even their interlinking with non-traditional data shall help to fight against many diseases and to develop new treatments which is a new hope for patients and for all the community. The results extracted from data use took decades to obtain only a few years ago. Currently, because Big Data and AI, it can be revealed within months, even days, and, above all, at a very affordable cost. Algorithms enable the comparison of a large number of healthcare processes, thus offering accurate conclusions, in terms of volume, on the most acute diagnosis and the best treatment for many diseases.
- ii. The context is, therefore, unique from an historical perspective and not taking advantage of it could be seem as a not very ethical option, above all, if we consider the opportunities offered for the prediction, prevention, or healing of many diseases.
- iii. As the German Ethics Council (*Deutscher Ethikrat*) pointed out, in biomedical research, the analysis of large volumes of health data should provide a better understanding of important scientific processes and their connections. Among the most data-intensive

applications are modern imaging and molecular biological procedures, such as those employed in what we call 'omics' (e.g., genomics or proteomics).

- iv. This opportunity has even more value and projection for the future in those States, such many of the EU Member States, which have implemented a public healthcare system where there is a correlation among millions of medical records and health data. On the other hand, these new opportunities of the development of new technologies, Big Data or AI pose some ethical and legal conflicts and dilemmas. Health data is one with a strict regulation and legal protection considering the impact of their revelation in individuals' privacy. There are risks to personal rights, as there are opportunities.
- v. **Is my health data mine anymore?** This question could be seen as a strong one or, at least, a tricky one. New technologies and mainly Big Data offer a great number of new opportunities in the area of health where we have a huge amount of data coming from medical records, clinical trials protocols, internet consultations, etc. Consequently, it can be stated that clinical data are no longer a mere reminder of the healthcare process, but rather the main source of knowledge and progress in Medicine and Biology. Health data can already be considered as the true treasure of biomedical research, as many said that biological samples were the treasure of the previous decade.
- vi. From an ethical perspective, as the Spanish Bioethics Committee said on its Report on the ethical legal requirements in research with health data and biological samples in the framework of the Covid-19 pandemic, 2020, maintaining the postulate that the disease and the data generated by its treatment only belong to those who suffer it is not only to ignore reality, but also to ignore the existence of conflicting values and rights and the correct way in which they should be reconciled. Data protection is not, nor has it ever been, an end in itself, but rather serves to protect the person in their privacy, both in their private sphere and in the public sphere. However, it is also important to remember that this right to privacy, like other rights, plays in a social environment of interrelations, in which it is as relevant to recognize the autonomy of the individual as the solidarity of the citizen.

- vii. A similar position is supported by Barbara J Evans: those who invoke their right not to share their data in any circumstance, even when the health of third parties may depend on them, may be blurring the line between individual autonomy and narcissism. A position that ignores the common good and prioritizes not only autonomy but even selfishness and narcissism does not seem acceptable from an ethical-legal perspective. Also, for Ricard Martínez, there is a change of paradigm towards a new one based on efficient control by the authorities of the use of data from an initial consent.
- viii. The International Bioethics Committee, IBC-UNESCO, pointed out in its 2017 Report on Big Data in health, that Big Data can already be considered a common good of humanity (literally, “Big Data can be framed as a common good of humankind”). Science and technology in the field of Big Data can help reduce the inequalities that prevent many human beings from enjoying the highest possible level of health, both nationally and internationally. Therefore, it can be said that health data, in the Big Data stage, is a true heritage of humanity, even if it is in merely metaphorical terms. However, the provision of this Big Data cannot be carried out at the cost of violating the right that each individual has.
- ix. The new EU regulation, while not specifically addressing the particular dilemmas and conflicts of Big Data, does contain specific references to health data and, more specifically, to the requirements for their secondary use for research purposes. We may say that the Regulation opens up a new era or even a new paradigm in this field. In fact, it replaces the model based on the alternative between informed consent and anonymization, with one based on informed consent or pseudonymization that would enable a more flexible use of health data in the interest of the community and everyone’s good health.
- x. What is relevant in this new model is not so much an individual’s prior consent to the new purpose for which data are intended or strict data anonymization. In fact, what matters is the legitimate origin of the data, the great importance of their secondary use for

community health and the adoption of sufficient measures to prevent non-authorized third parties from gaining access to an individual's identity through the data, without necessarily demanding any strict anonymization. This seems to be legally achievable through what is commonly named pseudonymisation, defined by the EU Regulation as the processing of personal data in such a way that they can no longer be attributed to a specific individual without the use of additional information, as long as that such additional information is kept separately and subject to technical and organisational measures of non-attribution to an identified or identifiable individual.

- xi. The advantages of pseudonymization over traditional, strict anonymization are clear from the standpoint of community health. In fact, interlinking the data to the person, even when it is extraordinarily difficult for a third party to decode them, means not only to broaden the data used in research to include other initially insignificant data (data enhancement), but also to corroborate the results of data use with the patients' real progress (results verification), for example. And this is very relevant in today's Big Data science. Pseudonymisation is, in the end, the only guarantee against the previously mentioned misleading causalities that are one of the main risks of Big Data.
- xii. Therefore, we can affirm that what is relevant in this new model will not be that the individual has given their prior consent for the new purpose to which the data is intended to be used, but a) the legitimate origin of data, b) the relevance for the general interest of the secondary use, c) and the implementation of enough guarantees to protect the individual's identity from whose data come from. And it seems that, legally, it can be achieved through what is now called pseudonymization, understood, in the words of the EU Regulation, as the processing of personal data in such a way that they can no longer be attributed to an interested party without using information additional information, provided that such additional information appears separately and is subject to technical and organizational measures designed to ensure that personal data is not attributed to an identified or identifiable natural person.

- xiii. The virtues offered by pseudonymization compared to the traditional strict anonymization are evident from the perspective of the interest of the health of the community, since, by maintaining the link between the data and the person, when it is extraordinarily difficult for a third party to decode it, it is allowed not only to expand the data used in the research to others that initially could not be considered transcendent (data expansion) but, which is very important in the current state of Big Data science, to contrast the results of the exploitation of data with, for example, the true evolution of the patients (verification of results). Pseudonymization is, in the end, the only guarantee against the spurious causalities which is one of the main risks of Big Data at its current stage of evolution.
- xiv. In this new framework of great opportunities to fight against diseases and improve people's health, it is important to promote new paradigms which do not forget that there is a very different context from the existing one a few years ago. The great advantages offered by massive data processing should determine a vision not only based on individual interest with a clear detriment of the common good. A balance between both positions seems to show itself, as it happens in many other areas, as true virtue.
- xv. Furthermore, the debate must be framed in terms where the context is also considered. In the models of healthcare developed in Western Europe after the Second World War and, above all, in those based on the more social democratic formula such as Beveridge model, it is a contradiction to maintain a position that only addresses the individual dimension, when the model has essential features of communitarianism.
- xvi. In any case, this new paradigm also needs the development of a real governance of health data to correctly support it. So, accepting a new model based on pseudonymization means to put all our efforts in that target, a new model of co-governance where all the benefits from the massive exploitation of millions of health data should redound to the benefit not of the industry nor the specific individuals from which these data come from, but to all the community.

- xvii. There is also a second question about the new paradigm: should we apply it for all kind of health data or only for some of them, mainly, the traditional health data, such as those coming from medical records or telemedicine, for instance. We pose this question because currently under the term health there are a lot of instrument and tools which produce a great amount of data, but where the fiduciary relationship is not so clear (for instance, apps, wearables, etc.).
- xviii. Finally, we should remember that developing a new paradigm in the area of health data research means improving healthcare of EU citizens and it will play a main role of satisfaction about the EU project and a great vaccine against nationalism and populism.

CONCLUSIONS OF THIS CHAPTER

1st There has been a growing disaffection with science and technological development in a significant part of European society and the causes are manifold. The often-inadequate communication of scientific and technological advances, together with an information overload, which saturates us undoubtedly contributes to this. Therefore, this reality obliges us to address the debate about what is the correct relationship between science and people, between knowledge and power, between experts and politicians.

2nd The most important political and social problems require a great deal of scientific knowledge and those who lead political institutions do not have it, so they have to be advised appropriately. Politics is not practicable today without a continuous recourse to expert knowledge, but we should think of the relationship between science and politics not as submission from one to the other but as an argumentative process.

3rd We also need more and better data and information, and this will not be achieved without sharing it efficiently and effectively. Fragmentation remains in many areas that are critical for data-based research, and that concern the sharing and use of data, as well as data governance and ownership and the responsibilities arising from its misuse. We must deal with this data fragmentation at EU level.

4th It is absolutely necessary to understand and cooperate between the countries of the Union, also in everything that is relevant in the so-called data economy, where there is no room for nationalisms and digital sovereignties at all costs or paralysis due to analysis.

5th Refining the concept of "national health security" in a global context will be essential to build a different framework to be prepared for a new pandemic.

6th We should develop a new paradigm in the area of health data research based on a moral duty of sharing those data

7th This new paradigm based on a moral duty of sharing health data could act as a way to promote innovation in EU and, therefore, to guarantee healthcare as a social right

8th This new paradigm has been, in some sense, included at the EU regulation on data protection

9th We should distinguish between traditional health data from the health system in a holistic way (coming from medical records, telemedicine, ..., for instance) and new health data from new agents and products (wearables, apps, ...)

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M. CHALLENGES TO THE EU: REFUGEE POLICY IN WESTERN EUROPE WITHIN A 21ST CENTURY NATIONALIST CONTEXT.

INTRODUCTION

In the last decades, the EU has faced the need to respond to different humanitarian crises and the sustained pressure of immigrant flows.

The EU has increasingly been seen as a problem and not a solution by many nationalists. Even moderates such as Theresa May declared European cosmopolitanism to be in opposition to “the people down the road”, stating that citizens of the world were, ‘citizens of nowhere’. This speech has been used by other nationalists to build a narrative of “us and them” which forms/is used as an obstacle to the implementation of an EU Humanitarian policy.

The main answer to the Refugee Policy challenge has been the prioritisation of the externalization policy, the outcomes of which are far from satisfactory.

Recent events, in particular the invasion of Ukraine by Russia and the reaction of some EU Members States that were traditionally reluctant in their reception of refugees, raise the question of whether all this will lead to a change of paradigm with regard to the EU’s refugee’s policy.

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A BRIEF ASSESSMENT OF EXTERNALISATION AND ITS IMPLICATIONS

The externalisation of migration policies has become the central policy framework for the governance of international migration, with implications for many regions and countries, particularly the source, transit, and destination countries.

The primary purpose of externalisation in migration policy is, ‘to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of [European] destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims’ (Frelick et al., 2016: 193). In Frelick’s framework, destination countries focus on containing or even preventing migration

movements before they reach their territories. Where entry cannot be prevented or controlled, readmission and return policies apply, drawing on collaboration with third countries.

Externalisation is often framed and presented as a means to justify acts of securitisation, to prevent irregular migration, or to support life-saving humanitarian efforts to protect migrants from the journey's dangers, rather than simply as a strategy of migration containment and control.

Externalisation results in the systematic enlistment of third countries to prevent migrants, including asylum seekers, from entering destination states. Today, cooperation with third countries appears as the most critical dimension of externalisation, and those countries are given important roles in preventing migrants and asylum seekers from entering primary countries territories or apprehending and returning them. They are encouraged through incentives to prevent migrants by physical or legal barrier policies, or more directly in exchange for aid or support to build the capacity of immigration or asylum systems in these third countries.

In forced migration, externalisation aims explicitly to reduce access to asylum by incentivising or paying a country of the first arrival or a transit state to keep the migration flow through its enforcement measures. The other strategy is to determine the transit or first country of arrival as a "safe third country" or "first country of asylum", and to use this as a basis for determining the country within a broader set of countries with harmonised standards that would be responsible for examining an asylum claim. Thus, this means to divert asylum seekers to those countries, as the protected areas near countries of origin, and externalise the international protection responsibility. Those efforts mainly result from the increased role of law enforcement or military assistance, pushbacks, apprehensions, and problematic access to protection mechanisms in apprehension and deportation practices. However, no risk of persecution of the 1951 Convention and no serious harm, no risk of non-refoulement, compliance with relevant international refugee and human rights standards, and access to a right of legal stay should be guaranteed.

The externalisation of EU migration policy has evolved in the wake of several significant developments (Lavanex, 2006):

- 1) Schengen Agreement of 1990 (to determine who are insiders and outsiders)

- 2) The 'Safe Third Country Rule' that became prominent in the Dublin Regulation of 1990
- 3) The Readmission agreements

According to those developments, the EU's externalisation in the field of migration and asylum can be categorised into three time periods (Gökalp-Aras, 2021):

- 1) The First Phase: The Emergence of the Legal and Institutional Framework of Externalisation (1990–2003)
- 2) The Second Phase: Emergence of the General Frame in External Action (2004–2014)
- 3) Third Phase: From the State of Exception to the New Normal (2015–present)

The third phase started after 2015, as migrant arrivals from the Middle East as well as Africa peaked in 2015 following the Arab uprisings that broke out in 2011. Whilst individual member states responded differently to this mass migration movement, migration in general became a top priority on the EU's overall political agenda and for all its members. The EU's asylum system proved to be weak in responding to this unexpected mass migration. The Dublin Regulation resulted in an uneven distribution of migrants within Europe and pressure on the frontline countries. The migration pressures at the borders became one of the significant challenges for the EU's migration and asylum policies and significantly impacted the external dimension of these policy fields. Within this period, great importance has been given in particular to cooperation with third countries on readmission in order to increase the EU policy's effectiveness in stopping the 'unwanted population' at the border and sending them back under the readmission agreements and the return policy.

The European Commission's new communication, "The EU Pact on Migration and Asylum" (2020), stands as an essential document of this period. It is arguably the first significant statement of the post-European migration crisis era and seeks to draw together the key justifications for the EU's ongoing crisis-management decisions and protocols. The EU Pact seems committed to justifying those flexible, and mainly non-standardised, ad-hoc and crisis driven bilateral acts of cooperation with third countries and to emphasising the

importance of externalisation. It also emphasises the importance of cooperation with countries of origin and/or transit to contain and control departures and allow repatriation.

Consequently, the EU Pact seems far from having the potential to deliver sustainable solutions, or to address specific externalisation changes. It strongly emphasises tailor-made and more balanced cooperation with third countries regarding return policy, yet fundamentally misses the target of increasing respect for fundamental rights and facilitating access to the European protection system (except for vulnerable migrants).

Undoubtedly, externalisation has significant consequences for destination, transit and source countries. However, it has worked in the interest of the EU not to notice two critical implications, especially in the post-2015 period: the weaponization of migration by the transit and source countries, and the increased violation of migrants' and asylum seekers rights.

- Externalisation has traditionally underscored the more powerful position of the EU in relation to the source and the transit countries, which are portrayed as passive recipients. This perspective downplays the dynamic, interactive nature of the EU relations with neighbouring countries and the capacity of the latter to exert agency in how policy frames are accepted and adopted. However, this period also showed how, by destabilizing or embarrassing adversaries, mass migration is used by sending and receiving countries as a tool to achieve foreign-policy objectives.
- Greenhill (2010) has proposed the concept of “coercive engineered migration (CEM)” to capture this dynamic. Tsourapas’ concept of “coercive and cooperative migration diplomacy” refers to the strategic use of migration flow to obtain other aims and the use of diplomatic methods to achieve goals related to migration (2017). During the present period of externalization in Europe, the ‘weaponizations of migration’ and asylum has become more visible as one of the significant implications of this policy.
- In the light of the increased number of mass refugee movements, in particular from Syria, then Afghanistan, and most recently from Ukraine, the EU is forced to partly adopt the potential role of external actors in the asylum and migration policies of the EU. Consequently, since 2015, the EU has been adopting more tailor-made, informal, flexible, and differentiated externalization strategies, rather than formal and standardized cooperation with third countries.

- Externalisation policies and practices in the field of migration and asylum directly affect the human rights of migrants and the international obligations of states to protect them in significant ways. Most importantly, by directing migrant flows to third countries, externalization influences the nature and duration of state legal obligations, and states are charged under international law with the protection of the rights of migrants. The rights of migrant and asylum seekers are violated in such third countries as a result of a destination state's externalization efforts, and this can raise complicated issues of state responsibility for both destination states and third countries. Therefore, externalization policies and practices place significant and unequal burdens on third countries.

Since 2015, externalisation and the cooperation with third countries is mainly based on bilateral soft law— such as the EU-Turkey Statement (European Council, 2016)— allowing signatories to evade responsibilities in terms of human rights and international protection due to the lack of reliable monitoring and accountability mechanisms. Thus, we encounter more human rights violations, where reception and detention conditions are abysmal and has consequently shifted migratory routes. Success is measured by low flows and decreased number of entrances or asylum applications, while the protection of people fleeing violence and persecution does not seem to be a priority.

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Similar issues of principle arise in respect to the UK's 2022 agreement with Rwanda, under which so-called “illegal refugees” will be sent to Rwanda for the processing of their claims. The policy is under legal challenge in the English courts. Yet, as recently as 25 January 2021, in the view of the UK's Foreign Office Rwanda was a country whose record on civil and political rights needed to be remodelled in line with, ‘Commonwealth values of democracy, rule of law and respect for human rights’ (37th Universal Periodic Review, UN Human Rights Council, Geneva - UK statement on Rwanda).

From an intra-EU political perspective, externalisation was a response to securitization concerns and to the lack of commitment among Member States to share the charges and responsibilities of a common Asylum policy. Dealing with asylum seekers while they remain outside of the EU borders would theoretically reduce the EU Member States burdens.

However, this has not served to moderate the discourse on asylum and immigration. The Syrian Refugee Crisis in 2015 has caused an East-West division in the Union, interpreted by Krastev as a confrontation between a 'German´s drive for cosmopolitanism as a way to flee the xenophobic legacy of Nazism and the Central Europe´s anti-cosmopolitanism rooted in an aversion to communist imposed internationalism' (Ivan Krastev¹⁷²).

The rise of nationalism and populism in the EU could exacerbate the externalisation policy. Radical nationalism and populism have built a narrative about the economic impact of refugees, consisting of i) allegations of exclusion of EU citizens from social benefits to be provided to refugees and immigrants; ii) the distortion of the economic charges of their allocation in the EU; iii) the narrative linking refugees and immigrants to public safety problems. Therefore, any alternative to externalisation policies shall be accompanied with a pedagogical effort to combat this narrative from politicians, media, and social leaders.

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DOES THE UKRAINE CRISIS MEAN A CHANGE IN SOCIAL PERCEPTION CONCERNING REFUGEES?

In short: probably not. The overwhelming support towards Ukrainian refugees is very much case specific. This can be attributed to, on the one hand, the evident nature of a wholesale aggression: a genocidal war against Ukraine, of the likes not seen in Eastern Europe since Hitler and Stalin, and the impact of this on public opinion, combined with images of continuing Russian atrocities: Bucha, Mariupol, Kharkiv, and so forth. On the other, an inevitable outpour of solidarity driven by empathy – the feeling that these millions of people, families crossing into Poland, Moldova, Slovakia, etc.- are Europeans and thus “like us” (a common message these days). Unfair as it may be to, for instance, Syrians or Afghans,

¹⁷² Ivan Krastev, "The Refugee Crisis and the Return of the East-West Divide in Europe", *Slavic Review*, Vol. 76, No. 2 (SUMMER 2017), p. 296 (6 pages), Published by: Cambridge University Press

it is a powerful social perception. Adding to this is the worst refugee crisis in Europe since the end of the Second World War, comparable in size to the expulsion of millions of ethnic Germans from Poland and Czechoslovakia in 1944/1945. A quarter of a Ukrainian population numbering 40 million has been displaced by war, both as internal displaced persons and refugees. And things would be much worse had Ukrainians not been successful in defending themselves against the multi-front Russian onslaught.

Moreover, Ukraine is an EU and NATO partner country, and now a country with a clear prospect for European integration.

These factors weighed heavily in the rapid EU consensus to apply the European directive for granting full temporary protection to Ukrainian refugees, initially conceived after the Balkan wars. As reckoned by government officials engaged in the EU discussions, this time there was collective ownership of this humanitarian decision, with limited internal debates.

Mid-term, key challenges will inevitably arise, especially as the war is set to drag on and its economic impact sinks in. However, it seems plausible to conclude that the response to Ukrainian refugees does not point to a change in the tendency towards externalization of refugee policies. If anything, it could make it more acute, as EU member states will claim they are already full enough and strained because of hosting Ukrainian refugees, at the cost of refugees from other countries. An EU-wide agreement for a Migration Pact is still elusive.

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In general, governments will continue to approach humanitarian crises very unevenly.

Moreover, there is a potential danger that humanitarian driven policies for refugees would be taken as a substitute for an equally powerful response to the root causes of conflicts driving them - and which entail uncomfortable questions. Namely, whilst the EU has been very forthcoming towards Ukrainian refugees, it is struggling to curtail the hefty energy bills it pays to the Russian state, thus funding and sustaining Putin's war machine that drives millions of Ukrainians away from their homes. Increasing energy independence from Russia would enhance Europe's strategic autonomy – but also, coupled with export restrictions and similar sanctions, deprive Putin of precious resources to pursue his open-ended war. By the same token, sustained military support to Ukraine, including the heavy weaponry that can offset Russia's superiority (displayed now in Donbas), would increase

the chances of Ukraine's survival as an independent, viable country that many of these refugees could one day return to.

Some of these questions were also raised in Bosnia. There, the West, through the Dayton Peace Agreements (1995), tried to achieve an uneven balance between, on the one hand, recognizing the military realities on the ground through power-sharing agreements to stop the war, and, on the other, fostering the return of refugees and displaced persons.

Ultimately, the depleting political will to enforce Dayton consolidated spoilers in power—the same ethnic nationalist elites that led to war and genocide—making a real return unviable and unrealistic.

It would be desirable for European peace and stability that European leaders do not make the same mistake as they did in Bosnia, regardless of their current commendable humanitarian policies for Ukrainian refugees.

ALTERNATIVES TO EXTERNALISATION FOR THE EU'S REFUGEE'S POLICY

Europe is able to develop and manage alternatives to externalisation, and to promote responsible and rights-based approaches to migration globally.

Furthermore, such alternatives would be imperative in light of the founding EU values. The difficulties of the challenges posed by refugee policy cannot be denied. However, this does not justify responses incompatible with these values. In practice, the policies pursued so far (in particular, externalisation) have not stopped the populist narrative, nor the use of immigration and asylum seekers as part of the populist discourse of fear. What is needed, therefore, is an effort of leadership and pedagogy from politicians and EU Institutions with citizens.

Alternatives to externalisation in asylum policy should include safeguards to guarantee compliance with EU and international obligations, and to maintain an actual connection between the EU's external objectives and its external affairs:

Global responsibility sharing

- Global action must consider the root causes of displacement; EU development assistance should address the eradication of poverty, prevention of conflict, sustainable development, and the realisation of rights.
- External action should be based on needs and identified protection situations, including protracted refugee situations.
- Protection and realisation of rights of displaced people should be explicit objectives for EU funding.

A functioning asylum system in Europe

- Access to procedure, dignified reception of refugees, strong procedural guarantees for everyone and quality asylum procedures are the minimum requirements for a robust system of protection.

- International refugee and human rights law, the European Convention on Human Rights and the EU Charter of Fundamental Rights must be the basis for any legislative action on behalf of the EU and any action transposing EU law on behalf of the Member States.
- Any proposals for the reform of the Common European Asylum System must not tilt the burden of responsibility to third countries.

Inclusion of refugees in Europe

- Access to safe and dignified living conditions from day one is indispensable for a meaningful and effective inclusion policy. Any form of containment of asylum seekers and refugees at the borders of the EU restricts access to societies and communities and undermines the possibility for future inclusion.
- Protection should not stop at the granting of international protection- Member States must provide for the inclusion of refugees in Europe primarily through wide access to rights.
- Where third-country nationals are not found to be eligible for international protection, deportation must not be the only measure; other national means of regularising stay should be considered, depending on case-specific circumstances.

Safe and legal channels for refugees

- The EU must ensure that safe and legal channels are in place for people in need of protection.
- Prioritisation of countries or caseloads should be based on global resettlement needs and identified protection situations, including protracted refugee situations.
- Partnerships with third countries should be based on humanitarian principles, as well as those of solidarity, with the aim to create stabilisation and safety for populations. A constructive approach to cooperation with third countries on readmission should include incentives for third countries, in the form of increased opportunities for legal and circular migration to Europe.

Beyond the practical obstacles, the need for an EU Humanitarian policy is also part of the response to the challenges posed by hyper-nationalist narratives, undermining the founding spirit — and treaties — of the EU.

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N. PANEL ON MISINFORMATION AND FREE SPEECH IN MODERN DEMOCRATIC SOCIETIES

ABSTRACT

Dis- and misinformation are challenging phenomena in today's digital society. The viral dissemination of false information online can undermine public debate and erode trust both in science and democratic institutions. In the following document, we approach these issues from three angles: 1) the balance it entails between conflicting fundamental rights; 2) the complexity of the problem, requiring multistakeholder responses with a focus on how digital platforms address this phenomenon; and 3) its impact on the authoritative role of science in democratic societies. We conclude that, while an intermediary liability regime for online platforms is inappropriate, several tools exist and are at the disposal of companies, states and other actors in tackling misinformation and disinformation campaigns.

INTRODUCTION

The pervasive phenomenon of dis/misinformation in contemporary societies presents a difficult challenge, as it erodes the quality and health of public debate and democratic institutions, and brings about an unstable, delicate balance of conflicting rights and interests. This panel aims to provide a critical analysis of the phenomenon of dis/misinformation (including 'fake news' and other information operations), its spread (conceptualisation, underlying motives, dynamics, taxonomy, etc.) and its interactions with the pillars and values of democratic societies. We also assess the scale and the relevance of the problem, anticipate solutions, and contextualise the conclusions.

The panel has approached the phenomenon from three main angles:

First- the balance between conflicting fundamental rights

Misinformation and disinformation pose a challenge to modern democratic societies, as they erode the quality of the public debate and trust in its institutions. Free speech, on the other hand, remains one of the very pillars underpinning democracy itself. How can the

negative effects of dis/misinformation be prevented whilst freedom of speech is preserved?
How to strike the right balance between conflicting fundamental rights?

Second- dis-/misinformation as a complex phenomenon to be decoded

Dis/misinformation is a highly complex and multi-layered phenomenon that requires the cooperation and involvement of many actors, including governments and institutions, academics, journalists, digital platforms, civil society and/or individual citizens themselves. How do we allocate not just the legitimacy to act, but also responsibilities amongst them? What role should each of these actors play?

Third- the impact of dis/misinformation on the authoritative role of science in democratic societies

Looking at specific cases, organised misinformation and disinformation campaigns surrounding the COVID-19 pandemic contributed to creating misconceptions and to the spread of inaccurate information. This had, and continues to have, an impact on individual and overall public health, as well as eroding citizens' collaboration and trust in national and international public health institutions strategies to contain the pandemic. How can the negative impact of health misinformation be prevented? To what extent has dis/misinformation undermined the authoritative nature of science?

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KEY POINTS

The complexity of the phenomenon and its permanently changing character invites us to devise an analytical and theoretical framework to capture the key issues. The proposed framework is based on four main pillars, as described below:

I. Concepts, Definitions, and Delimitation of Scope

The mis/disinformation binomial conceals a polyhedric, complex, and evolving phenomenon. An initial conceptualising effort is essential decisive. The aims are:

- To differentiate **misinformation** and **disinformation** (by means of intent, deliberateness, inauthentic behaviour, the promoting actors, propagators, context, etc.). As of yet, there is no formal definition of such types of operations under international law. A useful typology,

though, is one based on the authors' intentions and the verifiability of the information deployed:

(1) *Misinformation* – false information that is often shared unintentionally.

(2) *Disinformation* – coordinated efforts that aim to manipulate or corrupt the public debate to fulfil a strategic goal. It is characterized by two features: inauthenticity and coordination. Disinformation campaigns are often named “Influence Operations” or “Information Operations”.

- To **distinguish** these from content that consists of **opinions**, and therefore cannot be deemed true or false, and also from content that can be deemed as illegal or harmful. Falsity may arise from a diversity of situations (context, chronology, facts, etc.).

- To provide a **taxonomy** of ‘fake news’ as a mere buzzword that embraces a variety of mis/disinformation strategies or situations, on the basis of selected factors (facts, falsity, misleading potential, context, media, etc.) and to properly identify the distinctive characteristic of **information operations (disinformation)** and misinformation.

- To identify the new features of the phenomenon in **the digital society** as compared to the pre-digital use of propaganda, weaponized disinformation campaigns, and biased information: that is, the **viral** nature of ‘fake news’, the role of **social media and digital platforms**, and the **absence of authoritative references**.

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On ‘fake news’ and its potential harm: the role of civil liability rules - Teresa Rodríguez de las Heras Ballell

The term ‘fake news’ has become extraordinarily popular not just in describing various forms of misinformation and disinformation, but also to denote purely illegal content, defamation, parody, or simply offensive content. As a consequence, ‘fake news’ is a useful term to direct attention towards a well-identified social problem, although the concept is, in essence, vague, imprecise, and to a certain extent, too confusing to be employed in legal analysis. On the one hand, the “fake news” phenomenon certainly comprises more than news. It encompasses any visual, graphic, or textual content produced and disseminated on a digital format that is likely to misinform. On the other hand, the ‘fake news’ label is also used to tag a wide array of mis- and disinformation types, including manipulated content, false content, misleading content or fabricated content. With such imprecision, even if it

describes an apprehensible reality, the term is unsuitable for delimiting the scope of application of any regulatory action.

Should the delimitation of the scope be approached from the perspective of civil liability, a categorisation based on types of potential harm deriving from the content at stake becomes relevant. Harm caused by digital content can be varied in nature (moral, reputational, patrimonial, or even indirectly physical or personal) and may differ in extent. Whereas some digital content is likely to cause damage to identified persons (either natural persons or moral ones), other content does simply generate diffuse or collective harm. In the latter case, despite the severity of the harm and the amplex of the negative impact, no specific victims can be singled out. Even proper ‘fake news’ in a strict definition does very frequently fall under this last category.

The spread of manipulated, false, fabricated, or misleading content has a severe negative impact on collective trust, and on the ability of a society to create a common dialogue based on shared accurate facts. It undermines the value of objective facts, delegitimizes experts’ voices and authoritative institutions, and radicalises confrontational stances in a context of chaos and confusion.¹⁷³ ‘Fake news’ would be then a shorthand for a variety of mis- and disinformation vehicles. The repercussions are alarming, but specific quantifiable damage might not be proved, and identifiable injured persons might not be located.

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The above-stressed characteristics of misinformation (and disinformation) vehicles have a very relevant effect on their legal analysis, and a direct impact on the components of the

¹⁷³ As the **United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information** alert in their *Joint Declaration On Freedom Of Expression And “Fake News”, Disinformation And Propaganda* adopted in Vienna, 3 March 2017, (available at , <https://www.osce.org/fom/302796> last visit 10/01/2018) (hereinafter, Joint Declaration):

“Taking note of the growing prevalence of disinformation (sometimes referred to as “false” or “fake news”) and propaganda in legacy and social media, fueled by both States and non-State actors, and the various harms to which they may be a contributing factor or primary cause;

Expressing concern that disinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public’s right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions; (...).”

liability machinery.¹⁷⁴ If the damage is diffuse, it will be questionable who is entitled to claim compensation, if anyone at all. If the harm is a devaluation of collective trust, it might be difficult to quantify damages to claim. Damage to the public interest is probably the most feared and destabilising impact of the spread of falsity, but it may be not compensable under the principles of the civil liability regime. If the liability system is based on a notice-based scheme, it might be discussed who is expected to report and allege legitimate interests to act. As a consequence, should a fake-news-combating response be addressed and articulated by a liability-oriented discourse, all these considerations must be taken into account to devise the model.

On information operations (disinformation) and their potential harm: the role of international law – Talita Dias

Information operations (disinformation) and activities can be defined as any coordinated or individual deployment of digital resources for cognitive purposes to change or reinforce attitudes or behaviours of the targeted audience.¹⁷⁵ This includes a range of online activities, from “harmless” advertising to state-orchestrated fake news campaigns. Such operations have existed for centuries; however, they have garnered increasing attention over the last decade, as states and other stakeholders came to recognise the extent to which digital technologies facilitate their formation and execution and can easily amplify their impact.

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Successful information operations do not necessarily coerce targets or wear them down. They influence, persuade, or convince members of the targeted audience to willingly adopt the aims that the author wishes them to adopt, whether by open or covert means.¹⁷⁶

¹⁷⁴ Teresa Rodríguez de las Heras Ballell & Jorge Feliu Rey. *Digital Intermediary Liability or Greater Responsibility: A Remedy for Fake News?* in Weaver, Russell L.; et al. (Eds.), *Twenty-First Century Remedies*, North Carolina: Carolina Academic Press, 2019, pp. 91-114. See also: Teresa Rodríguez de las Heras Ballell. *Credibility-enhancing regulatory models to counter fake news: risks of a non-harmonized intermediary liability paradigm shift*. 8(2) J. Int'l Media & Entertainment Law, 2019, pp. 129-162.

¹⁷⁵ See Duncan B. Hollis, *The Influence of War, The War for Influence*, 32 Temple Int'l & Comp. L. J. 30 (2018); Oxford Institute for Ethics, Law and Armed Conflict (ELAC), *The Oxford Statement on International Law Protections in Cyberspace: The Regulation of Information Operations and Activities*, <https://elac.web.ox.ac.uk/the-oxford-statement-on-the-regulation-of-information-operations-and-activities>.

¹⁷⁶ Herbert Lin & Jackie Kerr, *On Cyber-Enabled Information/Influence Warfare and Manipulation*, in P. Cornish (ed.), *The Oxford Handbook on Cybersecurity* (OUP, 2022).

The risk of serious harm to states, individuals and other stakeholders is evident, given the range of potential cognitive impacts that information operations can generate. For instance, information operations may destabilise electoral outcomes (e.g., the right-wing occupation of the United States Capitol on 6 January 2021),¹⁷⁷ or they may undermine public health (e.g., the “infodemic” that has disrupted the ‘coordinated, medically sound response that is necessary to control the spread of the [COVID-19] virus’¹⁷⁸). Likewise, they may incite discrimination, violence, genocide, and other atrocities. A paradigmatic example was the dissemination, beginning in 2017, of inaccurate and hateful rhetoric on Facebook against the Rohingya in Myanmar.¹⁷⁹ More recently, a range of information operations have been employed by the Kremlin to justify the invasion of Ukraine.¹⁸⁰

Such information operations may fall under different international legal regimes, depending on their author, target audience, and the harm or risk of harm they give rise to. While international law has few specific rules addressing information operations, including dis- and misinformation, it provides a robust and comprehensive legal framework covering different aspects of the phenomenon. Granted, international law only binds states. However, a growing number of domestic legislatures are taking steps to adopt legal frameworks for online harms that mirror international legal obligations, to a greater or lesser extent, and bind online platforms and individuals. Likewise, companies and individuals should abide by international legal standards as a matter of good policy. Navigating the different international legal regimes applicable to the phenomenon of information operations is no easy exercise but acknowledging their existence and striving to clarify how they apply in the digital environment is a good first step.

¹⁷⁷ See, e.g., Stuart A. Thompson, Election Falsehoods Surged on Podcasts Before Capitol Riots, Researchers Find, *New York Times*, 4 January 2022.

¹⁷⁸ Marko Milanovic and Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations during a Pandemic*, 11 *J. Nat'l Sec. Law & Policy* 247, 249 (2020).

¹⁷⁹ UN Human Rights Council, Report of the independent international fact-finding mission on Myanmar, Advance Edited Version, UN Doc. A/HRC/39/64, 12 September 2018), paras 73-74 and 84-89; In Myanmar, “pervasive hate speech and shrinking freedom”, *AL JAZEERA* (March 5, 2019).

¹⁸⁰ See BBC Reality Check Team, ‘Ukraine crisis: Vladimir Putin address fact-checked’, *BBC News*, 22 February 2022, <https://www.bbc.co.uk/news/60477712>.

II. Rights at Stake: Reconciling Rights and Freedoms – Teresa Rodríguez de las Heras Ballell

Countering misinformation is an extremely delicate process, as it involves a **conflict of rights and freedoms that must be balanced**. Ensuring that the right balance is struck constitutes a fundamental decision in a democratic society.

A number of factors render any attempt to mitigate misinformation very challenging:

- An excessive reaction regarding the removal of misinformation may seriously encroach upon free speech, freedom of information or net neutrality.
- The assessment of falsity/veracity is challenging and multifactorial (context, intent, relevance, knowledge, etc.).
- Unlike illegal content, false content can easily be expressed as mere opinions.
- As mis- and disinformation go viral, attempts at rectifying and correcting them become unsuccessful.

Given the previous analysis, it can be sustained that in the fight against mis/disinformation three categories of content are faced: illegal content, harmful content, and false content. In certain cases, these categories can coincide. The distinction may be relevant for the application of liability rules, and in striking the proper balance between conflicting rights, such as free speech, the right to information, the freedom to run economic activities, and the right to honour. To that purpose, it may be relevant to treat these three categories as distinct and separate ones. Illegal content and false content might not produce actual damage, whereas harmful content could be entirely accurate and truthful, and might be fully licit and legitimate. Therefore, illegality, harmfulness, and falsity constitute different factual spheres that require tailored responses. Hence, preventive measures, and reparation and compensation mechanisms, contrived to combat the effects of illegality and harmfulness, are not equally effective in countering falsity. False content adds intricacies in the detection and assessment phase, and in the ascertainment of damages. The uncontrollable spread of misinformation and disinformation, its penetrating impact on society's stability, and the devastating effects on trust have crudely revealed such a gap—that is, the lack of preventive and protective measures against falsity. However, in the

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context of digital platforms' policies and approach to fighting misinformation, the triple distinction may be unnecessary, as digital platforms apply two relevant measures: removal, or demotion. To that end, if an opinion contains verifiable data that is assessed by an independent fact-checker as false, but does not violate the digital platform's policies, it will be demoted but not removed.

Yet, unlike illegal and harmful content, in the case of false content setting a fair balance of the conflicting rights and interests at stake is more complex and unstable. As the contours of false content are blurred, and the potential harm is, whilst albeit severe and massive, highly diffuse, freedom of expression becomes especially vulnerable to any ill-advised restrictive or banning decision.¹⁸¹

The gravity of the problem created by coordinated disinformation is not only caused by the falsity of the content or the inauthenticity of the actor, but principally exacerbated by the deafening “noise” its uncontrollable penetration and its pervasive expansion produces, silencing authoritative voices and concealing fact-checked content. The risk of ‘fake news’ is when it becomes widely credible. Factors other than the veracity of facts are able to generate a perception of credibility. Misallocated trust might have a more negative effect than distrust.¹⁸² Fact checking is frequently ineffective in attenuating this wrong perception of credibility, as content is infused with other credibility indicia based on popularity, perception of reliability, or sentiment-driven assessment. Compared to the widely shared misinformation, the fact-checking and public rectification response might not gain sufficient relevance, and even, when perceived as a minority opinion, it can dilute its credence. Against this backdrop, actions by widely used digital platforms to directly connect people with official and authoritative information, in collaboration with national and global governmental structures, is certainly an avenue to reinforce. During the

¹⁸¹ As the Joint Declaration states:

1.- General Principles:

a). States may only impose restrictions on the right to freedom of expression in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law, and be necessary and proportionate to protect that interest (...)

2.- Standards on Disinformation and Propaganda

a). General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression (...)

¹⁸² Russell Hardin. *Distrust*, 81 B. U. L. Rev. 2001, pp. 495.

pandemic, a number of digital platforms and messaging services established Covid-Information centres in collaboration with national ministries of health, as well as the World Health Organisation, to directly reach out to people with accurate health information.

III.- The Role of the Actors Involved in the Fight Against Mis/Disinformation: Digital Platforms Approach - Guillermo Serrano

Mis/disinformation is a highly complex phenomenon that requires a high level of collaboration between the different actors involved (namely digital platforms, but also governments, journalists, independent fact-checking organizations, academia, civil society, and even individual citizens) to be addressed effectively.

As noted in the introduction, the starting point of any strategy to fight misinformation (false information that is often shared unintentionally) and disinformation (coordinated efforts that aim to manipulate or corrupt the public debate seeking a strategic goal, characterised by inauthenticity and coordination) is precisely to clearly distinguish between the two. This distinction is important not only because the policy concerns underlying each differ, but also because the most appropriate response in each case will also differ.

A fundamental distinction in the way we tackle misinformation and disinformation (information/influence operations) at Meta is that we differentiate between the two on the basis of actor/behaviour and content. When we look at disinformation, we focus on actors and their behaviour, while with misinformation the focus is on content. In fact, actors engaged in information/influence operations (disinformation) need not necessarily use false information, and it would in fact be acceptable political discourse if it was shared by authentic actors. The real issue is that the actors behind these campaigns are using deceptive behaviours to either conceal the identity of the organisation behind a campaign, make the organisation or its activity appear more popular or trustworthy than it is, or evade enforcement efforts.

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1. Misinformation

Given the difficulties, dilemmas and the potential clashes between fundamental rights involved in addressing misinformation (those of free speech, the right to receive truthful information, the right to safety and security etc.), our overarching objective at Meta is to strike the right balance between having an authentic and secure platform whilst respecting fundamental rights like free speech. Furthermore, we consider that it is neither possible, nor desirable, that a private company acts as a sort of 'arbiter of truth'. We simply lack the legitimacy to do so. Hence, we rely on our collaboration with independent fact-checking organisations (more details about how this collaboration works in practice are to be found below).

Our approach to misinformation applies a **three-part strategy - remove, reduce, and inform** - to manage problematic content across the Meta family of apps (Facebook and Instagram).

(1) We remove content that violates our policies (Community Standards), including (but not limited to): fake accounts and accounts engaged in inauthentic behaviour, misinformation that may contribute to the risk of imminent violence or harm (for instance, COVID-19 misinformation claims debunked by the WHO that could cause harm in the real world, like 'drinking bleach cures COVID-19'), and voter fraud or interference (which includes any misrepresentation about how to participate in the voting process, such as the dates, location, time, methods, and qualification).

(2) We reduce the distribution and visibility of problematic content that does not violate our policies, but still undermines the authenticity of the platform. For instance, content debunked by independent third-party fact-checkers is demoted in the Feed. In demoting content instead of removing it we aim at striking a balance between having an authentic and secure platform whilst respecting fundamental rights like free speech.

For this important task, we rely on our collaboration with independent fact-checkers. We have a global partnership with the International Factchecking Network (IFCN) and collaborate with IFCN certified fact-checker's partners at the country level. Facebook's approach works by identifying content to be reviewed by independent fact-checker's partners through a combination of Technology (ML), user complaints/reports, human review, and fact-checkers themselves. Fact-checkers then choose which content to review



and rate. Finally, Meta acts on the content rated as false by fact-checkers by demoting it in the Feed. In addition, Pages that repeatedly share content that is rated false by fact-checkers will see their Page distribution reduced in the News Feed, and their ability to monetise and advertise removed. We have expanded this policy to also include penalties for individual accounts.

(3) Finally, we **inform** people with **additional information and context** (for example, by adding misinformation labels to content across Facebook and Instagram that has been rated false or partly false by independent fact-checkers, or adding a warning message for people trying to share content labelled as misinformation – amongst other actions) **and connect people with authoritative and/or official sources of information so they can make informed decisions** (by way of example, during the pandemic we launched our COVID-19 Information Centre at Facebook and Instagram, with real-time updates from national health authorities and global organizations, such as the World Health Organization).

2. Disinformation (information/influence operations)

When it comes to disinformation, the strategy and concerns are different (as noted above). If the main challenge when dealing with misinformation is to strike the right balance between having an authentic and secure platform whilst respecting fundamental rights like free speech, in the case of disinformation we do not tolerate any such activity and take these actors and their content down as soon as we become aware of this behaviour.

The most egregious form of this type of deception is Coordinated Inauthentic Behaviour (CIB): that is, any coordinated network of accounts, Pages and Groups on our platforms that centrally relies on fake accounts to mislead Meta and the people using our services about who is behind the operation and what they are doing. There are two types of CIB: (a) Foreign-led efforts to manipulate the public debate in another country, and (b) Operations run by domestic, state and/or non-government actors.

In order to find and act against influence operations, we focus on behaviour, as that is the best way to stop the abuse. Hence, our investigative work and enforcement are location, and are content agnostic. They actively look for the elements common to every information operation: (1) Coordination among accounts, among Pages, or among offline groups; (2) Manipulation or deception; and (3) A strategic goal to influence public discourse.

With each investigation, we identify the behaviours that are common across the people trying to do harm. Then, we work to automate the detection of these behaviours, and even modify our products to make those behaviours much more difficult. If expert investigations are like looking for a needle in a haystack, our automated work is like shrinking that haystack.

IV. Rules on Platforms and Social Media: Enhanced Responsibility and Liability (From 'Safe Harbour' Systems Onwards) - Teresa Rodríguez de las Heras Ballell

States can decide to devise a legal framework that, without regulating or interfering in the information sector and the activity of social media, does however effectively allocate incentives for private actors. That is one of the traditional goals of civil liability rules. Along with the goal of compensating victims, civil liability rules aim to deter those activities that a particular society perceives as undesirable or unacceptable, and to encourage private actors to adopt precautionary measures to prevent such harmful activities. To that end, liability risks should be allocated on the "cheapest-cost avoider". Rules on enhanced responsibility recently developed in the European Union (the *Recommendation on tackling illegal content*), and the key 'safe harbour' regime (*E-Commerce Directive*¹⁸³ and the *Digital Services Act*¹⁸⁴) are very important incentive-allocating policy decisions that will define the contributory role of platforms in the fight against disinformation.

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The core debate has been to what extent a liability-based approach in the digital services and digital platform legal framework would be an advisable solution, and how much it would contribute to striking the balance between conflicting rights. From that perspective, intermediaries and digital platforms represent a critical component in the disinformation machinery. It is undeniable that intermediaries and digital platforms provide the infrastructure that bad actors exploit for the dissemination of their content, create an environment suited to ignite the perception of credibility, and exacerbate the

¹⁸³ 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 ('Directive on electronic commerce').

¹⁸⁴ Regulation of the European Parliament and the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

massive effects of false news. Nevertheless, it is highly questionable that such an infrastructural contribution should hold [any level of liability]. More interestingly, it is even more uncertain how digital platforms should act to contain virality, counter popularity-measured credibility, and combat with objectivity and fact checking an oversized perception of trustfulness. A regulatory model that happens to dislocate incentives may trigger an overly cautious reaction of intermediaries and digital platforms, for fear of the liability consequences, likely to distort the free flow of ideas in the digital world, and to encroach upon freedom of expression.¹⁸⁵

Therefore, a liability-based approach to digital platforms is neither advisable nor effective. A liability solution is not going to replace the “lack of legitimacy” of digital platforms as private companies to arbitrate freedom of expression and other fundamental rights. Thus, a responsibility approach seems instead to better promote cooperation among different actors. Overall, social media and content-sharing platforms have already implemented proactive and very effective programs to prevent, react, and mitigate misinformation, such as notice-and-take down systems, trusted flaggers, internal policies, account blocking, fact-checkers, information centres in collaboration with public institutions, and so forth.

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¹⁸⁵ Teresa Rodríguez de las Heras Ballell. Credibility-enhancing regulatory models to counter fake news: risks of a non-harmonized intermediary liability paradigm shift. 8(2) J. Int'l Media & Entertainment Law, pp. 129-162, 2019.

PROPOSALS AND RECOMMENDATIONS

A) THE ROLE OF PLATFORMS - Should platforms be liable or otherwise responsible for user-generated dis/misinformation? What is the appropriate legal or regulatory approach to address the 'infodemic' and related influence or information operations, such as online hate speech? Should states aim for a liability, responsibility/accountability, or duty of care model?

The Working Group (WG) concludes that the intermediary liability model is inappropriate for tackling harmful content, both illegal and legal, because it will inevitably force online platforms to err on the side of censorship, i.e., it will lead to the over-removal of content by platforms to avoid liability and/or the accompanying prohibitively high fines. Furthermore, the WG agrees that, from a private law perspective, liability is often associated with causing direct damage to a specified individual, which is at odds with the type of diffuse or collective damage generated by dis/misinformation and other information/influence operations in society. Instead, **a model focussing on the responsibility of online platforms for failing to exercise, for instance, a duty of care, i.e., their best efforts to assess the risks and mitigate the presence of illegal, false, or harmful content, would strike a better balance between freedom to receive and impart information and the protection of individuals and society from online harms.**

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In human rights law terminology, fighting dis/misinformation and other online harms with strict intermediary liability rules and policies may not only be unnecessary to achieve legitimate aims (e.g., the protection of health and public order), but may also impose a disproportionate burden on the right of individuals to freedom of thought, information, expression, and participation in democratic processes, among others. Likewise, the **WG recommends that, whatever regulatory model is chosen in whichever political system, any official oversight body must be sufficiently independent of the executive, legislative, and judiciary branches.** If formally part of any such branch, states should avoid granting excessive power to official oversight bodies. They should also ensure that powers belonging to other government branches are not usurped by any such body. This is necessary to ensure a fair separation and equitable power balance between the various branches of government over the online information environment. It is also imperative for a free and pluralistic media environment, offline and online.

Likewise, given the transboundary nature of online harms, the WG recommends that states consider how to cooperate with other states when regulating online platforms, such as by agreeing on specific international digital media standards or setting up international media councils with an advisory function.

Finally, the WG believes that, before enacting legislation or regulation in this area, multiple stakeholders are consulted, including online platforms themselves, academia, and civil society organisations.

B) CONTENT MODERATION - To what extent should states and online platforms separate their approach to incitement to violence, hostility, or discrimination from how they tackle other types of problematic content? How difficult is it for online platforms to make such content moderation decisions?

The WG members have carefully considered this question and agree that States should clearly distinguish, by law, between content that gives rise to an imminent risk of violence, such as the tweets that instigated the January 6th Capitol riots, and other, less serious speech acts, such as misinformation about the origins of the COVID-19 pandemic. This type of framework already exists under international and domestic human rights law as well as in several constitutional systems around the world.

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For instance, under Article 20 of the International Covenant on Civil and Political Rights (ICCPR), states must prohibit by law any war propaganda, as well as any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence. Breach of such prohibition need *not* give rise to criminal liability of the individual speaker, but may amount to civil liability, depending on the seriousness of the speech act in question. Relevant factors include the speech act's proximity to the relevant outcome, the speaker's intention, and the severity of the content itself.

On the other hand, while states are *not* in principle required to prohibit other types of online speech, they *may* limit the freedom to receive and impart information to protect a legitimate aim, in line with Article 19(3) of the ICCPR. In some circumstances, the protection of other fundamental human rights at risk, such as the rights to health, life, and non-discrimination, may even require states to limit individuals' right to receive and impart information. However, states may only limit free speech in accordance with the law, for a legitimate purpose, in a necessary and proportionate manner. The same requirements

(legality, legitimacy, necessity, and proportionality) feature in Article 10(2) of the European Convention on Human Rights, now part and parcel of the domestic legal system of several European countries. These requirements should apply not only to the definitions of limited speech but also to their respective limiting measures.

This all means that, when moderating content on a daily basis, online platforms should follow human-rights consistent laws and regulations. In the absence of such laws and hard-pressed to make difficult calls about content posted on their platforms, companies should strive to look to international human rights law for guidance, in line with the United Nations Guidelines on Business and Human Rights.

The WG recognises that online platforms are under constant pressure from a variety of social and political groups – including opposing voices – to act upon content that such groups perceive as false or harmful. If platforms decide to leave ‘problematic’ content up, they are accused of endorsing it and so are pressured to remove it. On the other hand, if platforms actively moderate content that goes against their community standards but is perceived as unproblematic or legitimate by certain members of the public, they are accused of clamping down on free speech. The WG also acknowledges the difficulty of moderating an unsurmountable number of posts at scale every single day. Moderating dis/misinformation may be particularly difficult given the nuances and contextual nature of language, as well as the fine line that often exists between fact, fiction, and opinion, especially in cases where the science is not yet fully settled. The same is true of other types of problematic content, such as online hate speech, for which contextual interpretation is key to assess the very type of content at stake.

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In addition, online platforms often lack the technology to make such moderation decisions at scale in a speedy manner. For instance, while artificial intelligence technology is effective at identifying terrorist, child abuse, and pornographic content, especially images, the same cannot be said of other types of content, for which moderation still requires human judgement.

In short, moderating content, especially on large online platforms, is no easy task, and policymakers and civil society should acknowledge that.

C) TOOLS TO TACKLE DIS/MISINFORMATION - What are the current and potential tools at the disposal of online platforms to tackle dis/misinformation and other types of problematic content?

The WG notes that several tools are available to online platforms when tackling or moderating dis/misinformation and other types of problematic content. These include measures that have already been put in place in the context of COVID-19 dis/misinformation, such as labelling or tagging a certain item of content as potentially misleading, dismantling bots, false personas, or orchestrated disinformation campaigns, deprioritising/demoting such content or taking it down in extreme cases, as well as directing users to content produced by official health bodies, such as the World Health Organization. **The WG welcomes these measures.** However, **it also recommends that other tools to tackle dis/misinformation in a human rights-compliant manner be developed, tested, and put in place by online platforms, including in cooperation with other relevant stakeholders, such as states, academia and civil society organisations.**

These additional measures include platform-driven media and information literacy campaigns, as well as greater transparency in content moderation decision-making processes, such as by clearly informing users about content flagging and takedown processes and providing comprehensive data on the decisions or outcomes of those processes. **The WG also recommends that the adoption of these various measures be calibrated to the type of content being moderated (e.g., illegal, harmful, or false; disinformation vs misinformation), as well as its potential risks and impact on societal interests and individual rights (e.g., health, life, and electoral integrity).**

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The WG notes that the phenomenon of dis/misinformation has had an unprecedented effect on societal stability and unity, as well as on trust in public institutions. Given the ease with which false, hateful and sensationalist content can be disseminated online, coupled with the pervasiveness of online platforms in societies across the globe, dis/misinformation often becomes viral and uncontrollable.

The WG also recognises the role that platform recommendation algorithms may play in the dissemination and virality of dis/misinformation and other types of problematic content.

This is because such algorithms may be designed to maximise user engagement and thereby generate online advertisement revenue, with the inadvertent effect of fuelling

problematic content. **The WG agrees that, despite their ongoing efforts to tackle dis/misinformation and other types of problematic content, online platforms can and should do more to address the issue by preventing the exploitation and inadvertent impact of recommendation algorithms.**

- One option on the table is to give users more control over what they see on their feeds or search results. This could be done, for instance, by allowing users to directly adjust their personal content curation parameters or by developing advertisement-free versions of their platforms for a fee.
- Another set of options is to increase transparency around how content is curated and thus made visible to each user based on their personal data gathered online. This could include enabling users to understand why each piece of content has reached them, as well as disclaiming or labelling sponsored content or political advertisement (of note, both of these measures have already been put in place by some online platforms).
- Other options that the WG recommends, which remain underexplored, include:
 - a) third-party auditing or verification of recommendation algorithms, done consistently with platform proprietary rights, as well as
 - b) the publication of the data used to train and design such machine-learning algorithms, along with accuracy indicators and other test results.

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D) THE ADVERTISEMENT-BASED BUSINESS MODEL - Is there a feasible alternative to online platforms' advertisement business models? For instance, how can states and civil society ensure that online platforms act with greater public interest?

The WG is mindful of the power and impact of online platforms in societies around the world, including through their recommendation algorithms and advertisement business models. At the same time, **WG members also recognise that it may be financially unsustainable for companies to do away entirely with their advertisement business models.** Likewise, it would be difficult, if not impossible, to imagine how less advantaged or marginalised societal groups could continue to have access to online platforms and their rights-enhancing potential if such platforms followed a pure advertisement-free, paid

subscription-only model. **The WG thus agrees that the key lies in striking the right balance between on the one hand enabling platforms to operate in a profitable environment, and thereby remaining accessible to the majority of the population, and on the other reducing their human rights impact and other adverse consequences.**

There is no single, one-size-fits-all answer to this conundrum. This is first and foremost due to societal, cultural, political, and economic differences across states. Whilst, in some countries, significant parts of the population could afford to pay for online platform access or the state itself could subsidise such access, in others, this is not an economically feasible option. Moreover, it is also imperative to ensure that both traditional and online media outlets remain independent from the state. Thus, states should carefully consider whether and to what extent they should influence or affect individuals' access to online platforms.

Nevertheless, the WG believes that imbuing public interest values or elements within private technology companies is a feasible option that may counteract some of the negative human and societal impact of platforms' business models.

The WG also recommends that states have in place robust competition laws, and other ex-ante regulatory frameworks (e.g., the Digital Markets Act in the EU) to ensure that market access among small and large platforms is shared in a fair, equitable, and transparent manner.

E) DEMOCRACY, SCIENCE, AND DIS/MISINFORMATION - To what extent has dis/misinformation undermined the authoritative nature of science?

A significant number of dis/misinformation campaigns on social media and other online platforms are aimed at discrediting well-established scientific knowledge. The paradigmatic case has been COVID-19-related dis/misinformation. Examples range from false or misleading content offering ineffective or harmful alternative cures to posts discrediting the efficacy or safety of approved vaccines. Other examples include health dis/misinformation more generally, and false claims about the man-made origins of climate change and its devastating consequences. Thus, **the WG concludes that dis- and misinformation have, to some extent, undermined trust in science and its processes, especially among less-educated or resilient groups.** While dis- and misinformation are not exactly new phenomena, in the digital age, they have reached an unprecedented virality given the scale, pervasiveness and speed of the Internet.

Despite the importance of the freedom to receive and impart information of all kinds in democratic societies, states and other stakeholders broadly agree that such freedom is not absolute. For example, Article 19(3) of the ICCPR, currently ratified by 173 states around the world, provides that the exercise of those rights 'carries with it special duties and responsibilities' and may thus be 'subject to certain restrictions. These restrictions are valid insofar as they are 'provided by law and are necessary' to respect the rights or reputations of others and for the protection of national security or public order, public health, or morals.

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Public health features prominently among one of the rights or values that ought to be balanced against free speech and should often prevail over it. Likewise, the right to *life* is a core human right whose protection may often justify limitations to the freedom to receive and impart information. Therefore, **the WG agrees that health dis/misinformation may be limited insofar as it threatens the life and health of individuals.** However, both groups recognise that this approach requires caution and a careful balancing between conflicting human rights. Thus, **it is recommended that only in cases where dis/misinformation poses a significant and imminent risk to life or health, such types of false or misleading content should be taken down. When no such risk is present, other, less serious limitations, such as labelling or content redirection, should be adopted.**

It is often the case that politicians – both in the executive and legislative branches – are themselves the sources or disseminators of false or misleading information about COVID-19; for instance, by promoting unproven, ineffective, or harmful treatments, or by discrediting scientifically proven ones, such as clinically-approved vaccines. Such statements may have a particularly devastating impact on a state's public health response to the pandemic, given the prominence of the speakers involved. At the same time, when the science is uncertain (as was the case early on in the pandemic when it was unclear how the virus was transmitted), fair and democratic political discourse on public health policy must not be undermined. Thus, **the WG agrees that, if the content of the political discourse is of such a character as to pose a significant and imminent risk to individual life or public health, it should not deserve any special curation or moderation privileges.** Quite the contrary: such speech acts should be treated like any type of serious health dis/misinformation, if not more stringently, given the risk that content produced or endorsed by such actors may disseminate and convince others more easily. Thus, **some members of the WG propose the adoption of Codes of Conduct for political speakers to guide their behaviour in the online and offline information environment.** At the same time, other, less serious, types of political health dis/misinformation should be tackled with greater care, balancing the need for free, democratic, and pluralistic political discourse with the protection of life, health, and other important societal values.

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F) DATA SOVEREIGNTY - How to tackle dis/misinformation in states that follow a 'data sovereignty' model, i.e., whereby states have control over the data and information made available to the public?

The idea that states should have sovereignty over the data or information that may be accessed by the public is a euphemism for state censorship, that is, state-imposed limitations to freedom to receive or impart information and democracy more generally.

Thus, in those states, it is even more challenging to fact-check and counter state-endorsed narratives, including those amounting to dis/misinformation. In fact, in many such states, the media—both traditional and online—is controlled by the state, and foreign online platforms such as Google or Facebook are banned from operating therein. The WG agrees that there is no easy way to tackle this problem, especially because Western democracies often see it as a distant threat to the human rights of foreigners. However, in a world where the internet and pandemics do not follow territorial boundaries, states and platforms must

work together to counter dis/misinformation in non-democratic countries too. **The WG believes that education, especially media and information literacy, is an essential tool to tackle the problem at this root.** This may require, for example, greater investment in cultural or educational exchanges between Western and Eastern societies, as well as Global North and South communities.

G) EDUCATION AND ONLINE RESILIENCE - Does the root of the ‘infodemic’ and other ‘information disorders’ lie in the public’s lack of sufficient education and/or online resilience?

There was consensus among WG members that, at their core, dis/misinformation campaigns during the COVID-19 pandemic, and other influence or information operations, have been driven and made successful by the lack of public awareness and education about the online information environment and how it operates. As all kinds of information have become more easily, and often overwhelmingly, available online (at the touch of one button, a click, or a scroll), individuals have spent less time and effort educating themselves about the sources and verifiability of such information. Likewise, little attention has been paid by users to opposing narratives and, crucially, to the means by which such information is made available to them (i.e., the content curation or recommendation process). The digital age is an age of convenience, which is not conducive to careful research, thinking and speaking.

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The WG agrees that the best way to address this issue is, once again, by increasing education levels among the public, particularly by promoting media and information literacy campaigns or initiatives.

Media and information literacy includes the ability to understand a) the information or content itself that is presented; b) how this content has been generated and made accessible to an individual; and c) how this individual can respond to it. As noted by the United Nations General Assembly in its March 2021 Resolution, media and information literacy can help build resilience in societies, ensuring that online and offline media users are less vulnerable to false or misleading content. This should in turn prevent, or at least mitigate, the further spread and damaging effects of dis/misinformation in societies. To

achieve that, **the WGs¹⁸⁶ agree that both states and private actors must play a crucial role in developing and fostering global, regional, and local media and information literacy initiatives, including by cooperating with one another.** They also recognise that existing economic, digital, gender and intersectional divides must be reduced, especially between developed and developing countries, as well as between privileged and marginalised groups within each country.

Finally, the WG agrees that a free, pluralistic, and robust media environment, online and offline, is essential to ensuring the success of media and information literacy initiatives.

H) WELFARE MODELS - Is a social or welfare state model the necessary 'middle-ground' to build public resilience, increase the level of education in societies, fight inequality and curb the current information disorder?

The WG discussed holistic political options to tackle nationalism, health dis/misinformation and the information disorder at their core. It was pointed out that especially middle- and lower-income classes in Western democracies have been wary of, or disengaged with, the idea of a welfare state. This is perhaps due to an 'anti-establishment' sentiment, grown out of disappointment with traditional social-liberal policies, coupled with the rise and spread of populist rhetoric, including via online dis/misinformation.

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The WGs¹⁸⁷ conclude that a social, welfare state remains the best political option available to balance the need to invest in strong public health and educational policies, on the one hand, and the importance of free, open, and democratic information spaces on the other.

Thus, both the WGs recommend a continued promotion or revival of a welfare state in democracies around the world, including by debunking the myths that have fuelled an unwarranted anti-establishment sentiment.

¹⁸⁶ See paper on Nationalism in the context of the COVID-19 pandemic

¹⁸⁷ See footnote above (186)

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O. NET-ZERO WILL NEED HUGE INVESTMENT, NEW TECHNOLOGY, SUPPORT FOR DEVELOPING COUNTRIES, AND TO OVERCOME THE BLOCKING TACTICS OF POPULISTS. HOW OPTIMISTIC SHOULD WE BE?

REFLECTIONS ON THE CLIMATE CHANGE PANEL EVENT AT FIDE'S OXFORD CONGRESS

“In Europe, as elsewhere, climate change scepticism and denial has tended to soften and morph into criticism of net-zero policies on grounds of cost and impact on living standards.”

“Blaming the biggest greenhouse gas emitters of the past for global warming is something of a sideshow because reaching net-zero depends on action by those who are the biggest emitters today. That leaves the USA in the frame, but also brings in China and India as key contributors.”

INTRODUCTION

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The Climate Change Panel discussion was the opening event at the Oxford Congress. The panellists were Professor Gordon L Clark, Radhika Khosla, and Michael Urban, and the event was chaired by Professor Derrick Wyatt, QC, a member of Fide's International Academic Council.

Congress participants were briefed in advance by Derrick Wyatt in a document entitled “Net-zero will need huge investment, new technology, support for developing countries, and to overcome the blocking tactics of populists. How optimistic should we be?”

These reflections draw together elements of the briefing document, insights offered by Climate Change Panellists and other participants at the Panel event, and some significant later developments.

KEY POINTS

Governments around the world support the target of net-zero by 2050 and are putting in place the policies to bring it about. Public opinion in most western democracies is supportive. The invasion of Ukraine has pushed energy security up the agenda and many countries around the world are reducing imports of Russian oil and gas. This has meant new investment in domestic sources of fossil fuels as well as in renewables.

Optimists say renewables will be the winners because their price advantage over fossil fuels is increasing, and because technology is providing the means to store electricity generated by wind and solar power so it can be used to fill the gaps in generation when the wind does not blow, and the sun does not shine.

Nobody really knows how much net-zero will cost, nor how much of that cost will be borne by taxpayers, and how much by businesses and private individuals. Pledges by numerous internationally known businesses to achieve net-zero by 2050 suggest that progress is being made by the private sector, but critics argue that most pledges are over optimistic.

Developing countries blame developed countries for historic emissions and look to them to make the greatest contribution to reducing emissions, as well as financing the efforts of developing countries to do the same. Pledges of financial support have been given by developing countries, but they are likely to be inadequate and have yet to be delivered.

Blaming the biggest greenhouse gas emitters of the past for global warming is something of a sideshow because reaching net-zero depends on action by those who are the biggest emitters today. That leaves the USA in the frame, but also brings in China and India as key contributors. Both these countries have made huge strides in the use of solar power, but they have no plans to phase out coal until well after 2050.

The EU's planned response to countries which do not match its own rules on carbon emissions is to impose a carbon tax on imports from those countries. This plan is opposed vigorously by Brazil, Russia, India, China, and South Africa. And there is internal as well as external opposition to the EU tightening its emission standards. Achieving net zero is not guaranteed.

REFLECTIONS ON THE CLIMATE CHANGE PANEL EVENT

The need to achieve net zero is taken seriously in Europe

On the face of it, EU countries are phasing out coal, diligently applying the [EU's Emissions Trading Scheme](#), and moving resolutely in the direction of net-zero.

On top of that, the EU is considering the world's first carbon tax on imports, or "[carbon border adjustment mechanism](#)" (CBAM). The proposed tax would be levied on imports of cement, iron and steel, aluminium, fertilisers, and electricity (all big carbon-emitters), at a level equal to EU carbon charges on domestic products under the EU ETS. In calculating the level of the tax, account would take of charges already imposed in the country of origin under schemes equivalent to the EU ETS. The EU claims (probably rightly) that the proposed import tax would be consistent with exception clauses covering health, natural resources and environmental protection in WTO rules and in individual trade agreements with third countries.

The UK, no longer in the EU, seems equally committed to [reaching net-zero by 2050](#).

All this chimes well with the outcome of COP26 in November 2021.

But some European politicians and governments also have reservations, based on the costs of transition, worries about energy security, or climate-change scepticism.

EU plans received a setback on 10 June 2022, when the Commission's "green deal" which aims to update EU legislation and reduce greenhouse gas emissions by at least 55% by 2030, [was rejected by a large margin in the European Parliament](#). Right wing opponents voted against because they thought the proposal went too far, and green opponents voted against because they thought the proposal did not go far enough. This vote also delayed progress on the CBAM.

In Poland, it seems that the plan is to [burn coal until 2049](#), despite an apparent commitment at COP26 to [phase out coal in the 2030s](#). The EU's labelling of natural gas and nuclear power as "[green](#)" [transition fuels](#) divided the EU, with opposition from Spain, Germany and Austria, and support from Poland and France. [Recent Commission plans](#) for affordable, secure and sustainable energy for Europe make no mention of nuclear power.

The new Czech Government which took office in January 2022 is committed to [phase out coal in energy production by 2033](#) while increasing the country's reliance on nuclear and renewable sources, yet Prime Minister [Petr Fiala has questioned the extent to which human action is to blame for climate change](#).

The impact of the invasion of Ukraine on progress to net zero

And then there is the crisis resulting from Russian aggression against the Ukraine. This has led some countries to prioritise domestic sources of energy even if these risks postponing progress to net zero. Germany for example is considering [slowing its transition from coal](#).

But the Ukraine crisis has boosted investment in renewables as well as in fossil fuels.

An optimistic view is that increased reliance on fossil fuels is short term and transitional and that the invasion of Ukraine [could still accelerate progress to net zero in the medium term](#).

One commentator forecast that “a shift away from Russian natural gas is poised to reinforce the role of wind and solar as the bedrock of future energy.”

Nobody really knows how much net zero will cost

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Quite apart from the attitude of politicians, nobody really knows what the cost of achieving net-zero is going to be, at national regional or global level. The European Commission estimated in 2020 that reducing the EU's greenhouse gas emissions to 55% of 1990s levels by 2030 would require [additional annual investment of €360 billion](#). Input from public funds at EU and national level will be essential, though many EU countries are already carrying debt burdens traditionally regarded as excessive. Possible solutions could include finance from the EU budget, and [relaxation of the EU's Stability and Growth Pact to exclude green investments from its public sector deficit limit](#).

In the UK the Office for Budget Responsibility estimated in 2021 the public expenditure cost to the UK of reaching net zero by 2050 at [£320 billion, or 10 billion per year](#), but that is on the basis that most of the necessary investment will come from the private sector and individuals.

Governments count on businesses in the private sector playing an important role in transition to net zero. As COP26 got underway in the UK in November 2021, an [UK](#)

[Government Press Release](#) announced that Britain's largest businesses were leading the way in the global transition to net zero emissions, with "over half of FTSE100 companies now committed to eliminating their contribution to climate change by 2050."

European businesses, aware of the benefits of decarbonisation, are increasingly making strong commitments to climate neutrality by 2050, with multinationals such as Volkswagen & IKEA staking their future success on reaching net-zero and adopting clean technologies. Businesses have commercial incentives to adopt green policies to meet the demands of customers who want green products.

However, [a recent report by New Climate Institute](#) warns that the claims of businesses cannot always be taken at face value.

"Companies' headline climate pledges require detailed evaluation and in the majority of cases cannot be taken at face value, the report finds. Only one company's net zero pledge was evaluated as having "reasonable integrity"; three with "moderate", ten with "low" and the remaining 12 were rated as having "very low" integrity."

The report found, for example, that the headline pledges of Volkswagen and Ikea, referred to above, were of "low integrity". Not too much reliance can yet be placed on the desire of the private sector to please its green customers.

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Transferring climate finance to developing countries

An essential element in the fight against global warming is the transfer of climate finance from developed countries to developing countries. "Climate finance" comprises both funds to facilitate transition to net-zero plus funds for adaptation to global warming. At the 2009 COP in Copenhagen, developed countries pledged \$100 billion annually by 2020. This target has yet to be achieved, but [at COP26 confidence was expressed that it would be met by 2023](#).

[The main objective of the COP27 climate conference in Egypt later this year](#) will be to move from pledges that finance will be transferred, to implementation of those pledges.

According to the World Economic Forum, developing countries need to invest an additional [\\$800 billion per year on climate mitigation projects by 2025](#), dwarfing the \$100 million pledges which have been made. The World Economic Forum calls for more input

from the private sector, in conjunction with national governments acting as development partners.

Developing countries see developed countries as having greater responsibility for achieving net zero because of their greater historical contribution to climate warming

Climate finance is not the only issue to divide developed and developing countries.

Developing countries see the developed industrialised world as bearing an historic responsibility for climate change that demands a proportionate and so greater contribution to net zero.

On the face of it, developing countries have a point. While the USA is currently responsible for 13% of greenhouse gas emissions, it has contributed 20% of emissions since 1850. China, on the other hand (perhaps controversially still classed as a developing country), while currently contributing 27% of emissions, has only contributed 11% of total emissions since 1850. [These figures take into account land use and forestry as well as industrial emissions.](#)

Attributing responsibility for greenhouse gas emissions on a per capita basis creates further complications. New Zealand, Canada and Australia are the three top emitters on this basis, followed by the United States, Argentina, and Qatar. On a per capita basis, China does not even appear in the top 20. Interesting as these figures are, they provide no real assistance in tackling climate change in the present day, where reductions in emissions by New Zealand or Qatar will make little or no difference to achieving net zero, while action by China will be indispensable.

The EU's proposed CBAM (above) is seen by developing countries in a very different way than it is viewed in European capitals. CBAM would treat imports from all countries in the same way, which developing countries say would be incompatible with the pledge in Article 2(1) of the Paris Agreement that its implementation would reflect "equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." In other words, developing countries and less developed countries deserve some special treatment when it comes to application of the CBAM. [Brazil, Russian, India, China and South African, have all opposed the proposed CBAM on the ground that it is discriminatory.](#)

The routes planned by some countries to net-zero seem over-optimistic

The Government of Japan, despite its COP26 commitments, is seriously concerned about energy security and appears to be back-peddling. Even before the invasion of Ukraine forced energy security up the political agenda, Japanese officials had been quietly urging trading houses, refiners and utilities [to slow down their move away from fossil fuels](#), and encouraging new investments in oil-and-gas projects (Japan is responsible for 2% of world greenhouse gas emissions).

In a survey of public concern about the effects of global warming polled in spring 2021 in 17 advanced economies (across North America, Europe, and Asia-Pacific), concern had risen significantly since 2015 in all the countries [except Japan, where concern had declined significantly](#). Only days before the opening of COP26, the Prime Minister of Japan apologised for the comments of a former Prime Minister, campaigning on behalf of the governing Liberal Democratic Party, who had said there were [some advantages to be gained from global warming](#).

In Europe, as elsewhere, climate change scepticism and denial has tended to soften and morph into criticism of net-zero policies on grounds of cost and impact on living standards. Messaging becomes complex, mixing calls for energy independence with questions about the precise extent (rather than the existence of) human action on global warming, and accusations that the press and politicians are exaggerating the risks from global warming.

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One summary of this softening is [“climate change may be happening, but it’s no big deal...We don’t need to make any drastic changes, like curbing fossil fuels.”](#)

The IPCC’s Sixth Report predicts increasing damage as a result of global warming

Meanwhile the evidence is building that man-made global warming will inflict more severe extreme weather events on mankind than would otherwise be the case. The first instalment of the sixth report of the IPCC, released in the run-up to COP26, records that it is an “established fact” that human-caused emissions of greenhouse gases “have led to an increased frequency and/or intensity of some [weather and climate extremes](#)”.

It predicts, for example, that the frequency of lower intensity hurricanes is likely to decline, but that the potential of hurricanes to inflict damage over the land territory of the USA is likely to increase and that the cause is more likely than not human influences on the

climate. It finds that it is 80% likely that human influences on the climate contributed to extreme rainfall amounts during Hurricane Harvey and other intense hurricanes. And it finds it 90% likely that co-occurrent heat waves and droughts will continue to increase under higher levels of global warming.

The report also notes that climate change made Europe's record-breaking heatwave in 2019 (which saw the UK's highest-recorded temperature ever) as much as 100-times more likely.

Differentiated paths to net zero

Net-zero is a rational option for national policymakers, both to combat climate change, and as a declaration of energy independence from unreliable foreign suppliers, such as Putin's Russia, which [provides natural gas to Europe](#), including the UK.

The Paris Agreement allows national governments some leeway to design their own commitments to achieve net-zero, and since it also provides for differentiated pathways for less developed countries, which includes China and India.

China (27% of world greenhouse gas emissions) plans to "phase down" coal and be carbon neutral [by 2060](#). It is interesting that proven coal reserves in China are estimated [to run out about 2055](#). China, which already supplies [three-quarters of the world's solar panels](#), has the ambition to be the [world's leader in solar power](#). China may yet become the world's loudest cheerleader for net-zero.

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Achieving net-zero by 2050 seems unlikely but renewables are getting cheaper all the time

Flexibility means that there will be problems with the timing of net-zero. India endorsed the IPCC's 6th Report, referred to above, but its delegate at COP26 [described it as "too gloomy"](#). India, with 7% of global greenhouse gas emissions, has made it clear it plans on burning coal until 2070. Deadlines and warming limits may well be missed.

But renewable sources of energy are increasingly competitive. Energy from new renewables is cheaper than energy from new fossil fuel generation for [nearly half the world's population](#).

In 2020 the UK Government forecast that onshore [wind and solar power would be half as costly as gas in 2025](#), but already [by mid-2021 new onshore wind power was costing less than half that from existing gas plants](#). Major drivers of innovation and reduced costs have been the Kyoto and Paris Agreements and the political decisions and regulation to which they have given rise.

It is true that renewables in the form of solar and wind power need alternative energy backup to cover dull and windless days, until there have been large strides in battery technology – either through [factory size lithium-ion storage](#) or [technology beyond lithium-ion](#), of [various kinds](#). But the increasing competitiveness of renewables is nevertheless game-changingly significant, and the [technology of electricity storage is developing all the time](#).

Achieving net-zero is not yet guaranteed

Public opinion in the UK is [receptive to](#) the [need to combat climate change](#), and the same seems to be [true in advanced economies around the world](#). In Australia a climate-sceptic government was replaced in May 2022 [by one committed to achieving net zero](#). But willingness to accept mandated lifestyle changes or impacts on living standards has yet to be tested. If the public feel worse off and blame national policies designed to reach net-zero, there could be a backlash, and climate-sceptics will offer what may sound to some people like common-sense excuses for not regarding the climate emergency as such an emergency after all. Achieving net-zero is not yet guaranteed.

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Panel chaired by: **Derrick Wyatt QC**, Emeritus Professor of Law at the Faculty of Law, University of Oxford, Emeritus Fellow of St Edmund Hall, Oxford and formerly a member of Brick Court Chambers, London. Member of Fide's International Academic Council.

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AUTHOR

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P. THE LEGAL PROFESSION IN ENGLAND AND WALES; HOW GRAY'S INN FITS INTO THE LEGAL LANDSCAPE; WHY AND HOW GRAY'S INN VALUES INTERNATIONAL COLLABORATION.

A. INTRODUCTION

The Honourable Society of Gray's Inn (to give it its full formal name) is one of the four self-governing Inns of Court. The other three are the Inner and Middle Temple and Lincoln's Inn.

In order to become a barrister entitled to practise in England and Wales it is necessary to join one of the Inns, to satisfy the qualifying requirements and to be called to the Bar at a formal ceremony (Call Night) in the Inn of choice.

There are no Inns of Court in Scotland. Call to the English Bar does not entitle a barrister to practise in Scotland, which has its own separate legal system preserved on the Union with England 300 years ago. The advocates, as they are called, belong to the Faculty of Advocates.

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I will take my own case as an illustration of how the English system works in practice. I became a member of Gray's Inn when I joined it in 1961 while reading for a law degree at Pembroke College, Oxford. I was called to the Bar in 1964 after obtaining my degree and passing the Bar Exams. After spending a year as a pupil to a junior barrister I became a tenant in another set of Chambers in New Square in Lincoln's Inn from which I practised for the next 24 years. I remained a member of Gray's Inn even after I left the chambers and ceased to be a practising barrister on appointment first as a Justice of the High Court in 1989 and then as a Lord Justice of Appeal in 1996. I reached the compulsory retirement age of 75 for judges in 2013, but I am still a member of Gray's Inn and will be so for the rest of my life.

In explaining the organisation and functions of Gray's Inn and its many activities, both in this country and internationally, I will make a few short points on each topic.

Early in my career I had the good fortune to sit next to the former Head of an Oxford College at dinner. He was reputed to be one of the wisest men in Oxford (and therefore in England!) He warned me against the dangers of making fewer than or more than three points in a case: too few and people would think you had not given the subject sufficient thought; too many and people would think that you were trying to be too clever by half and the attention of the audience would soon be lost.

I have followed that wise advice for over 50 years.

First, a summary of how the Inn connects with the three topical themes of this Congress. They all reflect current concerns of common interest and great moment.

1. Nationalism

Gray's Inn is national in its origins, character, and core activities. But that does not make it “nationalist.” Its influence on law, legal thinking, professional practice, and judicial behaviour reaches far beyond its historic origins in 15th century London. The Inn recognises the mutual benefits of good international relations with other legal systems, cultures, and professions. Its members share with lawyers from many countries a wide range of useful knowledge and practical experience in legal affairs.

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2. Populism

Members of the Inn take part in professional, educational, charitable, cultural, recreational, and social activities organised and facilitated by the Inn. The Inn is not a political institution either in a populist or party sense. The Ministry of Justice is the Government Department responsible for the national court system. A Legal Services Board oversees the whole legal profession. The Inns of Court are not and never have been run by government. They have also always been independent of organised political parties, of disorganised populist movements and of business and commercial enterprises carried on for the financial and personal benefit of their owners.

The four Inns are best described as independent self-governing communities of lawyers who have been called to the Bar. Their overriding purpose is to promote and preserve for the public good an independent legal profession of barristers who are qualified to supply legal advice and representation to clients. The Inns make a valuable contribution to the

impartial administration of justice through the study of law and the education and training of lawyers in professional skills and ethics, notably in the traditions and art of advocacy practised on behalf of litigants in courts and tribunals.

The four Inns work alongside, while remaining distinct from, other bodies, such as the Bar Council, a body elected by the Bar to serve and protect its members' professional interests; the Bar Standards Board responsible for such matters as qualifications and disciplinary procedures for dealing with complaints of professional misconduct; and the College of Advocacy recently established to maintain and improve standards of advocacy.

3. Identity

The identity of Gray's Inn, like that of the other three Inns, is the creation of accumulated experience of lawyers over many centuries. What Gray's Inn is and what it does are easy to identify, explain and understand. Like the other three Inns it occupies a central place in the distinctive legal culture of English law, its precedents, principles, and traditions and of the English Bar and its high professional standards. It contributes to the everyday working of an adversarial judicial system, both criminal and civil. It is committed to upholding all aspects of the Rule of Law in this country and internationally. The roles of the Inns will continue to evolve as they adapt to the rapidly changing conditions of English society and to new needs in the lives of its people.

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THE ENGLISH LEGAL PROFESSION

The reference in the title to "the legal profession in England and Wales" requires some elaboration.

1. Two professions

In England there are two distinct legal professions: solicitors and barristers. They work closely together in the supply of legal services to the public. Transfer from one of the professions to practise in the other is permitted on complying with certain formal requirements.

There are about 150,000 practising solicitors. The Bar is much smaller, there being about 15,000 barristers in independent practice. When I was called in 1964 the number in practice was around 2000.

The functions and activities of the two professions differ, though there is some overlap. Each profession has its own functions, qualification and training requirements, organisation, and regulatory and disciplinary procedures.

2. Solicitors

Solicitors do not belong to an Inn of Court. Their professional body is called the Law Society. Solicitors work mainly in law firms which, like barristers' chambers, have tended to grow larger, some think too large, in recent years as a result of mergers, the opening of offices overseas and the increase in demand for legal services generally. Most solicitors practise either in partnership or as employees in offices operating in most cities and towns.

Some solicitors, like some barristers, are not in independent practice, but choose to work in full time employment for the government and for other public authorities or in the legal departments of commercial enterprises.

Firms of solicitors offer a wide range of legal services direct to the public, such as general legal advice, the processing of transactions and the drafting of documents, such as wills and property transfers. Some solicitors act as advocates in litigation, usually in the less complicated cases and in the lower courts. More often solicitors instruct a barrister to act for the client, to advise on the conduct of the case and to argue it in court with the benefit of professional assistance and support from the instructing solicitors.

The split between solicitors and barristers resembles that in the medical profession between General Practitioners (GPs) and the more specialised Consultants and Surgeons. This division is reflected in membership of different Royal Colleges for GPs, Physicians, Surgeons, and other specialist practitioners of medicine.

3. Barristers

Barristers are quite like Consultant Physicians and Surgeons in that their professions are referral in character and tend to be more specialised. The normal route followed by a client

to professional contact with a barrister is by going initially to see a solicitor about a problem. The solicitor may advise that it is in the best interests of the client to consult a barrister for advice and to act on behalf of the client in proposed and actual litigation.

Like many solicitors, barristers now practise in larger groupings than they used to when I started practice. My Chambers had 5 members when I joined. It had grown to 12 by the time I left and now it has over 20 members, which is small by modern standards. Opinions differ about the benefits of this change in scale for practitioners and their clients.

An increasing number of those who qualify as barristers choose to be employed in the legal departments of public bodies and companies rather than go into independent practice.

Barristers in independent practice belong to and work from sets of chambers many of which are rented from the Inns. Most of them act as advocates in criminal and civil courts and tribunals, usually for a fee negotiated in each case rather than a salary. The art of persuasion of judges and juries demands special professional skills in the oral and written presentation of cases in court, in the use and testing of oral evidence in court and in the intellectual content of legal argument.

Barristers share the expenses of their chambers, but they do not share their profits of practice. They do not employ one another or enter professional partnerships with one another. As individuals they take full personal responsibility for the conduct of cases undertaken by them.

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The individual members of chambers appoint one of their number to be the Head of Chambers. Within the chambers some of the senior barristers have embarked on the official process of applying for appointment as Queen's Counsel (QC) awarded to a small percentage of barristers in recognition of their seniority, ability, experience, reputation, and good standing at the Bar. QCs are instructed to appear, often with another barrister, in the more complicated and difficult cases. Other people in a set of chambers include junior barristers of varying seniority, their recently qualified pupils and support staff headed by a Barristers' Clerk.

4. Fusion

There have been discussions from time to time about fusing the professions as a possible way of improving efficiency, cutting costs, and speeding up delivery of services. That has not yet happened. It probably never will. In the English adversarial criminal and civil judicial system, which has enjoyed a continuous and stable history over many centuries, the public interest in a separate body of independent advocates is still generally accepted as outweighing the perceived advantages of larger fused or multi-disciplinary practices.

GRAY'S INN

How does Gray's Inn fit in to the above professional framework?

1. Origins

History supplies some answers. Originally there were many more Inns than there are now. All that is left of most of them are a few buildings and place names as evidence of their former existence.

The four Inns of Court date from late medieval times, 14th /15th centuries and grew up at about the same time as the colleges of the two Universities of Oxford and Cambridge. They were places where students went to live and learn the Common Law. The system is unique in the legal world. The bodies called Inns of Court in the USA do not perform the same professional role.

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In many respects the four Inns of Court are alike, though they make a point of how much they differ from one another. They co-operate closely with one another informally and formally through the Council of the Inns of Court.

2. Location

Their historic buildings are all close to one another north and south of the Royal Courts of Justice in the Strand and close to the boundary with the City of London. Each Inn has a hall which is used for communal eating and other gatherings, a library, a chapel, a garden and extensive accommodation for offices (called chambers) tenanted mostly by barristers for their professional use.

3. Continuity and stability

The Inns have enjoyed an unbroken history as honourable and learned professional societies. They are rather like the guilds of craftsmen that grew up in many parts of Western Europe. The Inns' craft was that of advocacy at the Bar. ("The Bar" derives from a barrier in early court rooms marking the physical separation of the court officials such as the judges, from the parties, their legal representatives, and the public.)

4. Functions

The functions of the Inn include the admission, education, training, well-being and financial assistance of law students. Once admitted they are members for life, even if they later become judges as in the notable recent instances in the Inn of the President of the Supreme Court (Lady Hale), the Lord Chief Justice (Lord Thomas) and the President of the Court of Appeal (called the Master of the Rolls -Lord Etherton).

The path to practice as a barrister follows three stages-academic study, vocational training on approved courses and at Inn qualifying sessions and a year as a pupil of a practising barrister.

The first step is to study for and obtain a university degree. Students study either on a law degree course for 3 years or, in the case of those with a non-law degree, on a post-graduate course for one year leading to a diploma in law.

The second stage is vocational. It involves being taught various skills required for legal practice. Students must attend a Bar Practical Training Course for one year at an approved institution such as the College of Advocacy in London, or somewhere outside London. The courses cost up to £20,000. Critics, who are not always the best judges of the quality of instruction, complain that some courses are not worth it.

Those courses are coupled with qualifying sessions organised at and by the Inn itself. The Inn helps students with the award of generous scholarships and grants to help meet the cost of the vocational courses.

The 12 qualifying sessions in the Inn concentrate on learning advocacy and litigation skills from barristers and judges by taking part in moots, mock trials, debates, and lectures as well as social activities and events. They replaced the earlier system which applied to me in

the 1960s of the compulsory eating of 36 dinners at the Inn spread over 3 years. The programme of dinners also had its critics, though there was more to it than just eating and drinking.

Learning how to talk to and get on with other people over a meal is a valuable exercise in human relations. It should not be under-estimated. Legal practice demands more of its exponents than intellectual ability and the ambition and will to succeed.

The third and final stage is a year's apprenticeship with a practising barrister in a set of chambers. It is called pupillage, a form of mentoring or professional parenting rather than a course of formal instruction. The pupils go to court with their pupil master and sit in on meetings with clients to discuss cases and so on. They learn how to behave as a barrister towards clients, professional opponents, judges, court officials and colleagues.

Advocacy, let us not forget, is a very special sort of human behaviour in a formal setting, for a serious purpose and carrying a burden of professional trust and responsibility. Like it or not, barristers are judged by how well they behave in and out of court, which is part of doing the job, as well as by their intellectual gifts, professional personality, and powers of persuasion.

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The entire educational and training programme takes at least 5 years to complete before starting to practise at the Bar. In order to practise it is then necessary to find and be taken on as a tenant in and become a member of a set of chambers, an important first exercise in making a good impression on fellow professionals.

5. Organisation

The Inns are unincorporated societies, and were not formally created by legislation, charter, or registration. What have been described as the Universities of the Common Law had obscure and informal origins. Their students were taught in practical exercises, such as moots and readings, how to argue points of English common law in the courts, as distinct from learning civil law taught at the universities of Oxford and Cambridge.

Many famous figures in English history have been associated with the Inns of Court. Each Inn has members of the Royal Family as honorary members of its governing body of Benchers-in the case of Gray's Inn they are the Prince of Wales, the Duchess of Cornwall,

and the Duke of Gloucester. (This is so even though the prosecuting counsel, John Cooke, and the Presiding Judge at the trial of Charles I, John Bradshaw, leading to his execution in 1649 were both members of Gray's Inn.)

Other members of Gray's Inn included Thomas Cromwell, Secretary of State to Henry VIII, the poet, Sir Philip Sidney who famously died in the wars for the liberation of the Low Countries, William Cecil, Secretary of State to Queen Elizabeth I for most of her reign and Francis Bacon, 17th century Lord Chancellor, writer, and renowned Renaissance philosopher. In more recent times the Honorary Benchers included Winston Churchill.

Shakespeare's play *The Comedy of Errors* was first performed in Gray's Inn and *Twelfth Night* in the Middle Temple Hall, the most beautiful and historic of all the halls.

The Inns are governed by bodies of elected Benchers who work through committees responsible for management of the property, finances and affairs of the Inn, the organisation of education and the award of scholarships, and the social life of the Inn.

The Benchers elect one of their number each year to become the Treasurer, who chairs meetings and ceremonies, such as Call Night, and represents the Inn at many events and occasions during the year of office.

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The day-to-day executive functions in running the Inn are performed by staff headed by a full time Under-Treasurer as chief executive, often a high-ranking ex-military person, who understands the oddities of human behaviour in the young and the old and knows how to run an unusual institution in an orderly, dignified, and efficient way.

Most barristers in independent practice have their chambers in the Inns, but there are flourishing local Bars with chambers in big cities in other parts of the country, such as Manchester, Birmingham, Liverpool, Leeds, Bristol, and Cardiff.

INTERNATIONAL ASPECTS

Gray's Inn and its members have forged strong long-lasting links with legal professions and judiciaries in other countries. Over the last 2 years normal visits to and by the Inn have been curtailed by the covid 19 pandemic. It will take some time for normal levels of hospitality and exchange to recover.

1. Origins

English history explains the early international links. As they explored and settled overseas the English took with them English law, and some of its practices and its institutions - to North America, The Caribbean, India, Sri Lanka, Pakistan, Africa, Australasia, New Zealand, Hong Kong, Singapore and so on. It has been estimated that now about 1/3rd of the world's population is subject to English law in various forms and as developed to suit local conditions. Many countries live with a legacy of English law, not least as a result of continuing expression in its living language. In London the Judicial Committee of the Privy Council still hears appeals from some of the smaller members of the Commonwealth.

Originally most of those who practised law and adjudicated in the courts of other countries had been called to the Bar by Gray's Inn or one of the other Inns. For example, both Gandhi and Nehru, the first Prime Minister of India, were called to the English Bar.

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That large- scale reception of English law thus formed and still underpins an international network of informal legal links. As happened in the case of Rome the Law has a way of persisting long after the parental power of politics and government has diminished and disappeared

2. Examples of International contacts

The Treasurer of Gray's Inn this year is Sir Peter Gross, a retired Appeal Judge. He re-iterated recently that the Inn has a role to play internationally. When he was in the Appeal Court, he was the Lead Judge in International Relations. He has made recent overseas visits to Iraq, Jordan, Brunei, and Uzbekistan.

Other important links were established in the UK's 40 years membership of the European Union. When I was Treasurer of the Inn in 2005, I was invited to Paris by the Batonnier of the Paris Bar. I was shown round the Palais de Justice, sat in on a criminal trial and visited

the Bar School. That was part of the annual Paris Bar exchange for young barristers and avocats, the French to London and the English to Paris as an exercise in comparative law, as well as in professional, cultural, and social life.

There were also annual exchanges with mooted teams from Law Schools in the USA, visiting speakers and, with the co-operation of all four Inns, the award of Pegasus Scholarships which financed working visits by young lawyers to overseas law firms and young lawyers coming to England to spend time in chambers, in the offices of city law firms and at law schools.

At other times I met EU judges and other national judges on visits to the court in Luxemburg and attendance at conferences in Stockholm, Krakov, Florence, Milan, and The Hague. Over the years I took part in annual visits to the Inn by members of the Paris Bar, exchanges under the Pegasus Scholarships with many overseas countries, mooted teams from US Law Schools and so on. I went on judicial visits to the US Supreme Court twice and a group of their judges came here to London and to Edinburgh. I also made visits to lawyers and judges in Hong Kong, Trinidad, the Bahamas, China, New Delhi and Mumbai, the Channel Islands, Ghana, Cape Town and Johannesburg, Philadelphia, and Ottawa.

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3. International lawyers

Members of the Inn have developed links with and influence in International Courts and Tribunals. I was taught International Law by Sir Humphrey Waldock, who was a Bencher of Gray's Inn, Professor of Public International Law in Oxford, a judge of the European Court of Human Rights in Strasburg and later President of the International Court at the Hague. Professor Waldock followed in the footsteps of Lord McNair and was in turn followed by Sir Ian Brownlie and Professor James Crawford, who both sadly died at the pinnacle of their careers.

Over the last 40 years other members of the Inn, such as Lord Slynn, have achieved prominence in the study and practice of European Union Law and in appointments to judicial offices in its courts and tribunals.

CONCLUDING REMARKS

1. The ideal and the complacent

An inspirational account of the Inns of Court was that of England's greatest legal historian, FW Maitland, nearly 150 years ago. He described them as places of vigorous intellectual effort peopled by worldly and gregarious people arguing, learning, and teaching as great mediators between life and logic, a reasoning reasonable element in the English nation.

The idea of a body of “great mediators” blessed with the quality of reasonableness is attractive in troubled times. But the Inns, like all human institutions and their members, are flawed. They do not always live up to their ideals. To believe otherwise is complacent, which is the most dangerous flaw in any institution or person.

2. Critics

Many long-established institutions are having a hard time. They are open to attack from nationalists and from populists. They also suffer from neglect and lack of active support in an age increasingly dominated by new and very different forms of organisation generated by communications technology and social media.

The Inns are criticised for being “exclusive” and being run by “out of touch” members of a professional elite for their own benefit. Another charge is inefficiency in failing to keep up with changing times. Like other ancient institutions the Inns are easy targets of ridicule for outworn traditions, outdated customs and ceremonies and pompous sounding offices and titles.

Not all the criticisms have been fair or well informed. Developments in science and technology, in politics and society and their relevance to teaching and training methods certainly need to be kept under regular review, as do the subject matter of courses, professional exercises and lectures and concerns whether the organisation truly reflects and represents relevant interests.

3. Reacting to criticism

Thoughtful and intelligent critics with constructive proposals for improvements of all kinds are always helpful. There is everything to be gained by listening to them patiently and with an open mind. Those who are reluctant to listen have probably stopped thinking or, what is almost the same thing, have lost touch with reality. By far the worst mistakes are made by people who are so complacent that they think that they do not need to take any notice of what other people think.

It is sensible to resist the temptation to change things just for the sake of change. Care should be taken to preserve what is still valuable. It is irresponsible to throw away what has worked reasonably well for centuries without first thinking carefully about what, if anything, to put in its place. That is where constructive criticism can help to improve the work of Gray's Inn in this country and in the nature and extent of its international relations.

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- **Michael URBAN**, PhD, Chief Sustainability Strategist at Lombard Odier (LO), which is a Swiss Bank specializing in wealth and asset management
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- **Frédéric JENNY**, Professor Emeritus of Economics at ESSEC Business School in Paris. Member of Fide's International Academic Council.
- **Cristina JIMENEZ SAVURIDO**, President of Fide. Congress director.
- **Christopher MUTTUKUMARU**, CB DL, Barrister, Bencher of Gray's Inn and Chair of the International Academic Council from 201-2022. Congress Director.
- **Jorge PADILLA**, Senior Managing Director and Head of Compass Lexecon Europe. Member of Fide's International Academic Council, currently chair since September 2022.
- **Marie PIERRE-REY**, Director of the Sorbonne research unit 'Identities, international relations, and civilizations of Europe', Professor of Modern History at the University

Panthéon-Sorbonne, and specialist of Russian-European relations. Member of Fide's International Academic Council until 2022 (*).

- **[Derrick WYATT](#)**, QC, Emeritus Professor of Law, University of Oxford. Member of Fide's International Academic Council.

FIDE MEMBERS

- **Álvaro ARRIBAS**, Marketing and Digital Development at Fide Foundation.
- **Cristina ARRIBAS**, Co-coordinator Fide Foundation. Congress co-coordinator
- **Victoria DAL LAGO**, Academic Director, Fide Foundation. Congress co-coordinator.
- **Carmen HERMIDA**, Managing Director at Fide Foundation.
- **Blanca JIMÉNEZ**, Marketing assistant at Fide Foundation.

() In this document we list the names of the participants with the position they held in April 2022 when the Congress was held, followed by their current position.*

ABOUT FIDE

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The [FIDE Foundation](#) is today a **permanent meeting** place for professionals of the highest level or with a long professional career, who carry out their activity in **companies, professional offices**, and the **Public Administration**.

Fide is a legal-economic think-tank, an operational centre of knowledge in a practical state, which is made possible thanks to the active participation of all levels of civil society that have something to say about it: from the top management of the companies to law firms, from university chairs to courts of justice, from all levels of administration to professionals from different fields related to the world of Law and Business.

At Fide we have set up a series of working groups whose purpose is to make a **continuous and deep reflection** on some of the major issues that we have considered that, due to their urgency, need for reform or capacity for improvement, deserve to be the **subject of special reflection** by a group of experts. Some have already published their first conclusions, have made specific regulatory proposals, or have advanced an initial analysis of the situation. Others will do so throughout the year. But there is no doubt that in each group we have an **essential point of reference**. The composition of each group, with **professionals with extensive experience and in-depth knowledge** of each subject, allows us to address all those issues that we collectively consider deserve reflection. Sometimes this can be reflected in some **generally accepted conclusions, or in specific regulatory proposals**, in others **the debate itself reveals the complexity and distance of the positions** and therefore the value of the work is reflected in specific summaries on the topics addressed. In any case, any professional involved in the evolution, development, application or improvement of regulation and especially economic regulation must be familiar with these works and contribute to their development, knowledge, and dissemination. The members of these working groups are members of Fide and regular attendees of Fide's sessions and forums, which are closely linked to the matters addressed in the respective areas of analysis.

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DISCLAIMER

This work of reflection and proposals has been prepared from the Contributions of all the participants in the Oxford Congress 22 by Fide. Although logically they do not represent the unanimous opinion of all do reflect the issues on which the debate has focused. All the people who have participated in this Congress, have done so in a personal capacity and not on behalf of the entities, offices, universities, or companies, where they carry out their work professional, therefore this document does not reflect and do not include institutional positions but particular ones of each one of the participants of the Congress.

R. ANNEX OXFORD CONGRESS

If you would like to take a look at the Congress Program → click [here](#)

If you would like to see the participants of the Congress → click [here](#)

Take a look at the Congress gallery → click [here](#)



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Source: Fide Foundation: Oxford Congress Participants at the Jesus College first quadrangle., April 2022

RECORD

**NATIONALISM, POPULISM,
AND IDENTITIES:**

**CONTEMPORARY
CHALLENGES**

JANUARY 2023

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