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Articles

Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values

edited by Matteo Bonelli, Monica Claes, Bruno De Witte *and* Karolina Podstawa

* The page numbering follows the chronological order of publication on the *European Paper* web site.

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES

edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renáta Uitz

EUROPEAN FORUM

ARTICLES

THE IDENTITY OF UNION LAW IN PRIMACY: PIERCING THROUGH *EURO BOX PROMOTION AND OTHERS*

FERDINAND WEBER*

ABSTRACT: The Grand Chamber's judgment of 21 December 2021 on rule of law deficits in Romania underlines the vulnerability of the Union's legal order. The facts of the case vividly demonstrate once again that its weak spot is spread across the national judicial systems of the Member States. The European Court of Justice (ECJ) opposes the developments by further strengthening the values while underlining special obligations Romania entered into upon accession. Of central importance beyond that are the Court's first additions to the long standing reasoning on Union Law's unrestricted primacy. The argumentation resembles a closing figure which is supposed to resolve the irreconcilable claims of final authority in favour of Union law. The attempt turns out to be unconvincing because the constitutional foundations of the integration process and its plurality of actors are selectively ignored.

KEYWORDS: rule of law crisis – value constitutionalism – primacy of European Union Law – constitutional reservations – *Euro Box Promotion and Others* – Romania.

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I. Clear Occasions

The Grand Chamber's judgment[1] responds to five references for preliminary rulings, four from the *Înalta Curte de Casație și Justiție*, the Romanian High Court of Cassation and Justice, and one from the *Tribunalul Bihor*, the Regional Court in Bihor. Four cases were based on criminal proceedings against high officials for bribery, VAT fraud, and corruption as well as money laundering offences related to projects financed by non-reimbursable Union funds.[2] One case was based on disciplinary proceedings against a judge at the Bucharest Court of Appeal, leading to his exclusion from the judiciary by decision of the Chamber for Judges hearing disciplinary matters of the Superior Council of Magistracy. It became pending before the High Court of Cassation and Justice after the judge lodged an appeal.[3] Against other judges involved in the mentioned criminal cases, disciplinary proceedings were initiated *after* they had filed their references for preliminary rulings.[4] In other words, the struggle to curb the abuse of political power in Romania is in full swing. In this struggle, the Romanian judiciary is inevitably a party.

The requests for preliminary rulings, submitted between May and November 2019, shed light on events that got only minor public attention compared to those in Poland and Hungary. Already in May 2021, the ECJ found Romanian laws tightening the personal liability for judges and prosecutors concerning "miscarriages of justice" and disciplinary measures undermining the independence of the judiciary to be incompatible with Union law. In its ruling, the Court emphasized the support given by Union institutions in establishing an independent judiciary in Romania since accession and affirmed, against the Romanian Constitutional Court, that the primacy of Union law also prevails against constitutional norms interpreted by the latter.[5]

In a follow-up decision from June 2021, the Romanian Constitutional Court prohibited the lower courts from examining the conformity of national norms with Union law it already found them to be in conformity with the Constitution of Romania, citing the Romanian constitutional identity.[6] The occurrences found their way into a rule of law report of

[1] Case C-357/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034.

[2] One of the accused persons was a minister at the time of the alleged offences, another was successively mayor, senator and minister, another held parliamentary and ministerial positions at the time of the offences; one constitutional proceeding leading to the annulment of decisions of the High Court of Cassation and Justice was initiated by the President of the Chamber of Deputies, against whom criminal proceedings were also pending before the High Court of Cassation and Justice at the time, see *ibid*. paras 59, 93, 95 and 104.

[3] For the facts described up to this point cf. *ibid*. paras 2 and 81-83.

[4] *Ibid*. para. 261; the Romanian Judicial Inspectorate has initiated disciplinary proceedings against the referring judge of the Bihor Regional Court for failure to comply with the judgments of the Constitutional Court addressed in the questions referred, *ibid*. para. 80.

[5] Case C-83/19 *Asociația "Forumul Judecătorilor din România"* ECLI:EU:C:2021:393 paras 49-51, 179 ff., 219, 222, 239 ff. and 242-252.

[6] For a critical account on the concept, see RR Cosmin, 'Constitutional Signs of Identity in Pre- and Post-Communist Romania' (2020) Analele Universitatii din Bucuresti Seria Drept 54, 74 ff.; other contributions

the Commission.[7] Two days after the publication of the Court's judgment *Euro Box Promotion and Others*, the Romanian Constitutional Court defended its case law in a press release and stated that the observance of the principle of primacy as read by the ECJ requires a constitutional amendment.[8] Until then, the judgment cannot be implemented.

The events are taking place in a "constitutional state under construction" since accession.[9] At the same time, they are part of a larger development. Decisions of the ECJ and the European Court of Human Rights (ECtHR) are increasingly disregarded.[10] During the French presidential election campaign announcements of activating a "constitutional shield" against supranational court decisions appeared[11] and in Poland a politically overturned

show that the issue won't be settled by the rejecting the whole concept, cf. M Guțan, 'The Infra-Constitutionality of European Law in Romania and the Challenges of the Romanian Constitutional Culture' in R Arnold (ed.), *Limitations of National Sovereignty through European Integration* (Springer 2016) 141 and 156-161; on the reception of Union law and the relationship between the Constitutional Court and the High Court of Cassation and Justice see B Selejan-Guțan, *The Constitution of Romania: A Contextual Analysis* (Hart Publishing 2016) 38-40, 191-193, 253 ff.

[7] Romanian Constitutional Court decision of 8 June 2021 390/2021 regarding the exception of unconstitutionality of the provisions of arts 88(1)-88(9) of Law No 304/2004 on judicial organization, and of the Government Emergency Ordinance No 90/2018 on measures to operationalise the Section for the investigation of offences in the Judiciary para. 74-76; Communication SWD(2021) 724 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 July 2021 on the rule of law situation in Romania 22-23.

[8] Romanian Constitutional Court, press release of 23 December 2021 penultimate and last paragraph (excerpt): "We emphasise that the decisions of the Constitutional Court are and remain generally binding, in accordance with Article 147(4) of the Constitution. [...] In practice, the effects of this judgment can only occur after a revision of the Constitution in force, which, however, cannot be done by law, but exclusively on the initiative of certain legal entities, in accordance with the procedure and conditions of the Romanian Constitution itself" (own translation) available at www.ccr.ro; cf. also the ECJ's latest decision concerning Romania, case C-430/21 *RS* ECLI:EU:C:2022:99.

[9] For monitoring bodies involved, see *Asociația "Forumul Judecătorilor din România"* cit. para. 49, 158.

[10] Cf. A Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) IJLC 258, 263-267; for the older example of the Working Time Directive F Weber, 'Überstaatlichkeit als Kontinuität und Identitätszumutung' (2018) Jahrbuch des öffentlichen Rechts 237, 284; concerning case C-673/16 *Coman and Others* ECLI:EU:C:2018:385 cf. Resolution 2021/2679(RSP) of the European Parliament of 14 September 2021 on the rights of LGBTIQ persons in the EU para. 10; concerning case C-490/20 *V.M.A. v. Bulgaria* ECLI:EU:C:2021:1008 cf. F Michl, 'Verwandschaft zum Zwecke der Freizügigkeit' (2021) Verfassungsblog verfassungsblog.de; on Hungary in detail Z Szente, 'Challenging the Basic Values: Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle them' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017) 456-475; on the non-compliance with ECHR provisional measures (such as ECtHR press release v. 28.9.2021, ECHR 281 (2021)) by Polish authorities cf. M Górczyńska, J Białas and D Witko, 'Legal Analysis of the Situation the Polish-Belarussian Border, Situation on: 9 September 2021' (2021) Helsinki Foundation of Human Rights 2: "According to them, it is not possible because migrants are in the territory of Belarus".

[11] With further references F Weber, 'Status, Accountability and Community after 9/11' (2021) Verfassungsblog verfassungsblog.de.

constitutional court declared decisions of the ECJ and ECtHR partially inapplicable.[12] Strasbourg and Luxembourg, semantically and functionally upgraded to "two senates of *one* European constitutional jurisdiction",[13] are under pressure from political hijacked courts. Supporting them is beyond question. At the same time, abandoning critical case law analysis wouldn't be an appropriate scholarly reaction. When the ECJ compensates the lack of strong political responses through case law, its critical monitoring is necessary. Against this background, the ruling will be examined in its immediate and wider contexts.

II. Confirmation and advancement of rule of law value-dogmatics

II.1. Voluntariness of accession, pre-legal normativity of values

The Court's central reminder is well known and repeated specifically with relation to Romania, following the Grand Chamber ruling from May 2021: Member States acceding to the Union have "freely and voluntarily" entered into the obligation to respect the values enshrined in art. 2 TEU, as stated by art. 49 TEU. The commitment to share, preserve and promote those values at the same time marks the premise on which the mutual trust between Member States "is based".[14] The entire transnational mechanism of the Union legal order, as expressed in the Treaties' different policy areasis, in other words, builds on this active living of the Union's values.

The core feature of this "value constitutionalism",[15] understood as the foundation of the integration process, is the simultaneity of legal and extra-legal normativity. The Court itself establishes these two dimensions in its reasoning: respect for the values enshrined in art. 2 TEU is "a *precondition* for the accession to the European Union of any European state applying to become an EU member" and, after accession, "a *condition* for the enjoyment of all of the rights deriving from the application of the Treaties to that Member

[12] Polish Constitutional Tribunal judgment of 7 October 2021 K 3/21, cf. on this Editorial, 'Sovereign within the Union? The Polish Constitutional Tribunal and the Struggle for European Values' (2021) European Papers www.europeanpapers.eu 1117-1118; Polish Constitutional Tribunal judgment of 24 November 2021 K 6/21 concerning the ECtHR point III(3)(2)(2); for summaries of the changes cf. ECtHR *Xero Flor sp. z o. o./v. Poland* n. 4907/18 [7 May 2021] paras 289 ff.; *Reczkowicz v. Poland* n. 43447/19 [22 July 2021] paras 240 ff.; ECtHR *Dolińska-Ficek and Ozimek v. Poland* App n. 49868/19 and 57511/19 [8 November 2021] paras 329 ff.; R Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) ELJ 1, 13 ff.

[13] This juristic metaphor originates from A v Bogdandy and C Krenn, 'EuGH und EGMR: zwei Senate einer europäischen Verfassungsgerichtsbarkeit' in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* (C F Müller 2021) ch. 118, summarising para. 94 (author's translation).

[14] See already *Asociația "Forumul Judecătorilor din România"* cit. para. 160; *Euro Box Promotion and Others* cit. para. 160, quotations from there.

[15] For a detailed account see F Schorkopf, 'Value Constitutionalism in the European Union' (2020) GLJ 956, 963-964, who sees the possibility of an emerging "core of European sovereignty" through this jurisprudence.

State".[16] Respect for the values of art. 2 TEU thus precedes and sustains the enactment of treaty rights and obligations as a condition of their activation. Legal and extra-legal normativity go hand in hand. Without a certain level of a "good" *pre-Union* legal order, or at least the plausible prospect of its achievability, no aspirant to accession will even be given the opportunity to enter into a binding value commitment under Union law.[17] This is vividly illustrated by the example of Romania.

II.2. Updating the dogmatic of self-assertion under the rule of law

Already in the aforementioned judgment of May 2021, the Grand Chamber ruled that Decision of 13 December 2006 from the Commission establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, which *inter alia* allows the Commission to issue recommendations, is binding in the sense of art. 288(4) TFEU. In accordance with the principle of loyal cooperation under art. 4(3) TEU, Romania must take due account of the issued recommendations to address the benchmarks enshrined in the decision, all aiming at institution-building, thus strengthening the rule of law.[18] Thus, Romania may not adopt or maintain any measures that jeopardize the goals to be achieved.[19] The Grand Chamber confirms this reading once more[20] and, with reference to the Accession Act and a monitoring report from the Commission, underlines that immediate dangers, *i.e*. deficiencies in the area of justice and corruption, persisted at the time of accession.[21] The institutional monitoring of Romania thus also reflects a difference compared to other Member States, made visible by the Grand Chamber's reasoning. At the same time, the jurisprudence triggered by the Polish rule of law crisis is confirmed, according to which art. 19(1)(2) TEU – as an expression of the value of the rule of law in art. 2 TEU – leads to the application of art. 47(2) of the Charter of Fundamental Rights of the European Union (CFR) without examining the Charter's activation requirements as set out in art. 51(1) CFR.[22]

[16] *Asociația "Forumul Judecătorilor din România"* cit. para. 161-162; the latter quotation firstly appeared in case C-896/19 *Repubblika* ECLI:EU:C:2021:311 para. 63; in the decision to be discussed here *Euro Box Promotion and Others* cit. paras 161 and 168, emphasis added.

[17] Differently A v Bogdandy, *Strukturwandel des öffentlichen Rechts* (Suhrkamp Verlag 2022) 155, apparently without the opportunity to take note of the Court's last judgments.

[18] Details in Decision 2006/928/EC of the Commission of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.

[19] *Asociația "Forumul Judecătorilor din România"* cit. paras 149, 163, 166-178.

[20] *Euro Box Promotion and Others* cit. 174-175.

[21] *Ibid*. paras 158 and 188 on the "specific obligations [...] assumed by that Member State at the conclusion of the accession negotiations on 14 December 2004".

[22] *Asociația "Forumul Judecătorilor din România"* cit. para. 186-200 on the one hand, *Euro Box Promotion and Others* cit. 220 on the other; for criticism cf. F Weber, 'Kompetenzfusion durch Bürgerschaft. Die föderale Logik in der Rechtsprechung des EuGH zur Unionsbürgerschaft' (2022) Der Staat 297, 309-310.

The Grand Chamber refines this jurisprudence against the relevant background, the protection of the Union's financial interests. Due to their clear and precise wording and their unconditionality, the Court already granted direct effect to the benchmarks in Annex of Decision 2006/928 in May 2021.[23] The ECJ now extends this to art. 19(1)(2) TEU in conjunction with art. 325(1) TFEU,[24] which only becomes understandable against the background of the complex argumentation structures that the Court developed on judicial independence since the *Associação Sindical dos Juízes Portugueses* judgment and subsequent case law, especially concerning Poland.[25] Considering art. 325(1) TFEU, two aspects deserve to be highlighted. Firstly, according to the Grand Chamber, the term "financial interests" of the Union is not limited to revenue made available to the Union budget, but also expenditure covered by the Union budget. Secondly, not only loss-provoking acts but also attempted acts are covered by its scope.[26]

The fundamental rights-conclusion then comes as a consequence on the Court's remarks considering direct effect. National criminal proceedings dealing with offences relating to the financial interests of the Union are to be qualified as an implementation of Union law within the meaning of art. 51(1) CFR, first sentence, even though Union law "does not, as it currently stands, provide for rules governing the organisation of justice in the Member States and, in particular, the composition of the panels hearing cases in matters of corruption and fraud".[27] In other words, if the obligation to achieve the results laid down in, *inter alia*, art. 325(1) TFEU (combating fraud etc. directed against the Union's financial interests by 'deterrent' measures that provide effective protection) is materially affected,[28] the Charter, namely the right to an independent and impartial tribunal in art. 47(2)(1) CFR, becomes applicable. Even if, for example, Germany does not face similar rule of law deficits, the simultaneous application of the Charter – for the offences touching the scope of art. 325(1) TFEU – and the fundamental rights of the Basic Law (for other offences) would be at issue simultaneously in the context of one criminal court procedure.

Nevertheless, the ECJ refrains from further examining Romanian disciplinary law against art. 47(2)(1) CFR (judicial independence). The incompatibility of national disciplinary measures under Union law which are initiated due to non-compliance with decisions

[23] *Asociația "Forumul Judecătorilor din România"* cit. para. 249.

[24] *Euro Box Promotion and Others* cit. para. 253; the decisions referred to by the Court here only describe the elements of unconditionality and clear and precise obligations without expressly deciding on their direct effect as a consequence; on art. 325(1) and (2) TFEU see already case C-105/14 *Taricco and others* ECLI:EU:C:2015:555 paras 51; case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936 para. 38-40.

[25] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117; on this and the first of the cases concerning Poland F Schorkopf, 'Europäischer Kontitutionalismus oder die normative Behauptung des "European way of life"' (2019) NJW 3418, 3419-3421.

[26] *Euro Box Promotion and Others* cit. para. 183 and 187.

[27] For the statement on art. 51(1) CFR in *Euro Box Promotion and Others.* cit. para. 204, the quotation *ibid*. para. 180; on art. 49 CFR see already *M.A.S. and M.B.* cit. para. 52.

[28] For a dense discussion of its case law on this point see *Euro Box Promotion and Others.* cit. para. 181 ff.

of the national constitutional court, despite Union law requiring it, already results from art. 2 in conjunction with art. 19(1)(2) TEU and Decision 2006/928. In the Grand Chamber's words, a separate Charter examination "could only substantiate" this outcome.[29] The doubling of standards due to the operationalization of norms containing institutional tasks (art. 19(1)(2) TEU) becomes particularly tangible in this section.

II.3. Conclusion: working with protection obligations while abstaining from intervening in the constitutional conflict

Overall, the case did not pose any difficulties for the Grand Chamber. Upon accession, Romania committed itself to measures going back to the 1995 Convention on the Protection of the European Communities' financial interests (PFI Convention).[30] In this respect, one of the Court's main findings is not surprising: art. 325(1) TFEU in conjunction with art. 2 PFI convention and Decision 2006/298 preclude national rules or practices that create a risk of impunity for serious fraud or corruption offences to the detriment of the Union's financial interests through an interplay of constitutional court decisions, back-referrals, extraordinary legal remedies and absolute limitation periods for prosecution.[31] The capacity for referral (art. 267 TFEU) may under no circumstances be subject to disciplinary measures. Moreover, constitutional obligations for lower courts to follow decisions of the national constitutional court are permissible under Union law (only) *as long as* the constitutional court's independence from legislative and executive powers is guaranteed, pursuant to art. 2 and art. 19(1)(2) TEU.[32]

Although the Court emphasizes that the above mentioned norms do not require "Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State",[33] the potential for developing overarching federal obligations in all policy areas – including those remaining within the competence of the Member States in accordance with the principle of conferral (art. 5(2) TEU) – shines through. The case law of the German Federal Constitutional Court (BVerfG), which traces both reason and limit of the primacy-principle back to the order to apply the

[29] *Ibid*. paras 242-243.

[30] In detail, *ibid*. paras 1-11; on the Convention and Directive 1371/2017 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law cf. C Waldhoff, 'Art. 325' in C Calliess, M Ruffert (eds), *EUV/AEUV Kommentar* (C.H. Beck 2022) para. 4; F Weber, 'Effektive Steuerbetrugsbekäpfung im Unionsrecht und nationalen Recht' (2020) DÖV 62, 64 ff.

[31] *Euro Box Promotion and Others* cit. paras 198-203 on the limitation problem and para. 213, on art. 325(1) TFEU while citing the principles of proportionality, equivalence and effectiveness, see paras 192-194; art. 325 TFEU represents a catch-up codification of ECJ case-law, see C Waldhoff, 'Art. 325' cit. para. 6; on the problem of limitation see already *Taricco and others* cit. para. 47.

[32] *Euro Box Promotion and Others* cit. paras 227 and 230; *RS* cit. paras 87-93.

[33] Cf. *Euro Box Promotion and Others* cit. para. 229.

law given by the Act Approving the Treaty, sees its scope coupled to the transferred competences in conformity with the constitution.[34] It has rejected overarching constructions and did explicitly include the value clause in its rejection.[35] The Court's reasoning dissolves this connection.

With regard to the Romanian Constitutional Court, the ECJ's reasoning remains cautious, despite the hints delivered by the referring courts. The latter noted that the Constitutional Court is institutionally not a part of the Romanian judicial system, has been politically staffed and exceeded its competences several times by encroaching ordinary jurisdiction.[36] Against this, the ECJ abstractly states that the independence of courts in the meaning of art. 19(1)(2) TEU must be ensured by rules which dispel "any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it".[37] A negative test or outcome with a view to the Romanian Constitutional Court is not spoken out. On the contrary, the Grand Chamber does not see any indication that it would not meet these requirements and rejects the raised objections. The burden of proof is noticeably shifted towards the referring courts, which would have been obliged to make considerably more factual submissions.[38] Denying the independence of national constitutionals courts can, beyond clear-cut cases, indeed hardly be of interest for the ECJ because it would reduce communication channels even further. However, a tougher stance could follow in the infringement proceedings initiated one day after this judgement concerning the abovementioned judgements from the Polish Constitutional Tribunal.[39]

[34] See German Federal Constitutional Court (BVerfG) judgment of 22 October 1986 2 BvR 197/83 *Solange II* p. 375; BVerfG judgment of 8 April 1987 2 BvR 687/85 *Kloppenburg-Beschluß* p. 244; BVerfG judgment of 12 October 1993 2 BvR 2134 *Treaty of Maastricht* p. 188; BVerfG judgment of 30 June 2009 2 BvR 1010 *Treaty of Lisbon* p. 399; BVerfG judgment of 19 July 2011 1 BvR 1916/09 *Anwendungserweiterung* p 98; BverfG decision of 13 February 2020 BvR 739/17 *Einheitliches Europäisches Patentgericht* para.115; BVerfG judgment of 5 May 2020 2 BvR 859/15 *PSPP* p. 151 para. 234; BVerfG decision of 27 April 2021 2 BvR 206/14 *Tierarzneimittel* para. 38.

[35] BVerfG decision of 22 November 2001 2 BvB 1, 2, 3/01 *NPD-Verbotsverfahren I/Vorabentscheidungsersuchen* p. 219: "There is no general binding of the Member States to the constitutional provisions of Union and Community law" references omitted, author's translation; BVerfG *Treaty of Lisbon* cit. p. 397: "The values of Art. 2 TEU-Lisbon, which are already partly contained as principles in the current art. 6 (1) TEU, do not provide the European integration association with any competence, so that the principle of limited individual authorisation continues to apply in this respect as well".

[36] *Euro Box Promotion and Others* cit. para. 215.

[37] *Ibid*. para. 225. Para. 224 emphasises an external aspect (full autonomy, absence of hierarchical subordination and de facto pressure from third parties) and an internal aspect (impartiality through objective distance from the parties to the dispute).

[38] *Ibid*. para. 232-237: no substantiated evidence that judgments of the Constitutional Court would have been handed down in a context that would give rise to reasonable doubts.

[39] Polish Constitutional Tribunal K 3/21 cit. and judgment K 6/21 cit.; European Commmission, *Rule of Law: Commission launches infringement proceedings against Poland for violations of EU law by its Constitutional Tribunal* (22 December 2021) ec.europa.eu; the infringement proceedings against the Federal Republic of

III. Reconceptualizing Unrestricted Primacy

The Court could have left the remaining questions about the principle of primacy unanswered for several reasons.[40] Immediately before, it found a separate examination of art. 47(2)(1) CFR to be unnecessary in view of the results already achieved through art. 2 and 19(1)(2) TEU (cf. section II.2, last paragraph). A reference to the principle of primacy was also already made, during the remarks on art. 325(1) TFEU, art. 2 PFI Convention and Decision 2006/928.[41] Moreover, the fact that primacy, as read by the ECJ, precludes

> "legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or the the second subparagraph of art. 19 (1) TEU"

was underlined by the Grand Chamber – precisely regarding the Romanian Constitutional Court – just before, in May 2021.[42] In other words: another engagement just seemed redundant. The nevertheless started attempt to resolve the open question of "final authority"[43] with – for the first time since *Costa/ENEL* – new arguments in favor of unrestricted primacy, turns out to weaken the concept as such.

III.1. The traditional basis

The starting point marks familiar ground. The Grand Chamber states, "in its settled case-law on the EEC Treaty, the Court has previously *held* that, unlike standard international treaties, the Community Treaties established a *new* legal order, which is integrated into the legal systems of the Member States on the entry into force of the Treaties and which are binding on their courts".[44] The second emphasis here is to indicate that formulations from the sem-

Germany concerning the BVerfG's *PSPP* judgment, on the other hand, were discontinued about three weeks before the Grand Chamber issued its judgment, European Commission, *December infringements package: key decisions* ec.europa.eu.

[40] *Euro Box Promotion and Others* cit. para. 68, question 3, concerning preliminary reference C-357/19, para. 103, question 3 concerning preliminary reference C-811/19 and para. 111, question 3 concerning preliminary reference C-840/19; the questions in para. 68 and 111 are as follows: "Must the primacy of Europe Union law be interpreted as permitting a national court to disapply a decision of the constitutional court delivered in a case relation to a constitutional dispute, which is binding under national law?".

[41] Explicitly *Euro Box Promotion and Others* cit. para. 212.

[42] *Asociația "Forumul Judecătorilor din România"* cit. para. 252.

[43] On it cf. C Calliess and A Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 348 and 357.

[44] *Euro Box Promotion and Others* cit. para. 245.

inal *van Gend en Loos* and *Costa/E.N.E.L.* judgments are taken up, albeit other language versions are more clear in combining them.[45] The first emphasis is intended to underline that the Court itself assumes an act of judicial decisionism which it continues not to underpin with legal-historical material because the latter provides equivalent evidence for other classifications of the Treaties.[46] The traditional starting point tips near circular reasoning when it finally states: "Thus, in the judgment of 15 July 1964, Costa [...], the Court laid down the principle of the primacy of Community law, which is understood to enshrine the precedence of Community law over the law of the Member States."[47]

Judicially developed primacy justifies precedence, one reads, unconvincingly, with the French version using *primauté* and *prééminence* while the German version doesn't distinguish terminologically at all, strengthening the impression of circularity even more.[48] Beyond semantic subtleties,[49] the void of a sustainable justification remains, as historical classifications showed early on.[50] The postulate of *unrestricted* primacy remains, at this level of reasoning, the central normative dogma of the Union legal order – you either believe or not.

This view is supported by the classic reference to the *consequences* of divergent views (*lex posterior*-principle, imminence of legal fragmentation)[51] – a problem no less familiar in international law, which has its own claim of "supremacy" (art. 27 Vienna Convention on the

[45] Cf. in the cited cases *Van Gend en Loos* ("new legal order of international law") and *Costa/E.N.E.L.* ("own legal system") and compare the more combining German and French version of *Euro Box Promotion and Others* cit. para. 245, emphasis added: "*neue eigene Rechtsordnung*" and "*un nouvel ordre juridique propre*" ("new own legal order").

[46] For a division of those involved in the integration process into "delegations and federal constitutionalists" see F Schorkopf, 'Value Constitutionalism in the European Union' cit. 957-958; for a differentiation into "federal constitutionalists", "traditionalists" and representatives of a "structural congruence" see B Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context' (2015) ELJ 434, 441-456; according to H Delfs, *Komplementäre Integration* (Mohr Siebeck 2015) 324-327, the lines of argumentation of the ECJ and the BVerfG both partly contradict the history of the origins of the Treaties of Rome in terms of European law.

[47] *Euro Box Promotion and Others* cit. para. 246.

[48] *Ibid*. in the respective language versions, the German translation goes: "Somit hat der Gerichtshof im Urteil vom 15. Juli 1964, Costa [...], den Grundsatz des Vorrangs des Gemeinschaftsrechts entwickelt, der den Vorrang dieses Rechts vor dem Recht der Mitgliedstaaten begründet".

[49] For attempts to sort the differing terminology see M Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' (2011) ELJ 744-754; T Tuominen, 'Reconceptualizing the Primacy–Supremacy Debate in EU Law' (2020) Legal Issues of Economic Integration 245, 246-249.

[50] Exemplary voices in F Weber, 'Überstaatlichkeit als Kontinuität und Identitätszumutung' cit. fn 54 at p 249 fn 54.

[51] *Euro Box Promotion and Others* cit. para. 246; U Haltern, *Europarecht Band II* (Mohr Siebeck 2017) para. 1275: "functional necessity" (author's translation).

Law of Treaties), only without the special normative expectation of self-enforcing precedence, as contained in Union law's primacy-principle.[52] The only difference, according to the ECJ's reasoning, lies in the assertion that Union law *has been incorporated by* the Member States *into* their legal systems, *i.e*. is an integral part of them, has somehow taken a place similar to a hierarchy, which is why national law is subordinate in unavoidable collisions. In other words, the primacy of Union law lives from a certain perception of federal unity, which must be believed because it can, to this day, only be weakly substantiated from the treaties.[53] This belief is difficult to achieve in its absoluteness because the incorporation-postulate *into* the legal systems of the Member States isn't free from contradictions when taking into account older and more recent decisions on the concept of autonomy, *i.e*. the independence of Union law *vis-à-vis* national law and international law alike.[54] If the jurisprudence boils down to an outwardly dualistic, inwardly monistic approach[55] the ECJ doesn't do much different than national constitutional courts in federal *states*.

The Court's subsequent attempt to establish a firm connection between constitutional semantics,[56] which it underlaid the Treaties itself, and the principle of primacy, doesn't match either. Constitutional semantics found their way into case law in 1977 at the latest, independently of the principles of direct applicability and primacy.[57] Their conflation is a later product of the Court's jurisprudence. The traditional line of reasoning

[52] M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 369, para. 12: "Article 27 expresses the principle that on the international level international law is supreme. [...] this has less to do with any monist v. dualist doctrinal victory than with the practical function of the provision to support *pacta sunt servanda*. Indeed, any other rule would undermine the performance of treaties"; K Schmalenbach, 'Article 27' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2018) 493, para. 16: "Art. 27 does not prohibit invoking internal law *stricto sensu* but declares the objection legally irrelevant for the purpose of Art. 26. In other words: deviating internal law is not internationally recognized as a valid justification for non-performance" (emphasis in the original).

[53] Cf. R Dehousse, *The European Court of Justice* (Palgrave 1998) 38: "[...] Court derived its judgment from the objectives of the treaty, as set out in the preamble and the institutional structure of the Community. [...] The textual arguments offered to justify its conclusion are rather vague"; A Stone Sweet, 'Constitutional Dialogues in the European Community' in AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) 305 and 308: "In declaring the doctrines of supremacy and direct effect, the Court had, after all, radically rewritten the Treaties (the Treaties contain neither supremacy clause nor textual support for the direct effect of Treaty provisions and directives)".

[54] *Euro Box Promotion and Others* cit. para. 247, referring to Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 170; for an older decision, see case C-13/61 *De Geus en Uitdenbogerd v Bosch and Others* ECLI:EU:C:1962:11 para. 47 ff.: national law and Community constitute "two separate and distinct legal orders".

[55] A Bergmann, *Zur Souveränitätskonzeption des Europäischen Gerichtshofs* (Mohr Siebeck 2018) 198.

[56] Opinion 1/91 *Accord EEE* ECLI:EU:C:1991:490 para. 21.

[57] The adoption of constitutional semantics did not begin, as is regularly assumed, with case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166 para. 23 ("basic constitutional Charter"; on the French version and the reduced meaning of "charte constitutionelle" see C Möllers, 'Pouvoir Constituant–Constitution–Constitutionalisation' in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart CH Beck Nomos 2010) 169, 189-190), but with Opinion 1/76 *Laying Up-Fund* ECLI:EU:C:1977:63 *ECR* 741, in which the

thus appears shaky overall. Maybe it is this – for decades repeated but in its absoluteness in the end unconvincing – baseline of argumentation that fuelled the Court's motive to add additional arguments with a view to the increasing rule of law-crises.

III.2. First addition: elements of international law to strengthen primacy?

The recourse to international law-patterns to substantiate the *special* features of Union law which distinguish it from the former is already remarkable in its constructive design. The Grand Chamber adopts an argument which was formulated by President Lenaerts in 2020, in the wake of the German Federal Constitutional Court's PSPP ruling.[58] According to it, the Member States themselves confirmed the special features of the Union legal order the Court repeatedly "held" for two reasons: firstly, "by the ratification, without reservation, of the Treaties amending the EEC Treaty", and secondly – argumentatively separated ("and") – "in particular the Treaty of Lisbon", because the conference of representatives of the Governments of the Member States "was keen to state expressly, in its Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [...] that, in accordance with settled case-law of the Court, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States, under the conditions laid down by that case-law".[59]

This addition stands in fundamental contradiction to the traditional starting point mentioned above. The thesis that, with the entry into force of the Treaties of Rome "unlike standard international treaties, the Community Treaties established a new legal order, which is integrated into the legal systems of the Member States"[60] is incompatible with a later reservation of recognition. The justification switches from a transformative postulate to a "delegationist reading", according to which everything is open until the ratification of the first amendment treaty and thus – classic international law – dependent on the behavior of the contracting parties. This weakens the Court's own starting point. Additionally, the Grand Chamber must ignore striking aspects of integration history that point to the opposite direction, like the proposal to include a primacy clause vis-à-vis national constitutional law in the Merger Treaty drawn up in 1965.[61] That didn't happen. The

impairment of the structure and tasks of the institutions by an international treaty was regarded, with reference to the Treaty's preamble and art. 3 ff. EEC, as incompatible with "the constitution of the Community" (in French "la constitution de la Communauté"; in the reasoning *ibid*. para. 12, only "internal constitution"/"constitution interne").

[58] K Lenaerts, 'No Member State is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) Verfassungsblog verfassungsblog.de, 11 days before an ECJ delegation visited the BVerfG in Karlsruhe.

[59] *Euro Box Promotion and Others* cit. para. 248; *RS* cit. para. 49.

[60] *Euro Box Promotion and Others* cit. para. 245.

[61] M Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten' (1971) Jahrbuch des öffentlichen Rechts 1, 30-32, referring to H Lesguillons*, L'Application d'Un Traité-Fondation: Le Traité Instituant La C.E.E.* (Pichon&Durand-Auzias 1968) 279-282; conversely, Ernst Wohlfarth, *inter*

attempts of the Commission and the European Parliament to promote a constitutional reading of the treaties rather prove that there was no acceptance.[62] Instead, the ratification of the Merger Treaty was linked with the Luxembourg compromise in order to mark a boundary against such extensive ideas.[63]

If one nevertheless follows the Court's line of argumentation experimentally, the recourse to Declaration No. 17 would become superfluous. Unrestricted primacy would already have become a legal reality through lack of opposition from the Member States, in the terminology of international law *acquiescence*.[64] Another circumstance proves to be decisive. To make its result appear plausible, the Grand Chamber has to ignore the supremacy clause provided for in the Treaty establishing a Constitution for Europe (TCE), which was not only limited to the "competences conferred on it", *i.e*. the Union (arts I-6 TCE), but dropped for the Lisbon Treaty. Only setting this aspect aside enables the Court to conceal that it, despite the obvious lack of political will of the actors referred to, the governments, to introduce a *limited* primacy clause at all, imputes the political will to accept *unlimited* primacy of Union law.[65] In international law, to remain on the level entered into by the Court, such a move would appear as an ineligible attempt to rewrite a treaty

alia a member of the drafting group of the Treaties of Rome, argued in a commentary on the EEC Treaty that there was no reservation in favour of member state constitutional law in the Treaties; on this cf. H Delfs, *Komplementäre Integration* cit. 324-327.

[62] H von der Groeben, 'Walter Hallstein as President of the Commission' in W Loth, W Wallace and W Wessels (eds), *Walter Hallstein: The Forgotten European?* (Palgrave Macmillan 1998) 95, 104; P Bajon, 'Renaissance eines "vergessenen Europäers". Erinnerungen an Walter Hallstein' in M Bachem-Rehm, C Hiepel and H Türk (eds), *Teilungen Überwinden* (De Gruyter 2014) 481, 487; L van Middelaar, 'Spanning the River: The Constitutional Crisis of 1965–1966 as the Genesis of Europe's Political Order' (2008) EuConst 98, 110, 117-118; instructive J White, 'Theory Guiding Practice: The Neofunctionalists and the Hallstein EEC Commission' (2003) JEIH 111, 123-130; A Vauchez, *Brokering Europe* (Cambridge University Press 2015) 43-56, 79, especially 135-138, 144-146 and 177-180; M Rasmussen and D Sindbjerg Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies' (2019) ELJ 251, 257-270.

[63] Cf. JM Palayret, 'De Gaulle Challenges the Community: France, the Empty Chair Crisis and the Luxembourg Compromise' in JM Palayret, H Wallace and P Winand (eds), *Visions, Votes and Vetoes* (Peter Lang 2006) 45, 49, 62-66, 72-77; NP Ludlow, 'De-Commissioning the Empty Chair Crisis: The Community Institutions and the Crisis of 1965-66' in JM Palayret, H Wallace and P Winand (eds), *Visions, Votes and Vetoes* cit. 79, 84-86; NP Ludlow, *The European Community and the Crises of the 1960s* (Routledge 2007) 120-123.

[64] On this figure as a special form of recognition MN Shaw, *International Law* (Cambridge University Press 2017) 66-68; W Heintschel von Heinegg, 'Ungültigkeit von Verträgen und Fortfall der Vertragsbindung' in K Ipsen, *Völkerrecht* (C H Beck 2019) ch. 18, para. 109.

[65] Art. I-6 TCE 1; the clause would thus have contributed nothing to the problem of "final authority" when it comes to the vertical delimitation of competences, cf. Conseil Constitutionnel decision of 19 November 2004 n. 2004-505 DC *On the Treaty Establishing a Constitution for Europe* para. 12-13; E Di Salvatore, 'The Supremacy of European Law in the Treaty Establishing a Constitution for Europe in the Light of Community Experience' in HJ Blanke and S Mangiameli (eds), *Governing Europe under a Constitution* (Springer 2006) 375, 377; cf. also U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving them: The Relationship between the Court of Justice of the European Union and the German Federal Constitutional Court' (2021) I-Con 208, 223.

by one of its organs, moreover one of the most thinly democratically equipped ones.[66] Finally, declarations can only be used as an instrument to interpret *agreed* norms (art. 31(2)(a) VCLT),[67] not to enforce *postulated* contents of an unwritten norm on which the treaties are deliberately silent after the failure of the TCE.

The literature repeatedly highlighted why the ECJ's jurisprudence wasn't opposed by the governments, which had long been the decisive actors in the Council. It was supportive in preserving and enforcing hard-won compromises on secondary law,[68] without accepting unrestricted primacy.[69] Exempting Member State executives from constitutional obligations in this multi-level game was just as little intended as the abandonment of the concept of understanding the autonomy of Union law as granted and guaranteed, taking place within a delegated framework. For the German Federal Constitutional Court, this dialectical harmony of support and reservation can be traced back to the decisions from the Second Senate from July 1967 and the First Senate from October 1967, the year the Merger Treaty came into force – more than three years before the extension of the primacy claim over national constitutional law.[70] While the Second Senate considered a review of secondary law and primary law via the German treaty ratification-act to be permissible under the Basic Law, the First Senate recognized the autonomy of Union law *in the delegated framework*.[71]

[66] Contrasting J Klabbers, *An Introduction to International Organizations Law* (Elgar 2015) 63; LE Popa, 'The Holistic Interpretation of Treaties at the International Court of Justice' (2018) ActScandJurisGent 249, 317: "It is to be reminded that the application of the effectiveness principle aids the interpreter to identify *what the parties to a treaty have agreed, and not what the interpreter thinks that they should have agreed*" emphasis in the original.

[67] Declarations don't fall under the ambit of art. 51 TEU; on the above cf. O Dörr, 'Art. 51' in E Grabitz, M Hilf and M Nettesheim, *Das Recht der Europäischen Union* (C H Beck 70th supply May 2020) para. 5; O Dörr, 'Article 31' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* cit. para. 63 ff.

[68] P Craig, 'EU Membership: Formal and Substantive Dimensions' (2020) CYELS 1, 17: "Normative supranationalism, fuelled through direct effect, helped to prevent the stagnation of Community law during the period of Community malaise, when decisional supranationalism, through the Council, was difficult"; JHH Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403, 2425; U Haltern, *Europarecht Band II* cit. para. 1060.

[69] R Dehousse, *The European Court of Justice* cit. 142; see also A Jakab, *European Constitutional Language* (Cambridge University Press 2016) 114-116.

[70] Case C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114 para. 3; M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* cit. chapter 121 para. 20: "The doctrine of primacy, which the Court of Justice established as early as 1964 in Costa v. ENEL, did not require a direct reaction on the part of the constitutional courts. The obligation established by the ECJ concerned only the ordinary national courts, which, following that decision, no longer had to apply domestic law contrary to Community law" (author's translation).

[71] In response to a referral order from a lower court of November 1963 BVerfG decision of 5 July 1967 2 BvL 29/63 *EWG-Recht* 146, 152; BVerfG decision of 18 October 1967 1 BvR 248/63 *EWG-Verordnungen* 296: "The EEC Treaty constitutes, as it were, the constitution of this Community. The legal provisions enacted by the Community institutions *within the framework of their competences under the Treaty*, the 'secondary Community law', form a legal order of their own, the norms of which are neither international law nor national law of the Member States", emphasis added, author's translation.

Lower court classifications were observed in detail.[72] The line of jurisprudence has since been continued,[73] and in mutual stimulation with the ECJ.[74] The conceptual middle way of "relative autonomy" can also found in other Member State legal systems.[75]

By focusing on the executives, the Court attempts to lever its normative objective with an alleged pattern of argumentation from international law that focuses on executive acts in addition to acts of ratification. However, the equation of Member States with their governments has long been rejected, and rightly so, because it fails to capture the complexity of the Union legal order.[76] For decades, national high courts and constitutional courts have been involved in its dynamics,[77] controlling executive activities. Treaty law itself in numerous places recognizes that the member states, thus their institutions,

[72] For an analysis of the decision of the Rhineland-Palatinate Regional Court (Neustadt a. d. Weinstraße) leading to BVerfG *EWG-Recht* cit. and in comparison with other Member State's innerjudicial processes in this regard cf. H Lesguillons, *L'Application d'Un Traité-Fondation: Le Traité Instituant La C.E.E.* cit. 234-244.

[73] BVerfG judgment of 29 May 1974 BvL 52/71 *Solange I* 279, 281; *Solange II* cit. 375; *Kloppenburg-Beschluß* cit. 242; *Treaty of Maastricht* cit. 182-184; *Treaty of Lisbon* cit. 346, 381; BVerfG judgment of 6 July 2010 2 BvR 2661/06 *Honeywell/Mangold* 301-305; BVerfG judgment of 15 December 2015 2 BvR 2735/14 *Identitätskontrolle* 335; BVerfG judgment of 6 November 2019 1 BvR 276/17 *Right to be forgotten II* 235; *PSPP* cit. 90-93; BVerfG judgment of 1 December 2020 2 BvR 1845/18 *Romania II* 199.

[74] For the protection of fundamental rights B Davies, '*Internationale Handelsgesellschaft* and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 157, 158: "The miscalculation rested on the misperception that the German judiciary would happily accept the extension of the supremacy of Community law over national constitutional principles and structures that *Internationale* proposed. In fact, the German Constitutional Court (BVerfG) rejected the *Internationale* doctrine when the lower national court, here the Frankfurt Administrative Court, re-referred the case within its domestic hierarchy after receiving the ECJ's opinion in 1970". And *ibid*. 176: "If pursuing 'ever closer union' had become a key part of the ECJ's identity, then equally safeguarding the national constitutional rights catalogue was the BVerfG's equivalent"; see also M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 42 fn 64; on the *Kloppenburg-Beschluß* see U Haltern, *Europarecht Band II* cit. para. 1111-1116.

[75] The term "*relative Autonomie*" is borrowed from H Delfs, *Komplementäre Integration* cit. 326; for comparative perspectives see M Claes, 'Constitutionalizing Europe at its Source: The "European Clauses"' in the National Constitutions: Evolution and Typology' (2005) YEL 81, 107; M Wendel, *Permeables Verfassungsrecht* (Mohr Siebeck 2011) 401 ff.; J Masing, 'Verfassung im internationalen Mehrbenensystem' in M Herdegen and others (eds), *Handbuch des Verfassungsrechts* (CH Beck 2021) ch. 2, para. 101-105; U Haltern, *Europarecht Band II* cit. para. 1260-1279.

[76] In the context of the former art. 235 EEC Treaty cf. JHH Weiler, 'The Transformation of Europe' cit. 2452: "The general assumption that unanimity sufficiently guarantees the Member States against abusive expansion is patently erroneous. First, it is built on the false assumption that conflates the government of a state with the state".

[77] U Haltern, *Europarecht Band II* cit. para. 1081: "Since 1967, the argumentation to conceptualise the national consent law as a decisive legal application order and ground of validity in the sense of the 'bridging theory' has been a topos that runs like a red line through the jurisprudence of the BVerfG (and other national courts [...])" (author's translation).

are bound by their constitutional rules.[78] The fact that reactions of member state constitutional courts have been priced in beforehand[79] turns the targeted reduction of the chosen perspective into an easy to see through self-constraint.

The German Federal Constitutional Court's assessment of Declaration No. 17 underlines the contrast. It emphasizes that a declaration, made by the executive after the deliberate deletion of an initially envisaged and *limited* primacy clause, can in no way support the reversal of the vertical constitutional architecture of the Union.[80] In other words, references to Declaration No. 17 in order to push through unrestricted primacy are irrelevant since the Lisbon decision, *i.e*. *before* the Amendment Treaty entered into force. The ratification act doesn't change the location of the declaration outside the treaty framework either (art. 51 TEU).[81] From this point of view, invoking it only contrasts a divergence in normative evaluation. Constitutionally, the ECJ, if its argumentation were to be taken seriously, would step outside the framework of constitutional authorization carrying art. 19 TEU.[82] This is made clear by another consideration: if the German Parliament cannot grant the Union blanket authorizations for constitutional reasons, the executive cannot give the ECJ *carte blanche* on the scope of the primacy doctrine by means of a simple declaration in the first place.[83]

[78] This is already mentioned by M Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten' cit. 30; today cf. art. 48(6), art. 49 and art. 42(2)(3) TEU; art. 218(8), 262, 311(3) TFEU and Recital 1 of Protocol No. 1 on the role of national parliaments in the European Union [2012].

[79] On the position of ECJ Judge Alberto Trabucchi, who was involved in the *van Gend en Loos* case, see M Rasmussen, 'Law Meets History: Interpreting the *Van Gend en Loos* Judgment' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 103, 116: "He advised that the primacy of European law should wait 'pour le moment' because of the constitutional difficulties this would impose on Italy and Germany".

[80] BVerfG *Treaty of Lisbon* cit. 401-402: "In this respect, it is insignificant whether the primacy of application, already recognised for Community law [...] is provided for in the Treaties themselves or in Declaration No. 17 annexed to the Final Act to the Treaty of Lisbon. [...] As regards public authority exercised in Germany, the primacy of application only reaches as far as the Federal Republic of Germany approved this conflict of law rule and was permitted to do so", references omitted; BVerfG decision of 23 June 2021 2 BvR 2216/20 *Eilanträge EPGÜ-ZustG II* para. 76: "Neither the Treaty on European Union nor the Treaty on the Functioning of the European Union contain an express guarantee specifying the precedence of application (*Anwendungsvorrang*) accorded to EU law. [...] there was no agreement among the contracting parties to expressly recognise an absolute and unconditional precedence in this respect. [...] It was on this basis that Member States had no constitutional objections to Declaration No. 17", references omitted.

[81] Cf. the differentiation in the Act Approving the Amendment Treaty, its two protocols, eleven further protocols and the "adopted declarations", which are divided into joint and unilateral ones, art. 1 Sentence 1 of the Act on the Treaty of Lisbon of 13 December 2007, Bundesgesetzblatt 2008 II, 1038 and 1147 ff.

[82] On this BVerfG *PSPP* cit. 92-96.

[83] Cf. BVerfG judgment of 30 July 2019 2 BvR 1685/14 *European Banking Union* 288 para. 121 with further references; the Federal Government relativises Declaration No. 17 by citing the BVerfG's case law itself in the Explanatory Memorandum to the Second Act Approving the European Patent Court Agreement, cf. Bundestags-Drucksache 19/22847 of 25 September 2020, 10.

An interim result can be noted: the invocation of Declaration No. 17 remains coupled to divergent understandings of Union law's ground of validity (*Geltungsgrund*) and must be rejected as a strategic argument. The recourse (or relapse) to international law-patterns tries to decide a complex problem, the deliberate non-decision on the vertical constitutional architecture between Union and member states, with an auxiliary argument under international law, although, according to the ECJ, this legal order has dedicated itself precisely to the ambition of being more than a "standard" organization under international law.[84] The reference to an "empirical and normative reality of the European Union today" doesn't add a legal argument but describes *one* holistic perception of the problem in general.[85]

III.3. Second supplement: equality through primacy, subordination through self-obligation

Slightly downgraded in its intended weight ("It must be added") follows a second addition which also upgrades a presidential argument to a position of the Court.[86] It reads: the Union can respect the "equality of the Member States before the Treaties" as laid down in art. 4(2)(1) TEU besides their national identity "only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature".[87]

The reasoning is stunning. Even in the Court's own jurisprudence (at least so far), primacy does not rule out non-compliance with Union law, triggering infringement proceedings, just as a breach of obligations under international law leads to state liability. Art. 4(2), first sentence, TEU formulates a duty, incumbent on all *Union organs*, to respect the equality of the Member States before the Treaties. The obligation is not dependent on the absence of unilateral deviations by Member State institutions. The Grand Chamber does not establish a connection. Thus, it remains unclear how Union institutions can be prevented from *their* legal duty to respect the equality of Member States by unilateral acts of the latter. If one applies the criteria of direct effect to this obligation – clear and precise wording, unconditionality – one is led to the conclusion that the Grand Chamber puts an additional condition into the norm that is neither visible in its wording nor plausibly extractable methodologically. The Grand Chamber just puts its desired outcome – the acceptance of unrestricted primacy – into an *unconditional* legal obligation directed at *Union organs*. Explanations on the understanding of equality would have been helpful

[84] Cf. the distinction from international treaties which "only" pursue the application of free trade and competition rules in Opinion 1/91 cit. paras 16-18.

[85] Quote from R Schütze, 'Models of Demoicracy: Some Preliminary Thoughts' (EUI Working Papers LAW 2020/08) 20, as well as 50; cf. A Bobić, 'Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU' (2020) CYELS; U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 212-215.

[86] K Lenaerts, 'No Member State is More Equal than Others' cit.

[87] *Euro Box Promotion and Others* cit. para. 249.

at this point, but are likely to have been omitted because it would have become clear that the violation of Union law by unilateral deviations is simply to be addressed by infringement proceedings.[88] Only by omitting this can the two-sentence passage, which doesn't include further references, conceal the fact that the Grand Chamber plays a rhetorical ploy to assert its understanding of primacy through the principle of equality by *one* of the legal systems involved: equality through primacy as *the* normative reality of Union law but only *one* normative reality in the *Verbund*.[89]

If one further thinks about the brief passage, the formula reads: the unconditional acceptance of primacy is the only way to enable the Union institutions to respect the equality of the member states. What is needed is an act of treaty-fulfilling subordination which the Federal Republic of Germany (for example), according to the German Federal Constitutional Court, isn't even capable of for constitutional reasons.[90] Until this happens, *argumentum e contrario* and in view of the various constitutional reservations of the highest courts of the member states, a continued state of self-inflicted inequality – up to this point – floats in the normative realm of Union law, as read by the ECJ. The fact that the fulfilment of a legal obligation by Union organs can be made impossible by the Member States *normatively* is, as far as one can see, a singular finding.

A step back from this unconvincing equation of unity (through primacy) with equality lets the deeper fundament of primacy's fragile validity shine through: the political will of its legal normativity.[91] The Court can demand value convergence and unrestricted primacy without being able to guarantee them as quasi-constitutional prerequisites (*Verfassungsvoraussetzungen*) of the Union legal order's specialty or even supplement political communities that have to support it.[92]

[88] Precisely this argumentation can therefore, since decades, be found in infringement proceedings: case C-39/72 *Commission v Italy* ECLI:EU:C:1973:13 para. 24-25.

[89] A Bobić, 'Constructive Versus Destructive Conflict' cit. 65: "However, the position of the Court of Justice as the 'high federal court' in the EU is but one reality; national courts performing constitutional review have developed a reality of their own, supported by jurisprudence that at times outright contradicts that of the Court of Justice. Thus, federalism cannot capture the EU without being stretched beyond recognition".

[90] BVerfG *Treaty of Lisbon* cit. 401-402, decision of 23 June 2021 2 BvR 2216/20 *Eilanträge EPGÜ-ZustG* II para. 76.

[91] Cf. JHH Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*' in K Nicolaidis and R Howse (eds), *The Federal Vision* (Oxford University Press 2001) 54, 68: "They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities. [...] When acceptance and subordination is voluntary, and repeatedly so, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance".

[92] Cf. J Bast and AK Thiruvengadam, 'Origins and Pathways of constitutionalism' in P Dann and A Thiruvengadam (eds), *Democratic Constitutionalism in India and the European Union* (Elgar 2021) 75, 102: "It is difficult to predict in which direction the Rule of Law Crisis in the EU will develop; a short-term solution is not in sight. As of now, it has not caused an institutional crisis at the EU level but it demonstrates the

III.4. Conclusion: "normed" primacy as a result of selective listening

A procedural consequence is also noteworthy. The Court treats the principle of primacy, on the basis of the questions referred,[93] not just as a constitutive element of Union law's supranationalism, a characteristic of its norms, but as a norm that can be referred itself.[94] Every court in the Member States can thus submit questions on primacy as such. Together with the value-jurisprudence, which already extends into Member States' spheres of competence, this – from the perspective of the German Federal Constitutional Court – leads to a detachment from the constitutional command which legitimizes the application of Union law in the first place.[95] For it is "ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law; that scope cannot turn on the interpretation of provisions of EU law by a national court which is at odds with that of the Court".[96] More clearly than before, the ECJ builds a loyalty bridge to the courts of instance, equally bypassing supreme courts that are deformed contrary to the rule of law as well as constitutionally impeccably composed courts that are just dogmatically recalcitrant. In this way, it will surely be avoided that deranged constitutional systems and "constitutional courts operating as an arm of the executive" of the Member States can influence and partake in shaping the content of the values enshrined in art. 2 TEU and, through them, the entire Union legal order.[97]

But can this closing figure for the benefit of European constitutional law claim legitimacy? And how does the German federal government's executive promise to do everything

extent to which the supranational project relies on *constitutional preconditions* at the national level which the EU itself, let alone its Court, cannot ensure." (emphasis added); see also C Möllers, *The European Union as a democratic federation* (Klaus Bittner 2019) 124-128.

[93] *Euro Box Promotion and Others* cit. para. 68, 103 and 111.

[94] *Ibid*. para. 263: "In the light of all the foregoing considerations, the [...] question[s] [...] must be answered to the effect that [...] the principle of primacy of EU law is to be interpreted as [...] "; this is relatively new, for example case C-585/18 *A.K.* ECLI:EU:C:2019:982 para. 171; case C-824/18 *A.B.* ECLI:EU:C:2021:153 para. 150; *Asociația "Forumul Judecătorilor din România"* cit. para. 252; case C-920/19 *Fluctus s.r.o. and Others* ECLI:EU:C:2021:395 para. 60; case C-439/19 *Latvijas Republikas Saeima* ECLI:EU:C:2021:504 para. 137; case C-107/19 *Dopravní podnik hl. m. Prahy* ECLI:EU:C:2021:722 para. 49; case C-360/20 *Ministerul Lucrărilor Publice, Dezvoltării şi Administraţiei* ECLI:EU:C:2021:856 para. 40; previously cf. case C-573/17 *Popławski* ECLI:EU:C:2019:530 para. 109; case C-378/17 *Minister for Justice and Equality ECLI:*EU:C:2018:979 para. 52; case C-409/06 *Winner Wetten GmbH* ECLI:EU:C:2010:503 para. 69.

[95] BVerfG *Solange II* cit. 375; *Kloppenburg-Beschluß* cit. 244; *Treaty of Maastricht* cit. 188; *Treaty of Lisbon* cit. 399; *Anwendungserweiterung* cit. 98; PSPP cit. 151 para. 234; *Einheitliches Europäisches Patentgericht* cit. para. 115; *Tierarzneimittel* cit. para. 38.

[96] *Euro Box Promotion and Others* cit. para. 254.

[97] A v Bogdandy, C Grabenwarter and PM Huber, 'Verfassungsgerichtsbarkeit im europäischen Rechtsraum' in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* cit. ch. 126, para. 42-43 (author's translation).

in its power to prevent future *ultra vires* findings by the BVerfG relate to this goal?[98] Even if it must not to be read as, in the event of another conflict, announcing a *packed court*, cleansed of dogmatic uncomfortable figures, quandaries remain which are attributable to the ECJ's unrestricted primacy claim.

The aim of this section was to make the Grand Chamber's statements visible as the result of a (very) selective listening. The meaning of constitutional reservations from impeccably composed constitutional or high courts, embedded in functioning constitutional states, remains alien to the ECJ. The idea that every power exercising institution needs balancing counterweights is relegated to the background – although it is indisputable that the Union's legal order is not self-sustaining.[99] Unsuspicious Governments rely heavily on the ECJ, and the Court can be sure of their support. A picture in need of balancing accompaniment by other unimpaired high courts cannot paint itself any clearer.

IV. Conclusion: Union Law's Identity Between Dialogical Crisis Containment and Constitutional Monologue

No one can dislike the Court for defending the Union legal order against interventions from judicial bodies under political influence or in the state of institutional dismantling. The Grand Chamber succeeds with ease in this case due to Romania's commitments

[98] On 2 December 2021, the Commission closed the infringement proceedings against the Federal Republic of Germany because of the *PSPP* ruling of the Federal Constitutional Court, *inter alia*, for the following reason: "Third, the German government, explicitly referring to its duty of loyal cooperation enshrined in the Treaties, commits to use all the means at its disposal to avoid, in the future, a repetition of an 'ultra vires' finding, and take an active role in that regard" cf. European Commission, *December infringements package: key decisions* cit.; the transmission of such a formulation is denied by the Federal Government with reference to Declaration No. 17 and the possibility of *ultra vires* findings by the BVerfG in Bundestags-Drucksache 20/290 of 17 December 2021, 10-11; cf. also Bundestags-Drucksache 20/658 of 14 February 2022, 2.

[99] On the idea of an institutional counterweight U Haltern, *Europarecht Band II* cit. para. 1042; the fact that constitutional reservations with regard to European integration *can* lead to a restraint in policy-making - M Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' (2021) EPL 465, 475-476: "In fact, the fog of identity unduly constrains the democratic process with regard to European integration in the basis of a provision that had once been framed in order to prevent a backslide into dictatorship" – is not a phenomenon limited to European policy and would have to be consistently brought into play against any constitutional court's cassation competences. The regularly cited aim of art. 79(3) Basic Law to protect against executive totalitarianism within the country, which is undoubtedly correct in terms of drafting history, also ignores its role in the integration process. The norm was regarded as limiting the influence of Community law early, cf. H Delfs, *Komplementäre Integration* cit. 326-327; according to K Zweigert, 'Der Einfluss des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten' (1964) RabelsZ 601, 640 fn 134, the restriction of art. 24(1) Basic Law by the eternity clause was the prevailing doctrine, which proves not more than the Basic Law also is a "living constitution" whose norms, like the primary law of the Union or the law of the ECHR, develop contextually. Dynamic-transformative changes are, in other words, not a privilege reserved for inter- and supranational legal orders; cf. S Baer, 'Wie viel Vielfalt garantiert/erträgt der Rechtsstaat?' (2013) RuP 90, 91: "Article 79 (3) GG sets substantive limits to transnational norm pluralism" (author's translation).

made upon accession. Criticism of dogmatic constructions such as "value constitutionalism"[100] or reasoning for unrestricted primacy, on the other hand, is part of a European legal scholarship that retains a critical perspective notwithstanding crises and thinks beyond individual cases, to which dogmatic constructions are always limited initially.[101]

The ECJ's case law can certainly be read as the judicial development of a constitutional core laid down in art. 2 TEU.[102] Assuming that the multiple rule of law problems will be managed, the more stimulating question is that of the identity of the legal systems involved. The Court recently spoke of the Union's values as an "integral part of the very identity of the European Union as a common legal order".[103] Member state's constitutional identities and Union law's "national identity" clause in art. 4(2)(1) TEU have been investigated for years. In ascertaining their difference[104] and elaborating on balancing-mechanisms, one can see attempts of preventively proceduralizing the diverging positions on Union law's legal source, being present in the background,[105] without being able to conceptually overcome that divergence.[106]

[100] F Schorkopf, 'Value Constitutionalism in the European Union' cit. 963-964.

[101] Cf. K F Gärditz, 'Glaubwürdigkeitsprobleme im Unionsverfassungsrecht' (2020) EuZW 505-508; deficits of disciplinary distance to the subject matter are made out in different aspects from J Komárek, 'Freedom and Power of European Constitutional Scholarship' (2021) EuConst 422, 426, 429, 440-441; A Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"' (2015) ICL Journal 151, 152-158; C Möllers, 'Fragmentierung als Demokratieproblem?' in C Franzius, FC Mayer and J Neyer (eds), *Strukturfragen der Europäischen Union* (Nomos 2010) 150, 156; F Schorkopf, 'Selbstverständnis und Perspektiven der Europarechtswissenschaft' (2020) Jahrbuch des öffentlichen Rechts 527, 536-538; U Haltern, 'Europarecht und ich' cit. 440-469; J Masing, 'Verfassung im internationalen Mehrbenensystem' cit. para. 119.

[102] A v Bogdandy, *Strukturwandel des öffentlichen Rechts* cit. 158-162, there "European constitutional core" (author's translation).

[103] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232; case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 264; for an analysis of these judgments cf. F Weber, 'The Pluralism of Values in an Identity-Framed *Verbund*: Federal Belonging in the European Union after the *Rule of Law Conditionality* Judgments' (2022) ELRev 514-533.

[104] PM Huber and A Paulus, 'Cooperation of Constitutional Courts in Europe' in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015) 281, 287: "The task of guarding the integrity of the Basic Law belongs to the Federal Constitutional Court and is not the same as the obligation of the Court of Justice of the European Union under the first sentence of Art. 4 sec. 2 of the TEU to give regard to the national identity, which is understood more broadly by the Member States"; A Paulus and JH Hinselmann, 'International Integration and its Counter-Limits' in C A Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) 411, 428; C Grabenwarter and others, 'The Role of the Constitutional Courts in the European Judicial Network' (2021) EPL 43, 51-58.

[105] See A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 348.

[106] On art. 4(2)(1) TEU PM Huber, 'Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum' in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* cit. ch. 123 para. 80: "Legal ground reference to national constitutional law" (author's translation); conflict resolution via art. 4(2) TEU did, so far, institutionally run towards the ECJ, see C Walter and M Vordermayer, 'Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen' (2015) Jahrbuch des öffentlichen

Studies on constitutional identities share a starting point with social science studies. Identity may be formed while being exposed to and individually select external elements from ones social environment, but always from within oneself. Interference by third parties in identity building-processes is excluded. It is a matter of subject formation and self-reflection which is to be distinguished from communicative acts between different subjects.[107]

This puts the ECJ's selective argumentation in a new light. For the Court, the Union legal order finds its constitutional identity in unrestricted primacy, formed with isolated set pieces taken from the integration process (above, section III.1-3). Primacy is the inaccessible element that categorically excludes co-formative voices of third parties. This realization, fuelled by the Grand Chamber's decision, is significant for two reasons. First, the rigidity of the Court's jurisprudence on this point can be fitted into an analytical framework that is already known for Member States. It is not a singularity in the *Verbund* between the Union and its member states.

Secondly and more important, an insight fed by the observation of member state concepts on constitutional identity becomes fruitful: the distinction between content determination and the absoluteness of its protection. Content determination is, as mentioned,[108] a closed process. However, the scope of protection is by no means absolute in all legal systems and can only be overcome through a new constitution, as in the case of the German Federal Constitutional Court's concept based on the eternity-clause in art. 79(3) Basic Law.[109] Realizing this fact leads to the insight that there are no European identity-assertions which are more similar in their absoluteness than those of the ECJ and the German Federal Constitutional Court. The difference lies in the fact that the channel of communication to the ECJ is open, if only to be able to avoid violations through corrections of its jurisprudence, whereas there is no reverse communication channel.[110] The Court is left with only one possibility, the visible recognition of identity-relevant objections within its own case by case-

Rechts 129, 132 ff.; A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' cit. 9, 30, 33-34; M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 82-84; therefore proposing a "reverse referral procedure" *de lege ferenda* (art. 267(a) TFEU) PM Huber, 'Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 81.

[107] G van der Schyff, 'Member States of the European Union, Constitutions, and Identity' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 305, 328: "developing identity is by the very nature of the topic something 'personal'"; A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' cit. 9, 10-11, 14.

[108] *Euro Box Promotion and Others* cit. para. 254.

[109] Comparative G van der Schyff, 'Member States of the European Union, Constitutions, and Identity' cit. 305, 342-345; critical C Walter, 'Wohin steuern die Ultra-vires- und die Identitätskontrolle? Eine Zwischenbilanz anhand der Entscheidungen des Bundesverfassungsgerichts im PSPP-Verfahren' (2021) 211, 216-217.

[110] As far as can be seen, for the first time in BVerfG decision of 14 January 2014 2 BvR 2728/13 *OMT/Preliminary Reference* 384-385 para. 27; for a classification of the concept of constitutional identity in Member State constitutional law and the principle of primacy of Union law as mutual "primacy claims" cf. C Walter, 'Wohin steuern die Ultra-vires- und die Identitätskontrolle?' cit. 211, 219, author's translation; cf. also F Weber, 'The Pluralism of Values in an identity-framed *Verbund*' cit. 525-526.

reasoning.[111] Quite a few voices see deficits here that are detrimental to the concern of equal cooperation in the European constitutional court network.[112]

The question thus is: when does the ECJ leave the phase of sealed identity-formation and enters into the phase of genuine identity negotiation? Identities that do not change don't exist. Dogmatically, the consideration of important *particular* identity objections is already possible, via art. 4(2)(1) TEU. Their recognition must not be understood as a breach of the basically accepted[113] primacy principle, but as a built in-exception into Union law's claim to unity, in other words an exception *in Union law itself*.[114] In engaging this possibility lies the key for reducing reservations from constitutional court that are adherents in the struggle to preserve the rule of law in Europe. The ECJ cannot be exempted from the thesis which says that there can be no absolute "guardians of the grail of constitutional identity" in integration communities.[115] None other than Walter Hallstein early on advocated for the establishment of stable and durable communication channels between the courts.[116]

[111] See now *RS* cit. para. 69-70; PM Huber, 'Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum' cit. para. 81, refers to an already possible involvement of national supreme and constitutional courts through the Court's Rules of Procedure; cf. also A v Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) CMLRev 1417, 1449.

[112] A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' cit. 35-37, especially 35: "A purely rhetorical reference to Article 4(2) TEU is not enough, considering the importance that many Member States attach to the protection of their constitutional identities. If the ECJ does not forward convincing and verifiable reasons for its statements, its judgments will likely lose persuasiveness and give rise to national presumptions favouring the protection of constitutional identity over the primacy of EU law"; M Guțan, 'The Infra-Constitutionality of European Law in Romania and the Challenges of the Romanian Constitutional Culture' 161; M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 51: "The ECJ must show – more than has been the case so far – that it understands the arguments of the constitutional courts and seriously addresses their concerns" (author's translation); PM Huber, 'Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum' cit. paras 78-81; J Larik and R Bruggemann, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) Utrecht Journal of International and European Law 20, 24-25, 30-31.

[113] BVerfG *PSPP* cit. para. 111: "If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences"; U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving them' cit. 210-211, 215-219 and 223-225.

[114] For such an understanding, which excludes from the outset a case of collision leading to precedence of application, A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' 32-34.

[115] Cf. (only) with regard to the Member States, C Walter and M Vordermayer, 'Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen' 165-166 (author's translation).

[116] Following art. 82(4) *Gesetz über das Bundesverfassungsgericht*, as a *constant* duty to include, even if only with consultative effect W Hallstein, 'Europapolitik durch Rechtsprechung' in H Sauermann and EJ Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm zum 80. Geburtstag* (Mohr Siebeck 1975) 205, 223-225.

ARTICLES

EXPLORING THE CONCEPT OF ESSENTIAL STATE FUNCTIONS ON THE BASIS OF THE CJEU'S DECISION ON THE TEMPORARY RELOCATION MECHANISM

TEREZIE BOKOVÁ*

ABSTRACT: Art. 4(2) TEU stipulating the EU's respect to Member States' national identities seems to be the topic of the day in EU law discussions. However, another part of the provision, obliging the EU to respect the Member States' essential state functions, has received less attention due to which it lacks clarity and is treated ambiguously. This *Article* attempts to address that gap. It suggests that while the essential state function clause is textually separate from the national identity clause, the aim and function of the clause, as well as the way in which some constitutional courts treat it, evidences that essential state functions are not strictly separated from national identity. Using the examples of the CJEU's judgment on the temporary relocation mechanism, the *Article* argues that some Member States' concerns *vis-à-vis* the EU could be based on either essential state functions or national identity. In such a situation, essential state functions might seem attractive because of their perceived more objective appearance than national identity. However, the given example also shows that even essential state functions could cover arguments problematic from the perspective of common EU values (art. 2 TEU).

KEYWORDS: essential state functions – national identity – art. 4(2) TEU – temporary relocation mechanism – migration crisis – Court of Justice of the European Union.

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I. The grey zone of art. 4(2) TEU

National identity, a distinct concept of Art. 4(2) TEU,[1] has been for some time an important topic of discussion in EU law. Although it has received a considerable amount of scholarly attention, the other concepts included in art. 4(2) TEU seem to be less developed. In this *Article*, I will focus on essential state functions and explore their contours and relation to national identity. Both national identity and essential state functions provide an "argumentative vehicle" how MSs could raise their particular, national concerns *vis-à-vis* the EU. Yet, essential state functions have been treated in a confusing manner by both the Court of Justice of the European Union (CJEU) and the scholarly literature: the concept is sometimes included in national identity, other times distinguished from it.

First, I illustrate this muddiness by analysing CJEU judgment concerning the dispute over the temporary relocation mechanism addressing the refugee crisis.[2] In this case, *Visegrad* countries[3] challenged the limited-scale relocations of applicants in clear need of international protection that were meant to represent a tangible solidarity gesture in the midst of the refugee crisis, aiming to help Member States (MSs) burdened with the biggest asylum application backlogs (i.e. Italy and Greece). In *Commission v Poland, Hungary and Czech Republic*,[4] CJEU found that the three MSs had infringed EU law by disregarding their obligation to relocate a specified number of applicants, regardless of their counter-argumentation built, *inter alia*, on art. 4(2) TEU's essential state functions. Nevertheless, the claim was broadly understood by the Advocate General (AG), the CJEU and the scholars as a national identity claim.

Second, I explore the concept of essential state functions deeper and attempt to clarify it. I claim that essential state functions encompass predominantly a set of state competences that form a core of the state actions and are distinct from national identity, but the aim and substance of the essential state functions are, in their very core, indeed similar to the national identity. The two concepts could be connected once we consider functions of state as a part of its identity. Therefore, essential state functions and national

[1] Art. 4(2) TEU reads: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

[2] The mechanism was established in two legal acts: Decision 2015/1523 of the Council of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, and Decision 2015/1601 of the Council of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (hereinafter the "Council relocation decisions").

[3] Slovakia and Hungary led the legal challenge to the relocations, supported by Poland (joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631). Later, the infringement proceedings concerned Hungary, Poland and Czech Republic, making all *Visegrad* Group countries somehow involved.

[4] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2020:257.

identity could, in some situations, cover the same substance of arguments raised by the MSs before the CJEU. The difference between them is thus more in framing then essence. On the face, however, national identity encompasses also features that distinguish a state including features of cultural character as long as they are of constitutional relevance, vulnerable to running contrary to art. 2 TEU, while essential state functions might appear as a more universal concept less open to subjective interpretation, thus less likely to collide with common EU values. Despite that, as the temporary relocation mechanism dispute reveals, essential state functions could also be used in an abusive manner which calls for scrutiny against art. 2 TEU.

I proceed as follows. In section II, I summarize proceedings concerning the temporary relocation mechanism at the CJEU, including the arguments raised and the CJEU's reaction to them. The case shows that in order to bring art. 4(2) TEU into play, the MSs claimed concern for their ability to perform essential state functions. Still, the AG responded as if the claim rested on national identity. In section III, I argue that the Union's obligation to respect essential state functions and to respect national identity are indeed closely related concepts, which explains the AG's approach. The argument rests on three lines of reasoning: discussion of art. 4(2) TEU (section III.1); a brief look into some of the national constitutional courts' identity review case-law (section III.2); and analysis of the CJEU's case-law concerning the concept of essential state functions (section III.3). In section IV, I discuss the consequences of the fact that both national identity and essential state functions could, in some instances, cover the same arguments, asking a question what pragmatic reasons there are to choose essential state functions over national identity. Section V concludes.

II. Highlighting art. 4(2) TEU variability: the CJEU's case-law on the temporary relocation mechanism

While national identity and essential state functions are two distinct concepts, both included in art. 4(2) TEU, their mutual boundaries seem sometimes unclear. One example is the CJEU's judgment in infringement proceeding against three MSs for their failures to implement the temporary relocation mechanism. The mechanism for the relocation of applicants for international protection from buffer-zone states at the EU external border, established by the Council, represented a part of the limited common European response to the refugee crisis.[5] The Council set up the mechanism in two separate decisions, providing for the relocation of, respectively, 40.000[6] and 120.000 applicants.[7] Originally, the latter decision was supposed to benefit Greece, Italy, and Hungary. Despite its designation as a beneficiary, Hungarian government decided to opt out, claiming that it was

[5] For comprehensive outline of EU response to the refugee crisis, see A Niemann and N Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) JComMarSt 3, 4–13.

[6] Decision 2015/1523 cit.

[7] *Ibid*.

not "a frontline state".[8] Therefore, after the Council adopted decision 2015/1601 by qualified majority (with the Czech Republic, Hungary, Romania, and Slovakia voting against and Finland abstaining[9]), Hungary became a MS of relocation too, being obliged to relocate a certain number of applicants in clear need of international protection from Italy and Greece. The Council relocation decisions seemingly took away control from the Member States on the issue of who would cross their borders in order to seek international protection, making them a highly disputed topic.

The CJEU ruled on the mechanism twice. First, Slovakia and Hungary unsuccessfully challenged the legality of Decision 2015/1601 at the CJEU, claiming that art. 78(3) TFEU provided for emergency non-legislative measures of technical or supportive nature, thus not providing a sufficient legal basis for the adopted decision, which materially constituted a legislative act amending parts of secondary law.[10] The CJEU found this claim unsubstantiated. It also denounced Slovak government's concern for the "sovereign rights of the states" being circumvented by the binding nature of the relocation mechanism. The CJEU focused not on the substance of the claim (i.e. whether any sovereign rights were interfered with and if so, on what legal basis), but rebutted Slovakia's suggestions that "another means of relief" had been available instead.[11]

As has become clear overtime, the temporary relocation mechanism as such did not fulfil its promise. While many reasons contributed to the failure,[12] one of them was the continuing unwillingness of some MSs to play their part. In this context, the Commission identified the three gravest sinners as Poland, Hungary, and the Czech Republic (but notably not Slovakia[13]) and started infringement proceedings against them. The three countries had either not pledged to relocate any applicants, pledged to relocate some applicants but did not fulfil this promise, or relocated only a fragment of the allocated number of applicants and then stopped making any commitments of further relocations.[14] In *Commission v Poland, Hungary and Czech Republic*, the CJEU found all three MSs in breach

[8] D Robinson, 'Why Hungary wanted out of EU's refugee scheme' (22 September 2015) Financial Times www.ft.com.

[9] See Council of EU (Justice and Home affairs), *Minutes of 22 September 2015 meeting of the Council* data.consilium.europa.eu.

[10] *Slovakia and Hungary v Council* cit. paras 47–55 and 85–88.

[11] *Ibid*. paras 235 and following.

[12] B De Witte and E Tsourdi, 'Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council' (2018) CMLRev 1457, 1492.

[13] After the unsuccessful challenge, Slovakia stopped disregarding the decision completely. Instead, it used a strategy of assenting to relocation of only very specific groups of applicants, which led to high rejection rates, and, consequently, slow pace of relocation. See European Commission, *Thirteenth Report on Relocation and Resettlement* www.europeanmigrationlaw.eu.

[14] See European Commission, *Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland (press release)* ec.europa.eu.

of EU law after it rejected their arguments justifying undisputed non-compliance with the relocation decisions as meritless.

It appears the Czech Republic raised similar sovereignty-based arguments as Slovakia in *Slovakia and Hungary v Council*. The CJEU considered it impermissible that a MS would unilaterally assess effectiveness or malfunctioning of the relocation mechanism, even if it affected the MS's internal security, and avoided its obligations arising from the relocation mechanism.[15] Lack of efficiency or need for additional security-related procedural steps should have been resolved in a spirit of mutual cooperation, not serve as an excuse for disregarding legal obligations.[16]

Concerning Hungary and Poland's pleas, the MSs did not succeed with their claim that they were allowed to disapply the relocation decisions on the basis of art. 72 TFEU.[17] The CJEU rejected the idea that art. 72 TFEU served as a rule of "conflict of laws" or as a basis for unilateral derogation from secondary law lying outside of any control of the EU.[18] Because the relocation decision respected MSs' exclusive competence in the area of internal security and provided specific security safeguards, Hungary and Poland could not rely on art. 72 TFEU. They failed to prove that it was necessary to have recourse to such a derogation in order to exercise their responsibilities in terms of the maintenance of law and order and safeguarding of internal security.

As to art. 4(2) TEU read together with art. 72 TFEU, the CJEU merely added that "[t]here is nothing to indicate that effectively safeguarding the essential State functions to which the latter provision refers, such as that of protecting national security, could not be carried out other than by disapplying Decisions 2015/1523 and 2015/1601".[19] This remark is rather mysterious, given that CJEU did not specifically summarize the defendant MS' arguments concerning art. 4(2) TEU.[20]

Let's unpack the claim a little. For the purposes of this *Article*, the written defence of Poland in the infringement proceedings was obtained from the Commission. The pleading shows that the national security issues that concerned Polish government fell into three broad areas. First, due to insufficient possibilities to verify the identity of applicants before relocation there was a possibility that applicants who are criminals, terrorists or extremists would be relocated. Secondly and more generally, Europe was facing a trend of terrorist attacks committed by applicants for or recipients of international protection. Thirdly, the government saw a threat in a wider social and cultural context, referring to other European countries that had experienced destabilized society and social tensions

[15] *Commission v Poland, Hungary and Czech Republic* cit. para. 180.

[16] *Ibid.* paras 181-182.

[17] "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

[18] *Commission v Poland, Hungary and Czech Republic* cit. paras. 137 and 145-147.

[19] *Ibid.* para. 170.

[20] Paras 134-137 of the judgment focus more on the issue of art. 72 TFEU, without substantive discussion of the impact of art. 4(2) TEU on the legal analysis.

as a result of uncontrolled immigration. Claiming that national security also encompasses "cultural security", the government referred to the possibility that individuals holding beliefs incompatible with the constitutional values of Poland might have been relocated too. That would have promoted reprehensible (and constitutionally incompatible) conduct, such as subordination of women to men, honour killings, antisemitism, violence against atheists or homosexuals, bigamy, child marriages and others. The government also pointed out it did not see Islam as a religion that endangers the national security of Poland per se, but the influence of extremist newcomers would threaten the established Muslim community in Poland in terms of religious and ethnic conflicts arising.

The reference to the "ethnicity" of the relocated applicants had also appeared earlier in the Polish intervention in *Slovakia and Hungary v Council* proceedings. Poland claimed that the binding relocation quota had a disproportionate impact in different MSs according to their ethnic and cultural homogeneity. Countries "virtually ethnically homogeneous, like Poland" bore much greater burden and had to expend greater effort (and money) in order to accommodate culturally and linguistically "unfitting" relocated applicants.[21] In *Slovakia and Hungary v Council*, the CJEU directly rejected the Polish government's argument, even though it could simply disregard it as inadmissible.[22] The CJEU stressed that if relocation had been conditional upon the existence of cultural and linguistic ties, it would have undermined the principle of solidarity (art. 80 TFEU) as a guiding principle of the Common European Asylum System, and consequently, prevented the Council from adopting any effective, i.e. binding, decision. Furthermore, the CJEU added that "considerations relating to the ethnic origin of applicants for international protection cannot be taken into account because they are clearly contrary to EU law and, in particular, to Art. 21 of the Charter of Fundamental Rights of the European Union".[23] Hence it distanced itself from the content of this claim.

Perhaps in response to this previous negative response of the CJEU, the arguments raised in the infringement proceedings (*Commission v Poland, Hungary and Czech Republic*) did not project such ethno-cultural understanding of the state. They were framed in terms of national security as an essential state function as in art. 4(2) TEU that stipulates the Union's respect for *MSs' essential State functions*. Despite that, AG Sharpston in her very brief discussion of the claim referred to case-law pertaining to *national identity*.[24] She summarized that Poland and Hungary relied on art. 72 TFEU read together with art. 4(2) TEU, claiming that these two provisions established their right to disapply the relocation decision in order to "ensure social and cultural cohesion, as well as to avoid potential

[21] *Slovakia and Hungary v Council* cit. para. 302.

[22] *Ibid.* para. 303.

[23] *Slovakia and Hungary v Council* cit. paras 304-305.

[24] Joined Cases C-715/17, C-718/17, and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2019:917, opinion of AG Sharpston.

ethnic and religious conflicts", citing the second and third sentence of art. 4(2) TEU.[25] She only briefly referenced the CJEU's *Commission v Luxembourg*[26] ruling and concluded that even though MSs have a legitimate interest in preserving social and cultural cohesion, in this particular case that interest might have been safeguarded effectively by other and less restrictive means than a unilateral and complete refusal to fulfil their obligations under EU law.[27]

In *Commission v Luxembourg* case, the CJEU reviewed a requirement of Luxembourgish law according to which notaries must have Luxembourgish nationality. The Commission alleged such a nationality requirement was contrary to the freedom of establishment (ex art. 43 Treaty establishing the European Community (TEC), now art. 49 TFEU), while the government claimed that the profession of notaries fell within the exception of the first paragraph of art. 45 EC (now art. 51 TFEU) as an activity which involves a direct and specific connection with the exercise of official authority. The CJEU found no such connection.[28] Activities of notaries were undoubtedly carried out in the public interest, but not in the capacity of public authority.[29] Additionally, though, the government also argued that because Luxemburgish language capability is necessary in the performance of notarial activities, the nationality condition ensures respect for the history, culture, tradition and national identity of Luxembourg, bringing into play the national identity clause (art. 6(3) TEU at the time). The CJEU was not persuaded by this line of reasoning. Acknowledging that the protection of national identity is a legitimate interest recognized by EU law, the CJEU emphasized that it was the nationality, not language, which was at stake. The same aim could have been "effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States".[30] In other words, the CJEU did not raise any principal objections to the claim; it merely noted the MSs' interest could have been safeguarded otherwise, thus failing the necessity part of the proportionality test.

By relying on case-law relating to the interpretation of the Union's obligation to respect national identities, the AG clearly signalled national identity provided the appropriate legal background for assessment of the art. 4(2) TEU claim put forward by the defendant MSs. Notably, she did not distinguish *Commission v Poland, Hungary and Czech Republic* case from *Commission v Luxembourg*. Rather, she treated the essential state function claim and the interest in preserving national language as a part of national identity in the same way.[31] The question is, first, was AG Sharpston's approach to the essential state functions claim grounded in a widely accepted interpretation of art. 4(2) TEU clauses of national identity and essential state functions?

[25] *Ibid.* para. 224.
[26] Case C-51/08 *Commission v Luxembourg* ECLI:EU:C:2011:336.
[27] *Commission v Poland, Hungary and Czech Republic*, opinion of AG Sharpston, cit. para. 227.
[28] *Commission v Luxembourg* cit. para. 92.
[29] *Ibid.* paras 95–96.
[30] *Ibid.* para. 124.
[31] See *Commission v Poland, Hungary and Czech Republic*, opinion of AG Sharpston, cit. paras 225–227.

III. Exploring the concept of essential state functions

III.1. Art. 4(2) TEU, national identities and essential state functions: two clauses, two separate concepts?

To answer the question in short, the AG's approach in *Commission v Poland, Hungary and Czech Republic* was not entirely exceptional. In fact, the relation between national identity and essential state functions seems to be a contested one.

Starting with the Treaty text itself, it is not entirely clear whether we should really speak of one or two concepts. Both the first and second sentence of art. 4(2) TEU open with a similar phrase "[the Union] shall respect". That would suggest the latter sentence does not form a continuum with the former. Were it the opposite, and essential state functions were considered a matter "inherent in" national identity, there would be no need to repeat the opening phrase. Thus, the wording of art. 4(2) TEU implies that the EU is bound to respect the equality, national identity, and essential state functions of the MSs, all three concepts being on equal footing. This understanding seems to be implicitly shared among some scholars who, while discussing national identity, refer only to a part of art. 4(2) TEU consisting of the obligation to respect "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" and separate essential state functions.[32] Piquani made that understanding more explicit relying on a historical argument derived from the Treaty Establishing a Constitution for Europe, from which the current wording of art. 4(2) TEU originated, noting that the national identity clause "was worded in a more detailed fashion" and "distinguished from essential functions of the State", which include "ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".[33] Therefore, one of the possible understandings of art. 4(2) TEU views essential state functions and national identity as separate concepts, hence in two separate clauses.

The above notwithstanding, a number of reasons supports the conclusion that there is no strict borders between the national identity clause and the essential state functions clause. Both clauses are included in the same paragraph of art. 4, Title I of the TEU, named "Common Provisions". Art. 4 TEU lists several fundamental constitutional principles governing the EU competences in pluralistic settings. In art. 4, the respect for national identity and essential state functions of the MSs appears alongside the principle of limited attribution

[32] *See e.g.* A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) CMLRev 1417, 1425. The same approach could be tracked down in case-law, see e.g. case C-213/07 *Michaniki* ECLI:EU:C:2008:544, opinion of AG Maduro, para. 31; or case C-742/19 *Ministrstvo za obrambo* ECLI:EU:C:2021:597 para. 36.

[33] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' in M Varju (ed), *Between Compliance and Particularism* (Springer 2019) 21, 26.

of competences,[34] the principle of equality of the MSs, and the principle of sincere cooperation. These principles appear to be logically linked to each other: the article (somewhat redundantly) serves as a reminder as to who (the EU or MSs) carries out the competences, and then specifies how the competences are to be performed by the EU (by treating the MSs equally and with respect to their national identities). Respect for essential state functions plays a twofold role. First, read together with art. 4(1) TEU, it serves as a guarantee that certain central competences still belong to the Member States.[35] Secondly, in analogy to national identity clause, it represents another limit of how the EU competences are to be performed. Finally, art. 4(3) TEU stipulates that within the sphere of the EU competences, the Union and MSs owe each other a duty of sincere cooperation.

The two provisions – respect for national identities and respect for essential state functions – share even more than functional links to the EU competences. The second paragraph of art. 4 TEU could be understood as an acknowledgment of plurality of political and constitutional orders within the EU.[36] MSs share a common core of values (art. 2 TEU) but retain their distinctive self; and despite their diversity, they are entitled to equal treatment. When discussing national identity, most of the attention focuses on the diversity among MSs, i.e. what their distinct national identities consist of. But the national identity clause also serves as a guarantee of the MSs' existence[37] – a guarantee that they would not dissolve if the Union transformed into a full-fledged federal state.[38] Understanding the national identity clause this way reveals the close relationship between the first and the second sentences of art. 4(2) TEU. Once the aim of the national identity clause is to protect the existence of a MS as a state, the question of "what defines a state?" becomes inevitable. To this question, one of the possible answers looks at the functions a state performs. This goes back to the Aristotelian idea of a state characterized by both its technique and its point, suggesting the purpose of a state's very existence is the advancement of its people's well-being.[39] In the end, one of the reasons behind the mythical social contract is achievement of person's good.[40] To achieve this purpose, the state performs a wider or narrower set of functions. Considering that the purpose of the state determines a part of the state's very own nature, the functions the state fulfils in order to achieve that purpose become parts of that nature too. The question of what a state is

[34] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' cit. 1425.

[35] *Ibid.* 1426.

[36] M Claes, 'The Primacy of EU Law in European and National Law' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 205.

[37] *Michaniki*, opinion of AG Maduro, cit. para. 31.

[38] M Claes and J-H Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) German Law Journal 917, 932.

[39] This section was inspired by NW Barber, *The Principles of Constitutionalism* (OUP 2018) 3-10.

[40] S Freeman, 'Social Contract Approaches' in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP, 2012) 135.

and what a state does are thus intimately connected. So are the concepts of national identity and essential state functions.

Furthermore, there is historic evidence that the drafters of the current art. 4(2) TEU did not read the national identity clause and essential state functions clause of said provision in a separate manner, but rather as parts of a two-folded norm.[41] The origins of art. 4(2) TEU lie in art. I-5 of the Treaty establishing a Constitution for Europe. The final report of Working Group V on complementary competencies supports reading the national identity clause and the essential state function clause as having a close relationship, blurring the lines between the two clauses.[42] Under the title "Principles of the exercise of Union competence", the Working Group formulated an aim to clarify the EU "respects certain core responsibilities" of the MSs by "elaborating the fundamental principle" of respect to national identities of the MSs.[43] Afterwards, the Working Group moved to define two areas of core national responsibilities. While doing so, it combined fundamental structures and *essential functions* of a MS into the same category.[44] Moreover, the Working Group's recommendation attempted to enumerate "the essential elements of the national identity", as, *inter alia,* "fundamental structures and essential functions of the Member States, notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organization of armed forces",[45] thus merging the categories even further.

III.2. Essential state functions as a part of constitutional identity

The argument that essential state functions are close to discussions of national identity is also evidenced by the approach of some constitutional courts to the issue. Without diving deep into the controversy of the exact relationship between constitutional identity and national identity,[46] it is safe to note that the two concepts are interrelated. Some constitutional courts have connected the issue of constitutional identity with the limits of constitutionally permissible transfers of sovereign state powers to the EU.[47] Whereas

[41] See *Final Report of Working group V* european-convention.europa.eu.

[42] For in-depth analysis, see B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) Yearbook of European Law 263, 271–285.

[43] See *Final Report of Working group V* cit. 10.

[44] *Ibid.* 11. See also B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' cit. 285–286.

[45] See *Final Report of Working group V* cit. 12.

[46] Compare E Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) Netherlands Journal of Legal Philosophy 82, 93; A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' cit. 1427; F Fabbrini and A Sajó, 'The Dangers of Constitutional Identity' (2019) ELJ 457, 461.

[47] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' cit. 31.

these courts speak about the transfer of competences, we might also consider *competences* as being a concrete means of how states fulfil certain *functions*.[48] Thus, while limits on the possible transfer of power is a card played by the MSs in the context of respect to their national/constitutional identity, Faraguna noted that "[m]ost of the matters that result in constitutional identity sensitive concerns are comprised in the traditional understanding of *essential State functions* [...]".[49] (emphasis added) Let's further explore this point using two examples – German and Czech Constitutional Courts.

When speaking of national and constitutional identity on the MSs' level, the German Federal Constitutional Court must be mentioned for its leading role in establishing constitutional identity review. Its earlier case-law, subjected to rigorous scholarly scrutiny,[50] would be a prime illustration of the *functions of a state–constitutional identity–national identity* axis. Following the adoption of the Lisbon treaty, the Federal Constitutional Court interpreted art. 4(2) TEU and art. 79(3) of the *Grundgesetz*,[51] stipulating an inviolable core of the constitution, as essentially the same.[52] A part of the inviolable core of the constitution, and hence of German constitutional identity, is the requirement that Germany remains a viable and independent political community. In order for it to stay so, transfer of competences to the EU must remain limited,[53] so that

> "sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions, [...] in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics".[54]

[48] After all, even EU competencies are partly defined as functions, as B. Guastaferro noted. See B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' cit. 273.

[49] P Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) BrookJIntlL 491, 573.

[50] See e.g. M Polzin, 'Constitutional identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) ICON 411.

[51] "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible".

[52] See German Federal Constitutional Court judgment of 30 June 2009 2 BvE 2/08 *Lisbon judgment* para. 240. See alsoJ-H Reestman, 'The Franco-German Constitutional Divide: Reflection on National and Constitutional Identity' (2009) EuConst 374, 375.

[53] M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 925.

[54] German Federal Constitutional Court Lisbon judgment cit. para. 249. See also M Claes and J-H Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 925.

Despite declining the idea that there is "a pre-determined number of types of sovereign rights" that should remain in the hands of the state,[55] the Federal Constitutional Court provided quite an extensive list of essential areas where the democratic principle comes into play,[56] and, moreover, identified five areas of particular sensitivity.[57] As Claes and Reestman explained, these five areas of competences are closely linked to German constitutional identity, making any possible conferral of powers limited by the need to preserve a "democratic reserve competence".[58] From the requirement that a state remains a sovereign and democratic state despite its participation in supranational European integration, it follows that the state is obliged to perform some of its functions, and consequently, it must not confer certain competences to the supranational institution.[59] While the court later departed from its notion that national identity under art. 4(2) TEU and constitutional identity under art. 79(3) *Grundgesetz* go hand in hand,[60] that did not affect the notion of limited transfer of competences.

Inspired by its German counterpart, the Czech Constitutional Court (*Ústavní soud*)[61] used somewhat similar perspective in its EU law-friendly judgments concerning the Lisbon Treaty, albeit it did not refer to constitutional or national "identity".[62] The applicants in two proceedings of *ex ante* constitutional review of the international treaty challenged,

[55] German Federal Constitutional Court Lisbon judgment cit. para. 248.

[56] See *ibid.* para. 249.

[57] German Federal Constitutional Court Lisbon judgment cit. para. 252: (1) decisions on substantive and formal criminal law, (2) the monopoly on the use of force by the police within the state and by the military towards the exterior, (3) fundamental fiscal decisions on public revenue and public expenditure, (4) decisions on the shaping of living conditions in a social state, and (5) decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities.

[58] M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 926.

[59] Assuming that "performing a function" inherently entails decision-making capacity, too.

[60] German Federal Constitutional Court order of 14 January 2014 2 BvR 2728/13 *OMT* para. 29.

[61] I use the example of Czech Constitutional Court because it is one of the *Visegrad* Group MSs constitutional courts. At the same time, apart from its *Holubec* ruling (judgment of 31 January 2012 Pl. ÚS 5/12) resulting in pronouncing CJEU's case C-399/09 *Landtová* ECLI:EU:C:2011:415 as an *ultra vires* decision, the Czech Constitutional Court mostly shows a favourable stance towards the EU law. Its independence has not been compromised, unlike Polish and Hungarian Constitutional Courts. For more detailed account of its constitutional identity case-law, see D Kosař and L Vyhnánek, 'Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP, 2019) 85–113.

[62] There were two separate proceedings, initiated by two different applicants' groups. In Czech Constitutional Court judgment of 26 November 2008 Pl. ÚS 19/08, the Czech Constitutional Court laid out its approach to the review. Most importantly, it specified that it would review the treaty's compliance with the constitutional order as a whole, but, nevertheless, ascribed the biggest importance to the "material core of the Constitution" (art. 9(2) of the Constitution; see paras 91-93 of judgment Pl. ÚS 19/08). During delay caused by the president's Klaus refusal to ratify the treaty, another application for constitutional review was filed, resulting in Czech Constitutional Court judgment of 3 November 2009 Pl. ÚS 29/09. The latter judgment draws from the former to a large extent.

among others, that foreseen transfer of competences to the EU would have striped Czechia its sovereignty, in breach of core constitutional principles (art. 1(1) of the Constitution (*Ústava*)). On one hand, the Constitutional Court refused to provide an exhaustive list of competences that must not be transferred to the EU in order to protect state's sovereignty, because that question is of political nature and the court, guided by the principle of judicial self-restraint, did not see itself fit to rule in an abstract, general manner.[63] It declared that, in any case, the transfer has to be a limited one, transferred competences need to be sufficiently clearly specified, and it must be ensured that the characteristics of the state as sovereign, democratic, and based on rule of law and respect to human rights are not affected.[64] Notwithstanding its declared reluctance to provide concrete guidance, the court went on and discussed that, in particular, competences under common defence and security policy do not violate the constitutional characteristics of sovereignty (art. 1(1) Constitution).[65] Hence, the Czech Constitutional Court also concluded that the mere notion of statehood requires a state to perform certain functions and competences, even though it refrained from providing any list, unlike its German counterpart.

III.3. The CJEU's approach to essential state functions

These conceptual links between national identity and essential state functions also find their expression in the CJEU's case-law, as far as could be established. The issue of essential state functions is often not reflected in the CJEU's ruling, but remains discussed only in opinions of advocates general.[66] Overall, it does not seem to be particularly well-developed in the CJEU's case-law.

First, as for the content of essential state functions, the term is usually connected with functions listed in the second sentence of art. 4(2) TEU: territorial integrity of the State, maintaining law and order[67] and safeguarding national security. Frequently mentioned are the element of national security as the sole responsibility of the MSs,[68] sometimes used with a reference to art. 72 TFEU, as in *Commission v Poland, Hungary and Czech Republic*, or to art. 346 TFEU.[69] The language of the essential state functions clause, however, does not rule out the possibility of adding more elements under the term. For instance, in *Sindicatul*

[63] See Czech Constitutional Court judgment Pl. ÚS 19/08 cit., paras 94-111 (see para. 109 for the "political question" quote); *mutatis mutandis* judgment Czech Constitutional Court Pl. ÚS 29/09 cit., paras 111–113.

[64] Czech Constitutional Court judgment Pl. ÚS 19/08 cit., para. 97.

[65] See Czech Constitutional Court judgment P. ÚS 19/08 cit., paras, and Czech Constitutional Court judgment Pl. ÚS 29/09 cit., paras 145 and following.

[66] Examples include case C-137/09 *Josemans* ECLI:EU:C:2010:774; case C-300/11 *ZZ* ECLI:EU:C:2013:363; and case C-601/15 PPU *N.* ECLI:EU:C:2016:84.

[67] E.g. case C-137/09 *Josemans* ECLI:EU:C:2010:433, opinion of AG Bot.

[68] E.g. case C-298/15 *Borta* ECLI:EU:C:2016:921, opinion of AG Sharpston.

[69] Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2018:870, opinion of AG Szpunar.

Familia Constanţa,[70] the CJEU opined that the protection of minors belongs among essential state functions. The preliminary question asked if foster parents, who on the basis of an employment contract with a public authority receive and integrate a child into their home and provide on a continuous basis for the harmonious upbringing and education of that child, are workers within the meaning of Directive 2003/88[71] and fall within the exception of art. 1(3) of Directive 2003/88, read in conjunction with art. 2(2) of Directive 89/391.[72] In essence, whether foster parents belong among workers in certain public services activities, such as armed forces or police, who are for the peculiar character of their work excluded from the health and safety requirements of the directives. Answering in the affirmative, the CJEU held that foster parenting is a public service activity. To be considered a public service worker, it suffices that work is carried out for a private person who performs a task in the public interest, which forms part of the essential functions of the state and does so under the control of the public authorities.[73] Alas, the CJEU did not provide much guidance on why the protection of minors belongs under essential state functions[74] nor whether the concept of essential state functions as used here (i.e. outside art. 4(2) TEU context) is the same as essential state functions under art. 4(2) TEU. In light of *Ministrstvo za obrambo,* which also concerned art. 2 of Directive 89/391 as well as art. 4(2) TEU, it seems likely that the two notions of essential state functions are indeed related.

In *Ministrstvo za obrambo*, the CJEU importantly elaborated on the concept of essential state functions. The case concerned a Slovenian army officer who requested overtime remuneration for seven days per month of uninterrupted guard duty which required that he was contactable and present at all times at the barracks where he was posted.[75] The Slovenian Supreme Court doubted whether the exception provided for in art. 2 of Directive 89/391 applies to members of military personnel in peacetime and workers in the defence sector.[76] The CJEU opened its examination of the issue with the intervening states' objection that organizational arrangements of armed forces of the MSs fall outside the scope of EU law.[77] The principal task of armed forces, i.e. preservation of territorial

[70] Case C-147/17 *Sindicatul Familia Constanţa and Others* ECLI:EU:C:2018:926.

[71] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[72] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. Art. 2(2) of the directive reads: "This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it".

[73] *Sindicatul Familia Constanţa* cit. para. 56.

[74] The whole para. 61 of the judgment reads: "Their work therefore contributes to the protection of minors, which is a task in the public interest forming part of the essential functions of the State".

[75] In this period, he received wages for eight hours of working time, but claimed the whole time when he was at his superiors' disposal should be remunerated as working overtime.

[76] *Ministrstvo za obrambo* cit. paras 23, 25.

[77] See case C-186/01 *Dory* EU:C:2003:146 para. 35.

integrity and national security, falls within the essential state functions of art. 4(2) TEU, the court opined.[78] Even though it is up to the MSs "alone to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, including decisions relating to the organisation of their armed forces, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law".[79] Rather, art. 4(2) TEU requires that the application of EU law should not hinder the proper performance of those essential functions. Therefore, rules on the organization of working time must not be interpreted in such a way as to prevent the armed forces from fulfilling their tasks and, consequently, to adversely affect the essential functions of the state (the preservation of its territorial integrity and the safeguarding of national security).[80] As a result, the CJEU suggested delicate distinguishing between actual military operations and operational training,[81] falling outside the scope of EU law, and other army activity. It is apparent the CJEU put emphasis on respect for essential state functions as an interpretive principle of EU law, which can only justify non-applicability of EU law in extraordinary circumstances, when it is impossible to interpret EU law in a way not adversely affecting the performance of essential state functions.

Despite the specific content of essential state functions elaborated by the CJEU, there are two types of visible links between the national identity and essential state functions clauses. First, CJEU's case-law mixes elements protected under national identity and essential state functions. This may be explained by the similarity of the two concepts' aim, as I argued earlier. An example of dual qualification of one issue under both national identity and essential state functions is the internal self-organization of a MS. AG Mengozzi in *Remondis*[82] discussed whether acts effecting transfers of powers between administrative authorities may constitute a public contract and thus be subject to the relevant EU rules. He positioned the issue outside the scope of EU law because self-organization of a MS and internal delegation of powers fall within essential state functions. At the same time, the CJEU considered a related question of the division of competences between *Länder* and the federal state as a matter of national identity, "inherent in their fundamental structures, political and constitutional, including regional and local self-government".[83] Naturally, the difference here could lie in the more specific question at hand: while federalism in Germany is a core issue of national identity (and constitutional identity, see German Federal Constitutional Court above), qualification of internal delegation of powers within the state might not bear national identity significance, yet deserve protection under art. 4(2) TEU's essential state functions clause. It is an open question

[78] *Ministrstvo za obrambo* cit. para. 37.
[79] *Ibid.* para. 40.
[80] *Ibid.* para. 43.
[81] *Ibid.* paras 73-83.
[82] Case C-51/15 *Remondis* ECLI:EU:C:2016:504, opinion of AG Mengozzi, paras 38-39.
[83] Case C-156/13 *Digibet and Albers* ECLI:EU:C:2014:1756 paras 33–34.

whether the CJEU would employ a different standard of proportionality assessment if the claim rested on national identity than on essential state functions.

Therefore, a more telling is the second link, cross-referencing between issues related to essential state functions and national identity. The cross-reference made by AG Sharpston in *Commission v Poland, Hungary and Czech Republic* is not the only one in the records of the CJEU. Similarly, AG Øe in *Ministrstvo za obrambo*[84] resorted to a reference ("by analogy") to AG Kokott's opinion in *G4S Secure Solutions (Achbita),* who reasoned that respect for national identity does not justify limiting the scope of secondary law, but requires that "application of that directive [2000/78] must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the Directive as such, but must be duly taken into account in the interpretation".[85] AG Øe relied on the quote in order to argue that just like in national identity cases, application of secondary law must not negatively affect the performance of essential state functions by the MSs.[86]

While other case-law refers solely to essential state functions without making any direct link (be it textual or functional) to national identity,[87] there are, moreover, similarities in the way the CJEU treats both concepts. MSs are free in defining their national security or public order needs, which essentially amounts to defining how to perform some of their essential state functions. However, they must not do so unilaterally, entirely without the supervision of CJEU.[88] Invoking the public order or national security, supported by the essential state functions clause, does not exclude the applicability of EU law as such.[89] On the contrary, the principle of respect for essential state functions speaks more to the manner in which EU law is to be adopted and applied, so that it does not "stand in the way" of the essential state functions.[90] Therefore, a derogation from EU law could be justified only when necessary and proportionate. If – in light of a particular situation – the essential state function could be fully carried out in any other way, the CJEU would not uphold a MS's unilateral derogation from secondary law.[91]

Similarly, a national identity claim does not provide a free ticket for unilateral derogations from EU law and it does not provide an exception to the primacy of EU law.[92]

[84] Case C-742/19 *Ministrstvo za obrambo* ECLI:EU:C:2021:77, opinion of AG Øe, para. 47.

[85] Case C-157/15 *G4S Secure Solutions* ECLI:EU:C:2016:382, opinion of AG Kokott, para. 32.

[86] *Ministrstvo za obrambo*, opinion of AG Øe, cit. paras 46 and 47.

[87] See e.g. *Josemans*, opinion of AG Bot, cit.

[88] Generally e.g. case C-601/15 PPU *N.* ECLI:EU:C:2016:85, view of AG Sharpston, paras 81.82.

[89] Case C-623/17 *Privacy International* ECLI:EU:C:2020:790, para. 44. See also case C-300/11 *ZZ* ECLI:EU:C:2012:563, opinion of AG Bot, paras 66–73; *Ministrstvo za obrambo*, opinion of AG Øe, cit. paras 42-48.

[90] *Ministrstvo za obrambo*, opinion of AG Øe, cit. para. 47.

[91] Case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 para. 262 (referencing Commission v Poland, Hungary and Czech Republic). See also S Progin-Theuerkauf, 'Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?' (2021) European Papers (European Forum Insight of 29 March 2021) www.europeanpapers.eu.

[92] M Claes, 'The Primacy of EU Law in European and National Law' cit. 205.

Arguments based on national identity should lead to two-way dialogue between national authorities, especially courts, and the CJEU in the role of "the ultimate interpreter" of art. 4(2) TEU.[93] Despite the fact that national identity encompasses only fundamental constitutional provisions, i.e. provisions stipulating "fundamental structures" of a MS,[94] art. 4(2) TEU does not accord them "automatic priority".[95] Instead, a balancing exercise between different interests at stake requires that a restriction should not exceed what is necessary.[96] The manner in which the CJEU treats national identity claims and essential state functions claims thus seem to have significant commonalities.

The CJEU also expressly compared, or even equated, respect to essential state functions to a public policy reservation. In order to justify a restriction on rights and freedoms guaranteed under EU law, including fundamental rights and freedoms protected by the Charter of Fundamental Rights of the European Union,[97] a MS must prove a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[98] That could be again compared to national identity claims, which the CJEU in the pre-Lisbon setting also decided in the framework of public policy reservations.[99] Even post-Lisbon, its approach has not significantly changed in its substance.[100] Consider briefly the well-known *Omega* judgment,[101] labelled as "the most significant" (pre-Lisbon) case, in which the CJEU acknowledged relevance of MSs' constitutional arrangements.[102] In *Omega*, a restriction on the freedom to provide services, or more specifically, to operate a laser-game venue, was imposed for public policy reasons according to art. 55 TEC (now art. 62 TFEU).[103] The CJEU recalled that the concept of "public policy" must be interpreted strictly and within the control of Community institutions, despite the fact that MSs retain a margin of discretion because public policy varies across MSs and time.[104] Considering laser-game to be "a simulated act of violence", the national

[93] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' cit. 26.

[94] *Ibid.* 39. See also LFM Besselink, 'National and Constitutional Identity Before and after Lisbon' (2010) Utrech Law Review 36, 49.

[95] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1441.

[96] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' cit. 40-41.

[97] See *ZZ*, opinion of AG Bot, cit. on the interference of national security interest with art. 47 of the Charter.

[98] *Josemans*, opinion of AG Bot, cit. para. 116.

[99] Compare the CJEU's reasoning in two well-known cases, namely case C-36/02 *Omega* ECLI:EU:C:2004:614 and case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806.

[100] Z Vikarska, *National Identity and EU Internal Market Law* (Master of Philosophy thesis, University of Oxford 2017, on file with the author) 62.

[101] *Omega* cit.

[102] LFM Besselink, 'National and Constitutional Identity Before and after Lisbon' cit. 45.

[103] *Omega* cit. para. 28.

[104] *Ibid.* paras 30-31.

authorities decided it violated human dignity as a fundamental value enshrined in the national constitution, and thus presented a threat to public policy.[105] Finding that the restriction was necessary, and no less restrictive measures were available, the CJEU found it in compliance with the freedom to provide services.[106]

As section III has showed, national identity and essential state functions work side-by-side. Even though textually art. 4(2) TEU contains three clauses – equality, national identity, and essential state functions, with an additionally stressed component of national security – the two latter categories are separate, yet intimately connected as to their aim. Moreover, some national constitutional courts tend to include essential state functions into the constitutional identity which they protect. While the CJEU's case-law is slightly ambiguous regarding what extent to separate national identity and essential state functions, it uses the same methodology in review of both categories, relying on proportionality. In that light, the fact that AG Sharpston dealt with the essential state functions claims concerning Council relocation decisions by quoting national identity case-law, could be justified.

IV. Essential state functions: pushing the concept further

In the last section of this *Article*, I want to stress two consequences of the conclusion that national identity and essential state functions are separate yet closely connected concepts. First, in some instances, arguments of the MSs could rest on any of the two concepts, national identity or essential state functions. Secondly, given this similar nature, intrinsic dangers connected to use — and more importantly misuse — of national identity claims do also apply to essential state functions claims. I again rely on *Commission v Poland, Hungary and Czech Republic*.

IV.1. Understanding national identity

My argument rests on understanding national identity as a wide and open concept. A primary reason why the concept is open-ended one is the ambiguous nature of the term itself, even under the legal framework of art. 4(2) TEU. Bogdandy and Schill stressed that national identity in art. 4(2) TEU became a legal concept, because its established link to the "fundamental political and constitutional structures" of a respective MS.[107] That led them to argue that "only elements somehow enshrined in national constitutions or in domestic constitutional processes can be relevant for art. 4(2) TEU. By contrast, an entirely pre-political or pre-constitutional understanding of national identity is not protected".[108]

[105] *Ibid.* para. 32.

[106] *Ibid.* paras 40-41.

[107] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1427.

[108] *Ibid.* 1430.

Nevertheless, in my opinion, this does not mean national identity is stripped of all cultural content. Faraguna suggests a similar point, while distinguishing between ethnic-centred and civic conception of national identity.[109] He saw the civic conception, which still includes cultural elements, as fitting for art. 4(2) TEU purposes. Even if we accept von Bogdandy and Schill's opinion that the national identity clause in art. 4(2) TEU has an essentially constitutional content, we also have to acknowledge some constitutional norms in fact constitutionalize certain cultural norms. By doing that, they not only make them legally binding, but also elevate them above the ordinary legislation and out of the reach of ordinary legislature. After all, law as a normative system does not draw its content in a vacuum. Fabbrini and Sajó even argued, concerning identity, that "in the deep bosom of the concept lie its cultural roots and such roots may be embedded in a nationalist and even nativist soil".[110] The cultural dimension may be somewhat obscured by the wording of art. 4(2) TEU, which refers to "fundamental structures, political and constitutional". But in the end, national identity's content could be more far reaching than the wording would suggest.

To illustrate the cultural dimension of national identity, the CJEU's case-law provides a number of examples of when the CJEU accepted that some cultural issues belong to the national identity sphere. In fact, some of the most well-known national identity cases fall into this category. National identity may cover the promotion of national language, including the requirement that people in certain positions speak that language;[111] the way citizens spell their name;[112] prohibition of nobility titles motivated by historic developments leading to strong republican appeal;[113] or even standards of family relationships, such as a definition of marriage.[114] All these bear a strong cultural dimension, and in some instances also hide a preference for "us" against "the other". A good example is *Commission v Luxemburg*. In that case, national identity was argued in relation to promoting the use of a national language. This time, unlike in *Groener*, that aim was not pursued by a linguistic knowledge requirement, but directly by the Luxemburgish nationality requirement. Therefore, the CJEU found the public interest could have been effectively safeguarded in other ways than by a general exclusion of nationals of other MSs.[115]

[109] "According to an ethnic-centered reading of 'nation', the concept is related to the existence of common elements in a community: language, history, customs, and ethnicity. In contrast to this view, the civic conception of 'nation' identifies the notion with a subjective sense of belonging to a community, based on very different elements, such as citizenship, law, culture, and religion"; see P Faraguna, 'Taking Constitutional Identities Away from the Courts' cit. 499.

[110] F Fabbrini and A Sajó, 'The dangers of constitutional identity' cit. 471.

[111] Case C-379/87 *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* ECLI:EU:C:1989:599.

[112] Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291.

[113] *Sayn-Wittgenstein* cit.

[114] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

[115] *Commission v Luxemburg* cit. para. 124.

Indeed, some scholars warned that national identity brings inherent dangers.[116] In order to mitigate them, they have prescribed national identity as vast, but not limitless concept. A wide consensus supports the idea that national identity is not boundless. The point of reference should be art. 2 TEU providing a list of values EU aims to promote and protect. Rodin similarly pointed out that while art. 2 TEU values should become a part of MSs' DNA, the concept of national identity is broader and some of its elements MSs define at the national level independently; but these "regardless of the EU context, still have to comply with the values of Article 2 TEU". Thus, only national identity compliant with art. 2 TEU deserves protection.[117]

It has to be admitted that the opinion of the CJEU on the limits of national identity has so far been less clear. Of course, the CJEU's requirement of proportionality is one factor limiting which national identity arguments succeed (and when).[118] But looking at the content of claims, the CJEU is reluctant to interfere with what a MS pleads as its national identity.[119] The CJEU's hesitance concerning the merits of the claims is understandable. It finds itself in a peculiar position because the content of the national identity claims must be shaped by the MSs', not judges in Luxembourg. Hence, raising any objections towards the content of the national identity claim would amount to walking on thin ice in regard to the legitimacy of the CJEU's action.

Nevertheless, the CJEU has recently showed its willingness to provide more tangible protection of common values of art. 2 TEU in well-known legal challenge to the so called conditionality mechanism.[120] The CJEU recalled that "the European Union is founded on values, such as the rule of law, which are common to the Member States and that, in accordance with Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union".[121] It is a "fundamental premiss [of the EU legal order] that each Member State shares with all the other Member States, and recognises that they share with it, the common values, contained in Article 2 TEU".[122] In even stronger terms, the common values form

[116] See e.g. A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1430.

[117] S Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) Croatian Yearbook of European Law and Policy 11, 15.

[118] To this end, see, e.g., case C-202/11 *Las* ECLI:EU:C:2013:239.

[119] M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 937. There is an ongoing discussion whether the CJEU should embrace national identity arguments more responsively. See, e.g., S Weatherill, 'Distinctive Identity Claims, Article 4(2) TEU (and a Fleetingly Sad Nod to Brexit)' (2016) Croatian Yearbook of European Law and Policy XI-XII; P Faraguna, 'Taking Constitutional Identities Away from the Courts' cit. 521.

[120] Cases C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[121] *Poland v Parliament and Council* cit. para. 142.

[122] *Ibid.* para. 143.

"the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties",[123] and the duty of MSs to respect them flows directly from their EU membership.[124] It remains to be seen how this translates into art. 4(2) TEU context.

IV.2. Essential state functions: wider scope brings risks

Let's now compare and contrast essential state functions with national identity. National identity depends, by definition, on the self-perception of a particular MSs. On the contrary, essential state functions make the appearance of a more general and objective concept than national identity. While national identity builds mostly on what is peculiar to the specific MS, and thus perhaps running against the common set of values, functions of state, in particular the essential ones, seem to refer to a more universal concept. It could be assumed that common EU values emerged alongside established notion of essential functions of states, making them appear less likely to be on a collision course with art. 2 TEU. Coupled with fear (and experience) of exploitative national identity claims, essential state functions could appeal to the MSs as a convenient Treaty vehicle for their claims. What adds to their appeal is also the fact that the concept of essential state functions is an open-ended one too. There will be some common ground among MSs in what essential state function entails. Art. 4(2) TEU states some of the essential state functions directly in its text, and we might infer there would be broad consensus on these functions.

However, societies hold different ideas about the role and nature of the state. Hence, essential state functions may differ significantly. Even under the commonly accepted elements of essential state functions, the exact idea about the content, purpose, and state's interest varies a lot among the MSs. As a result, the respect for essential state functions could very well serve as a vehicle for bringing forward claims of varied content and flavour. As showed by the temporary relocation dispute, the scope of essential state functions could be far reaching and encompass also peculiarities more likely to appear under the coat of national identity. The essence of essential functions claim used by Poland in the temporary relocation mechanism (see *supra* section II) was far from universal. Instead, it was heavily laden with cultural content that we could expect rather in national identity claims. Essential state functions thus provide room for interpretation that provides significant flexibility too.

IV.3. Lessons learnt from *Commission v Poland, Hungary and Czech Republic*

It is worth noting that building the claim on essential state functions was in a way surprising, since it was national identity that was used as a figure of speech during the migration

[123] *Ibid.* para. 145.
[124] *Ibid.* para. 169.

crisis, replacing sovereignty as the main argumentative tool. While it has been years since some prominent scholars pronounced the concept of sovereignty outdated,[125] the underlying concerns remained and were transformed into identity-based claims.[126] Nevertheless, if one should name one area where sovereignty has retained its argumentative significance, the choice could well fall on migration and asylum matters. The issue of who can cross the border and settle in a country is still generally considered to be an issue of sovereign competence of a state.[127] Reframing the sovereignty concerns in terms of national identity, let alone essential state functions, was a novel move.

Even though the EU reacted to the refugee crises by adopting a number of asylum policies with a more security oriented and less humanitarian or human rights enhancing perspective,[128] it comes as no surprise that the refugee crisis provided fertile soil for political rhetoric asserting an urgent need to take the policy decision-making back to the nation state level, pointing out the "will of the people" prioritizing their own security over care for unknown "others" because of humanitarian concerns. Such sovereignty claims, Penasa and Romeo argued, found their epicentre in countries of the *Visegrad* Group and were accompanied by visions of homogenous political community, protection of the culture of "own people" and the duty to preserve *the identity* of the state and the nation.[129]

According to De Witte and Tsourdi, the core of the legal challenge to the temporary relocation mechanism (*Slovakia and Hungary v Council*) concerned the extent of MSs' sovereignty in asylum and migration matters.[130] The sovereignty argument in *Slovakia and Hungary v Council* being unsuccessful, the MSs re-framed their concerns into art. 4(2) TEU essential state functions claim. Yet, national identity might have been a more probable vehicle for such a transformation than the essential state function clause. As Bast and Organ suggested, any immigration policies raise the issue of identity "by mirroring not

[125] JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP, 2001) 7–24.

[126] As Wilkinson noted, "it is identity that fills the gap, whether constitutional, cultural, or consumption-oriented". See M Wilkinson, 'Beyond the Post-Sovereign State?: The Past, Present, and Future of Constitutional Pluralism' (2019) CYELS 6, 19.

[127] Judgments of the European Court of Human Rights routinely include a statement that states bound by the European Convention on Human Rights "have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens". See e.g. ECtHR *Ilias and Ahmed v Hungary* App. no. 47287/15 [21 November 2019], para. 125.

[128] S Penasa and G Romeo, 'Sovereignty-Based Arguments and the European Asylum System: Searching for a European Constitutional Moment?' (2020) European Journal of Migration and Law 11, 26. See also S Lavenex, ''Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) JComMarSt 1195.

[129] S Penasa and G Romeo, 'Sovereignty-Based Arguments and the European Asylum System: Searching for a European Constitutional Moment?' cit. 14–17.

[130] B De Witte and E Tsourdi, 'Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council' cit. 1476.

only the qualities that 'we' value in others, but also the essentials that define 'us' as a nation".[131] Questioning identity is, therefore, intrinsically linked to the issue of accepting refugees. Coman and Leconte's research suggested that some Central and Eastern European political leaders had employed the protection of identity alongside a long-established argument that the EU constrains sovereignty and the sovereign rights of the MSs.[132] Leaders such as Orbán had claimed to protect the European identity – incoming migrants had been pictured as a threat to Europe's cultural identity and as a threat to European self-rule.[133] Thus, the firm stance against migration was, in that understanding, a stance for the protection of Europe.[134] Moreover, identity was not only deployed as a figure of political speech. Especially in Hungary, identity as a legal concept of national constitutional law underwent major developments that are directly linked to the relocation mechanism dispute.[135] According to some scholars, the same legal development also evidences the ethno-cultural understanding of a nation, and hence of a national identity.[136] Nevertheless, in *Commission v Poland, Hungary and Czech Republic* the MS did not transform the national identitarian rhetoric and legal developments directly into art. 4(2)

[131] J Bast and L Orgad, 'Constitutional Identity in the Age of Global Migration' (2017) German Law Journal 1587, 1590.

[132] R Coman and C Leconte, 'Contesting EU Authority in the Name of European Identity: the New Clothes of the Sovereignty Discourse in Central Europe' (2019) Journal of European Integration 855, 856.

[133] For interesting insight into the rhetoric of Orbán, see also ES Balogh, 'Viktor Orbán's "Ethnically Homogeneous" Hungary' (1 March 2017) Hungarian Spectrum hungarianspectrum.org.

[134] R Coman and C Leconte, 'Contesting EU Authority in the Name of European Identity: the New Clothes of the Sovereignty Discourse in Central Europe' cit. 862–865.

[135] The development could be described in three major steps, with a prelude in a form of a national consultation on popular opinion about migration. First, the government conducted a (constitutionally problematic) referendum asking whether Hungarians want to allow EU to mandate relocation of non-Hungarians to Hungary. The referendum rendered invalid results due to low number of casted votes. Secondly, the government tried to push an amendment to the Fundamental Law on protection of national identity and restriction of immigration to Hungary. After Orbán failed to secure required majority in order to ratify the amendment, Hungarian Constitutional Court stepped in and delivered its judgment on the request of the Commissioner of Human Rights (ombudsperson) for abstract interpretation of the Fundamental Law in connection with the Council relocation decisions. In the judgment, the Constitutional Court developed its own identity review. For deeper analysis including the national consultation, see e.g. Á Bocskor, 'Anti-Immigration Discourses in Hungary During the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015' (2018) Sociology 551; G Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) Review of Central and East European Law 23; T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) German Law Journal 1140. See also insightful blogposts of G Halmai and R Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades' (11 November 2016) *Verfassungsblog* verfassungsblog.de.

[136] T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' cit. 1157. See also K Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) German Law Journal 1703, 1714.

TEU national identity claims but relied on essential state functions, stretching the understanding of the concept.

It has to be emphasized that irrespective of particular legal framing, the nature of the argument would remain deeply problematic. It is true that the "reprehensible conduct" of potentially relocated applicants feared by the Polish government would indeed be considered, depending on the circumstances, illegal or inappropriate by EU MSs' standards. Still, the claim indirectly links any relocations with a threat to national security on the basis that the relocated applicants came from different societies, which makes it more probable that they would hold culturally problematic views. But, in the context of asylum law, such objections hardly trump the need for protection.[137] Admittedly, the government did not play the cultural card directly by suggesting that it perceived such a threat from every applicant, but rather limited it to only some individuals. And those who were indeed problematic could not be properly identified. The government's response to this obstacle – a refusal to relocate anyone – treats the whole group as if they posed the danger. All that suffices for being labelled as "dangerous" is a certain nationality, which is presumed to be linked to the majority culture in the country of origin. So, in the end, what the government was concerned about did not differ that much from "the cultural threat" refused by the CJEU in *Slovakia and Hungary v Council*. Yet, in *Commission v Poland, Hungary and Czech Republic,* the response of the CJEU was significantly less vocal in dismissing the claim as legally impermissible.

Had it decided to respond to the MSs' essential state functions argument openly and comprehensively, the CJEU would have faced the same issues as in national identity cases. The CJEU recognizes MSs are responsible for defining their essential interests, including how to perform their essential state functions such as securing national security. To question the MS's vision of its essential state functions would be a delicate task. Perhaps, that has led the CJEU to a more deferential response to the arguments put forward by Poland: instead of discussing the merits of Polish claims, the CJEU focused on rebutting them on the basis that the unilateral measures had exceeded what had been necessary. Hence, the response of the CJEU was less straightforward than in *Slovakia and Hungary v Council*, when the CJEU bluntly refused to take into account ethnic and linguistic homogeneity as national values worth protecting over the common EU value of solidarity. Perhaps it considered refusal of such an argument as inevitable because it too obviously contradicted the core liberal values that the EU is built upon (art. 2 TEU). Once the argument became more sophisticated and coated as essential state function, the CJEU took a more cautious approach.

Consequently, the temporary relocation mechanism dispute has revealed that the essential state functions could be abused the same way as national identity. Hence the CJEU's less vocal approach towards essential state functions claim, in comparison with

[137] Asylum law is based on an assumption that states would accept refugees irrespective of any cultural or linguistic ties. The 1951 Refugee Convention contains only very narrow reasons for exclusion from receiving protection. See Convention Relating to the Status of Refugees [1951] art. 1(f).

ethnic-centred concerns expressed in earlier proceedings, *should not* be understood as suggesting that essential state functions are a free, limitless concept. Art. 2 TEU stating common EU values, *inter alia,* human dignity, equality, respect for human rights, including the rights of persons belonging to minorities, pluralism, tolerance and solidarity, must be used as a normative framework for assessing essential state function claims, just as in the case of national identity claims. Given the number of similarities between the two concepts, there is no reason to treat essential state functions claims otherwise.

V. Conclusion

Art. 4(2) TEU remains a highly relevant topic that only gains new urgency given the illiberal constitutionalism tendencies in some MSs. Given the prominence of national identity, it comes as a surprise that its art. 4(2) TEU sibling, essential state functions, has so far received limited attention and lacks clarity as to their scope, aim and relation to national identity. In this *Article*, I attempted to address that gap. Analysing the Treaty text, historic context, the CJEU's and selected national constitutional courts' case-law, I concluded that essential state functions are a distinctive legal concept. Nevertheless, they are intrinsically linked to national identity. In that regard, I found the way the CJEU treated the Member States' essential state functions claim in *Commission v Poland, Hungary and Czech Republic*—without any distinguishing from national identity—justified. But the case provides basis for two lessons to be learnt about essential state functions. First, that the concept could be stretched to encompass claims that could potentially, or even more likely be founded on national identity. Secondly, building on the previous conclusion, it has to be emphasized that just like national identity, essential state functions find their substantive limit in art. 2 TEU.

ARTICLES

The International Representation of the Eurozone and of the Eurosystem: The Role of the ECB

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ABSTRACT: This *Article* will attempt to answer three main questions: *i)* whether the ECB is a qualified representative for the eurozone or the Union in international fora – and if so, *ii)* to what extent its role falls within art. 138 TFEU or rather art. 6 of the ESCB Statute – and *iii)* whether national central banks in the eurozone enjoy any residual competence in managing external activity falling within the area of monetary relations and specifically ESCB technical cooperation projects. To that end, it will be necessary to explore the current external projection of the Union and of the eurozone in the area of economic and monetary policies and their representation in the main fora in charge of global economic governance. Specific attention will be paid to the impact of the dichotomy Union-eurozone on the EMU external relations. In the concluding remarks, the advantage of a single eurozone external representation at all levels will be pointed out, after having explored the political and technical obstacles which explain the delay in the achievement of such an objective.

KEYWORDS: European Central Bank – EMU – Eurosystem – euro area – EU external relations – monetary policy.

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I. The complex institutional balance in the external relations of the European monetary policy: legal bases

European Treaties provide several appropriate legal bases to take all the necessary decisions to project an external dimension of the European monetary policy. Some provisions pertain to the external relations of the Union and may be found in part V of the TFEU, "The Union's External Action", under title V concerning international agreements. Other provisions specifically regarding the external projection of the euro area are set out in part III, "Union Policies and Internal Action", title VIII, "Economic and Monetary Policy", chapter 4, "Provisions Specific to Member States Whose Currency Is the Euro". The conclusion of formal agreements on monetary and exchange policy and the approval of orientations in currency exchange matters fall within the first group of provisions, while the adoption of common positions and of a unified representation in international fora is in the second category. Following the Lisbon revision, the two sets of provisions are found in arts 219 and 138 TFEU, respectively. As it has already been pointed out, the first refers to all the Member States without distinction, while the second is specific to the Member States whose currency is the euro.[1]

All these provisions apply only to States sharing the euro as their currency, as in art. 139(2)(g) TFEU it is specified that art. 219 TFEU "shall not apply to Member States with a derogation". However, the international agreements concluded on the legal basis of art. 219 TFEU are agreements of the Union, while the common positions in international fora that are agreed upon under art. 138 TFEU are positions of the eurozone.

Yet, to date, little use has been made of these provisions, and specifically of art. 138 TFEU. Therefore, the eurozone fails to have both one voice and proper visibility as a monetary union in international financial institutions (IFIs).

A third area of international monetary relations falls within the competence of the European Central Bank (ECB) and it is based on art. 6 of Protocol No. 4, "Statute of the European System of Central Banks and of the European Central Bank" (hereinafter ESCB Statute).

After a general overview, we will attempt to answer three questions. Firstly, we will try to understand *i)* whether the ECB is a qualified representative for the eurozone or the Union in international fora. If so, we will examine *ii)* to what extent its role falls within art. 138 TFEU or rather art. 6 ESCB Statute. Finally, we will focus on *iii)* whether national central banks in the eurozone enjoy any residual competence in managing external activity falling within the area of monetary relations and specifically the ESCB technical cooperation projects. In the concluding remarks, we are going to point out the advantage of a single eurozone external representation at all levels, after having explored the political and technical hindrances that could explain the delay in achieving such an objective.

[1] This is how the relevant provisions were reorganised by the Treaty of Lisbon, signed on 13 December 2007 and in force since 1 January 2009, the latest significant revision of the Treaty establishing the European Union and of the Treaty establishing the European Community, the latter now Treaty on the functioning of the European Union. Previously, all of them were in different paragraphs of art. 111, in part III of the EC Treaty.

II. The external relations of the European Union in international economic and monetary relations

Art. 219 TFEU has a relevant role in the international monetary relations of the European Union, as it largely, if not completely, clarifies the complex institutional balance in external relations in the wide area of economic and monetary policies. While the internal monetary policy is set by the ECB, its external dimension falls within the competence of the Council, which shall decide it while also taking into consideration the key role of the ECB and the views of the other political institutions. According to this provision, which makes an exception to the ordinary treaty making power regulated by art. 218 TFEU,

> "[...] the Council, either on a recommendation from the ECB or on a recommendation from the Commission and after consulting the ECB, *in an endeavour to reach a consensus consistent with the objective of price stability*,[2] may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously after consulting the European Parliament and in accordance with the procedure provided for in paragraph 3".[3]

Within this hypothesis,

> "[t]he Council may, either on a recommendation from the ECB or on a recommendation from the Commission, and after consulting the ECB, once again *in an endeavour to reach a consensus consistent with the objective of price stability*, adopt, adjust or abandon the central rates of the euro within the exchange-rate system. The President of the Council shall inform the European Parliament of the adoption, adjustment or abandonment of the euro central rates".[4]

On the same line:

> "[i]n the absence of an exchange-rate system in relation to one or more currencies of third States as referred to in paragraph 1, the Council, either on a recommendation from the Commission *and after consulting the European Central Bank or on a recommendation from the European Central Bank,* may formulate general orientations for exchange-rate policy in relation to these currencies. These general orientations shall be *without prejudice to the primary objective of the ESCB to maintain price stability*".[5]

[2] Art. 219 TFEU, emphasis added, here and in the following lines.

[3] *Ibid*. para. 1.

[4] *Ibid*.

[5] *Ibid*. para. 2. According to Louis, the term "orientation" should be interpreted as "*plus que des simples recommandations mais moins que des actes contraignants*" (emphasis added), see JV Louis, *L'Union Européenne et sa monnaie* (Commentaire J Mégret 3rd ed. University of Bruxelles 2009). On this point, also JV Louis, 'Les relations extérieures de l'Union économique et monétaire' in Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) 84; A Malatesta and C Ricci, 'Le relazioni esterne della Comunità europea in materia monetaria' (2002) Diritto dell'Unione Europea 231; HJ

To date, no such orientations have been adopted.[6]

In the absence of such general orientations, which may be considered an extraordinary measure, the management of exchange-rate policy falls entirely within the competence of the ECB, under art. 127(2) TFEU, which lists, among the "basic tasks to be carried out through the ESCB", "to conduct foreign-exchange operations consistent with the provisions of Article 219" and "to hold and manage the official foreign reserves of the Member States", in its second and third lines, respectively.

The above-mentioned paragraphs of art. 219 TFEU are more interesting from a theoretical than a practical point of view, since, having never been used, they simply help to understand that external relations in the field of monetary policy are entrusted, in the first place, to the Council, even though it is committed to seeking the consensus of the European Central Bank.[7]

As the idea of an international multilateral agreement on an exchange-rate system for the euro in relation to the currencies of third States – similar to the Bretton Woods agreement in 1944 – seems to be unrealistic nowadays, bilateral agreements could be envisaged.

The third paragraph of the same art. 219 TFEU has proved far more useful as a legal basis, as it governs the conclusion of any agreements on monetary and exchange-rate policies, being so the main legal basis for the EU treaty making power in this field. It is particularly interesting as it is not just an attribution of competence, but it gives *carte blanche* on how to establish procedures for negotiating, concluding, and carrying out international agreements on the matter. Consequently, there is much more flexibility in external relations in the field of monetary policy than there usually is in other EU external policies, just as it has been shown by the agreements concluded in over two decades of European monetary union. Yet, these are the external monetary relations of the European Union, rather than just of the eurozone, despite specifically affecting the euro area.

Hahn, 'Exchange Rate Policies in the ESCB' in M Giovanoli (ed.), *International Monetary Law: Issues for the New Millennium* (Oxford 2000) 195 ff. This art. 219 (former art. 111 TCE) is defined as a procedural rule in C Zilioli and M Selmayr, *La Banca Centrale europea* (Giuffré Milano 2007) 352.

[6] Resolution II/523/97 – C4-0574/97 of the European Parliament of 04 December 1997 on Economic Policy Coordination in Stage 3 of EMU: Common Ground and Ways Forward arts 109 and 109(b), Annex I to the European Council Conclusions states that "the Council may, in exceptional circumstances, for example in the case of clear misalignment, formulate general orientations for exchange-rate policy in relation to non-EC currencies in accordance with Article 109(2) of the Treaty. These general orientations should always respect the independence of the ESCB and be consistent with the primary objective of the ESCB to maintain price stability". Therefore, it seems that such general orientations of a political nature have been considered exceptional since the very beginning.

[7] The notion of consensus is well-known in international law. It could be defined as the presumption of acquiescence in the absence of expressed objections. One of the first legal recognitions of the practice is in the opinion concerning Certain expenses of the United Nations, by the International Court of Justice, see ICJ *Certain Expenses of the United Nations (art. 17 para. 2 of the Charter)* [20 July 1962] 151 ff. and 167 ff.

Most of these agreements aim at establishing (or rather extending) a wider monetary union. Quite exceptionally, the first set of them was negotiated and concluded by Italy and France, on behalf of the European Community, with the Republic of San Marino, the Vatican City State, and the Principality of Monaco, respectively, taking great advantage of the flexibility allowed by art. 219(3) TFEU (previously art. 111 TEC). In other cases, on the same legal basis, Member States have been authorised to maintain previous agreements, such as the ones between Portugal and Cape Verde, and the ones between France and the African states using the CFA Franc as their currency.[8]

Some years later, the older agreements were further renegotiated and eventually concluded directly by the Union. Unlike the previous ones, these were agreements of the Community, and not simply authorised by it. The monetary agreement between the European Union and the Vatican City State, signed on 17 December 2009, repealed the previous agreement between the European Community, represented by the Italian Republic, and the Vatican City State, while the monetary agreement between the European Union and the Republic of San Marino, concluded on 27 March 2012, replaced the previous agreement between the Italian Republic, on behalf of the European Community, and the Republic of San Marino.[9] Both agreements provide for the authorisation of the minting of euro coins (but not the issuing of banknotes), the attribution of legal tender status to the euro on the territory of third States and the creation of a mixed committee composed of representatives of the Union and of the signatory State; the Court of Justice has exclusive jurisdiction in the event of disputes between the parties.

An agreement similar in content was concluded with the Principality of Andorra, a microstate without an official currency of its own, which – unlike the aforementioned countries – had never concluded any monetary agreement with a Member State or a third

[8] The CFA Franc agreement involves 15 African countries, 8 members of the Monetary Union of Western Africa (Benin, Burkina Faso, the Ivory Coast, Guinea Bissau, Mali, Niger, Senegal and Togo), whose currency is the *franc de la Communauté Financière de l'Afrique*, and 6 members of the Monetary and Economic Community of Central Africa (Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon), whose currency is the *franc de la Coopération financière Africaine*. The two areas, although diverse from a formal legal perspective, are both part of just one currency area, as the two currencies have the same parity with the Euro, as the French Franc previously did. The Comoros Islands joined the same currency area with their Comorian Franc. Decision 98/683/EC of the Council of 23 November 1998 concerning exchange rate matters relating to the CFA Franc and the Comorian Franc and Decision 98/744/CE of the Council of 21 December 1998 concerning exchange rate matters relating to the Cape Verde Escudo.

[9] The revision process of the agreements started in 2009, after the Communication COM/2009/359 final from the Commission to the Council of 14 July 2009 Report on the functioning of the Monetary Agreements with Monaco, San Marino and Vatican. Subsequently, the Council adopted the Decision 2009/895/EC of 26 November 2009 on the position to be taken by the European Community regarding the renegotiation of the Monetary Agreement with the Vatican City State, and the Decision 2009/904/EC of the Council of 26 November 2009 on the position to be taken by the European Community regarding the renegotiation of the Monetary Agreement with the Republic of San Marino.

country. The Spanish and French banknotes and coins, which were legal tender in Andorra, were replaced by euro banknotes and coins starting from 1 January 2002. Today, the use of the euro is governed by a monetary agreement between the European Union and the Principality of Andorra, signed on 30 June 2011,[10] under which the euro is the official currency. Yet, unlike the other ones, this agreement was not just negotiated, but also concluded, by the European Commission on behalf of the Union and was published in the Official Journal in the C series.

In 2011, the same art. 219(3) TFEU was used as a legal basis for an agreement between the EU and France (acting for the benefit of the French overseas collectivity of Saint-Barthélemy), on keeping the euro in Saint-Barthélemy following the amendment of its status regarding the European Union.[11]

Despite being perfectly compatible with the legal basis provided by art. 219(3) TFEU, such a variety of concluding procedures is quite surprising and can only be explained by historical ties and the special regimes previously in place. Even though the main actors in the procedure were the Council, which opened and concluded negotiations, and the Commission, which was asked to lead the negotiations, the ECB was also strongly associated with the negotiations, together with the euro area national authorities of those Member States having a strong historical link with the concerned country. Nevertheless, to date, the ECB still does not have an office specifically entrusted with the negotiation of monetary agreements.[12]

External relations in matters of economic and monetary policy are not always based on agreements but are more often conducted by means of soft law and negotiations in a series of international fora that make up the so-called global economic governance. Some of them are institutionalised, such as the Bretton Woods organizations (International Monetary Fund (IMF) and World Bank), others are informal, such as the Groups of

[10] Monetary Agreement 2011/C 369/01 between the European Union and the Principality of Andorra [2011].

[11] See Decision 2011/433/EU of the European Council of 12 July 2011 on the signing and conclusion of the Monetary Agreement between the European Union and the French Republic on keeping the euro in Saint-Barthélemy following the amendment of its status with regard to the European Union. Such a change is a consequence of Decision 2010/718/EU of the European Council of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy, as it is to cease to be an outermost region of the Union with effect from 1 January 2012 and is to have the status of an overseas country or territory, as referred to in Part Four of the Treaty.

[12] This competence is shared within the institution by the DG Legal Service (DG/L) and DG International and European Relations (DG/I). The appointed ECB representatives in the Joint Committee meetings are managers in DG/L and DG/I, respectively. Appointment of the ECB representatives in the Joint Committees is an Executive Board competence (current business of the ECB under art. 11(6) of the ESCB Statute) that has been delegated to the two Executive Board members in charge of DG/L and DG/I, respectively. The delegation decision allows the appointed ECB representatives to be supported by ECB staff from relevant business areas. They can also be substituted for individual meetings of the Joint Committees by other ECB staff, subject to prior guidance to the substituting staff and to a debriefing to be provided after the Joint Committee meeting. Source: ECB staff.

States (G7, G10, G20, G24), and others are characterised by a technical nature, such as the Bank for International Settlements (BIS) and the Financial Stability Board (FSB). The next section will explore how these relations are managed without resorting to the legal bases provided for by European Treaties.

III. The external relations of the eurozone: the ECB as a representative of the union and of the eurozone

III.1. Institutional "intricacies"

Under art. 138(1) TFEU, "[t]o secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences".

Once again, "[t]he Council shall act after consulting the European Central Bank". The second paragraph of the same art. 138 TFEU, more ambitiously, states that "[t]he Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences", always "after consulting the European Central Bank".

The Council is still the Economic and Financial Affairs Council (ECOFIN) of the whole Union, made up of 27 members, even though eight of them have had their vote suspended, being states with a derogation, outside the eurozone, and perfectly sovereign in their monetary relations. Therefore, the measures adopted under its rule have a binding effect only upon the Member States whose currency is the euro.

Consequently, the main difficulties concerning external political representation in international monetary relations lie exactly in this multi-speed system introduced by the Maastricht Treaty along with the double track established for economic and monetary policies: the first being a matter of coordination among all the Member States, the second an exclusive competence of the Union.[13] The consequences of these intricacies in the so-called "economic and monetary union" may be summarised as follows:

a) There is a clear division of competences in terms of economic and monetary policies: while the first one is a coordination of the national economic policies of all the Member States, the second is an exclusive competence of the Union, specific to the eurozone.[14]

b) This is mirrored by a clear division of institutional roles – economic policy belongs to all the Member States, the Council, and the European Council, while monetary policy

[13] In 1992, the Treaty of Maastricht, revising the Treaty establishing the European Community, added the title dedicated to economic and monetary policy to Part III, thus laying down the new provisions necessary for European monetary integration. These articles have been subject to minor changes since then.

[14] On this inconsistency in the project of EMU, see S Cafaro, *Unione monetaria e coordinamento delle politiche economiche. Il difficile equilibrio tra modelli antagonisti di integrazione europea* (Giuffré 2001).

is entrusted (and for the eurozone only) to the ECB. Consequently, the external projection of the Economic and Monetary Union (EMU), as referred to in art. 138 TFEU, cannot but be complicated, as it puts together the two policies.[15]

c) Moreover, the dividing line between economic and monetary policies remains extremely unclear also in the definition of what is meant by economic policy and monetary policy. Even more so when considering the secondary objective of the ECB, which is to support the general economic policies in the Union.[16] Economic policy has an impact on monetary policy and vice-versa, as it has clearly been pointed out by the European Court of Justice (ECJ) in the recent *Weiss* case.[17] The case law of the ECJ on the topic has confirmed the fluidity of this dividing line: see the *Pringle*,[18] *Gauweiler*,[19] and *Weiss*[20] cases, and the ruling of the German Constitutional Court.[21]

d) As it has already been mentioned, the internal complex institutional balance is not reflected exactly in the external dimension concerning *economic and monetary* policies. In

[15] ECB, *The External Representation of the EU and EMU* www.ecb.europa.eu; B Dutzler, 'EMU and the Representation of the Community in International Organizations' in S Griller and B Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (Springer Wien New York 2002) 449; M Herrmann, 'Monetary Sovereignty of the Euro and External Relations of the Euro Area: Competences, Procedures and Practices' (2002) European Foreign Affairs Review 1; M López- Escudero, 'La politique de taux de change de l'euro vis-à-vis des monnaies de pays tiers' in G Vandersanden (ed.), *Mélanges en hommage à Jean-Victor Louis* (Editions de l'Université de Bruxelles 2003) 282-300; JV Louis, 'Les relations extérieures de l'union économique et monétaire' cit. 77; C Zilioli and M Selmayer, 'The External Relations of the Euro Area: Legal Aspects' (1996) CMLRev 273.

[16] For a further example of the important role of the ECB in supporting the general economic policies of the Union, see C Zilioli and M Ioannidis, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies' (2022) CMLRev 363.

[17] Case C-493/17 *Weiss and others* ECLI:EU:C:2018:1000.

[18] Case C-370/12 *Pringle* EU:C:2012:756. See C Koedooder, 'The Pringle Judgment: Economic and/or Monetary Union?' (2013) FordhamIntlLJ 111-146; G Lo Schiavo, 'The Judicial "Bail Out" of the European Stability Mechanism: Comment on the Pringle Case' (College of Europe Research Papers in Law 9-2013).

[19] Case C-62/14 *Gauweiler and others* EU:C:2015:400. See V Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler' (2016) CMLRev 139-196; P Craig and M Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) ELR 4-24; F Fabbrini and others, 'The European Court of Justice, the European Central Bank, and the Supremacy of EU Law' (1 February 2016) Maastricht Journal of European and Comparative Law 23; F Martucci, 'La Cour de justice face à la politique monétaire en temps de crise de dettes souveraines: l'arrêt Gauweiler entre droit et marché: Commentaire de l'arrêt CJ, GC, 16 juin 2015, Peter Gauweiler e.a, C-62/14 (1)' (2015) Cahiers de droit européen 493-534.

[20] *Weiss* cit. See AAM Mooij, 'The *Weiss* Judgment: The Court's further Clarification of the ECB's Legal Framework: Case C-493/17 *Weiss and others*, EU:C:2018:1000' (2019) Maastricht Journal of European and Comparative Law 449-465.

[21] German Federal Constitutional Court (BVerfG) judgment of 5 May 2020 2 BvR 859/15. See M Avbelj, 'The Right Question about the FCC Ultra Vires Decision' (6 May 2020) Verfassungsblog verfassungsblog.de; L Bini Smaghi, 'The Judgment of the German Constitutional Court is Incomprehensible' (Luiss SEP Policy Brief 25-2020); F Fabbrini and RD Keleman, 'With one Court Decision, Germany May be Plunging Europe into a Constitutional Crisis' (7 May 2020) Washingtonpost.com www.washingtonpost.com; MP Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (6 May 2020) Verfassungsblog verfassungsblog.de.

fact, while the internal monetary policy is set by the ECB, its external dimension appears to have a strong link with the economic policy (with relevant foreign policy implications). This could explain why – under arts 219 and 138 TFEU – it falls mostly within the competence of the Council, even though it is bound to take into consideration the views of the ECB and its primary objective.

e) While the principle of the unity of the institutional framework of the Union cannot be denied, sovereignty in monetary policy has been irrevocably transferred to the EU level exclusively by the eurozone countries. The ECB's deliberative process falls within the competence of the Governing Council (in charge of the monetary policy of the eurozone), while the Council of the Union is a decisional body of the whole Union, although the voting right of non–euro countries is suspended.[22] Moreover, art. 138 TFEU refers to the adoption of common positions "on matters of particular interest for economic and monetary union" and unified representation in international fora, without specifying if those regard the eurozone only, although the article falls within a chapter concerning "provisions specific to member states whose currency is the euro" (arts 136-138 TFEU). The following pages will explore how the eurozone contrived to take (some) decisions by itself, by developing parallel bodies and tools.

f) Most critically, both the Union and the ECB have legal personality, under art. 47 TEU and art. 9 ESCB Statute, respectively, yet the eurozone does not. Therefore, any single representation adopted on the legal basis of art. 138 TFEU refers to the Union, rather than the eurozone. The ECB is the central bank of the European Union and the euro is the currency of the Union, even though the Member States whose voting rights are limited have preserved their monetary sovereignty entirely.[23] This makes it more difficult to figure out an autonomous representation for the eurozone.

III.2. Practical arrangements

a) The IMF

One of the most sensitive political issues is the representation of the euro area within the Groups of States and the IMF, as these organizations deal with both monetary and financial matters, simultaneously covering economic and monetary policies, Union and eurozone.

[22] Art. 139 TFEU excludes the application of the following provisions to the Member States with a derogation: "(g) monetary agreements and other measures relating to exchange-rate policy (Art. 219); [...] (i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Art. 138(1)); (j) measures to ensure unified representation within the international financial institutions and conferences (Art. 138(2))".

[23] Although they keep their monetary sovereignty, their national central banks are part of the European System of Central Banks and are represented in its General Council. Moreover, they have to respect some fundamental principles of the TFEU regarding monetary policy, including central bank independence (see e.g. recent Opinion CON/2020/13 of the European Central Bank of 20 April 2020 on reform of Sveriges Riksbank).

The IMF might be said to be the most important case to study, as it is a cornerstone in the global economic governance, due to it being entrusted with the mission of safeguarding financial stability, highly relevant for both the Union and the ECB. Furthermore, it is an institution built on hard law, which is not often the case in global economic governance. The unified representation of the euro area in IMF contexts seemed to be quite a natural legal development of European monetary integration since the beginning, as the eurozone States no longer had all the requirements needed to fulfil the obligations specified in the IMF Articles of Agreement.[24] Consequently, since the very beginning of European monetary unification, practical arrangements have been set up for the new currency union to fit into the IMF framework, for instance concerning the exchange of information and statistical data.[25] Since January 1999, official views have been exchanged between the IMF and the ECB about the monetary and exchange policy of the euro area. Since November 2000, the ECB has held the status of "other holder" of special drawing rights (SDR)[26] and may exchange these against freely usable currencies. The so-called art. IV Consultations with Member Countries are now also being carried out with the European institutions on the euro area policies. Consequently, the IMF not only meets the national authorities of Member States, but also representatives from the EU Commission, the ECB, the Economic and Financial Committee and the Eurogroup.[27]

Within the IMF, the ECB enjoys an observer status in both the Executive Board (EB) and the International Monetary and Financial Committee (IMFC), which allows it to send an (invited) representative to meetings and to address the EB with the permission of the chairman, on matters falling within the responsibility of the ECB. These are: euro area policies in the context of art. IV Consultations, Fund surveillance under art. IV on the policies of individual euro area members, the role of the euro in the international monetary system, the World Economic Outlook, global financial stability reports, and world economic and market developments. Written statements may be circulated in advance and

[24] See, for instance, the "Obligations regarding exchange arrangements" set out in art. IV IMF Articles of Agreement, or the "General Obligations of Members" in art. VIII IMF Articles of Agreement: Avoidance of restrictions on current payments; Avoidance of discriminatory currency practices; Convertibility of foreign-held balances; Furnishing of information; Consultation between members regarding existing international agreements; Obligation to collaborate regarding policies on reserve assets. The IMF enjoys the correspondent right to supervise the fulfilment of these obligations, and may, to this end, ask its members to provide all the necessary information. On this topic, see FA Mann, *The Legal Aspect of Money* (V ed. Clarendon Press 1992) 364 ff. On the same topic, see RSJ Martha, 'The Fund Agreement and the Surrender of Monetary Sovereignty to the European Community' (1993) CMLRev 749 ff.; R Smits, *The European Central Bank: Institutional Aspects* (Kluwer 1997) 429 ff.

[25] See ECB, *Annual Report 1998* www.ecb.europa.eu 99.

[26] Art. XVII sect. III IMF Articles of Agreement.

[27] See DG of the European Commission, *The Relationship between Union and the IMF in Stage III: Issues and Options* (27 June 1997) II/316/97-EN on file with the author, or the International Monetary Fund, *Concluding Statement of the IMF Mission on the Economic Policies of the Euro Area* (30 January 2001) www.IMF.org.

added to the recording with the chairman's permission.[28] All the mentioned activities seem to show that the ECB contributes to the activity of the IMF as a representative of the euro area in the field of monetary policy, projecting on the international level its policies as adopted by the General Council. When it comes to economic policy, the ECB's position might be regarded as an original contribution which nonetheless is fed by its continuous exchanges of views with the Council of the Union and the Commission.[29] Moreover, the ECB observers in the meetings of the IMFC have an informational role, as they are consulted by non-EU members in the IMF to explain questions pertaining to the euro area.[30] The ECB's permanent representative in Washington, D.C. is appointed by the Executive Board of the ECB.

Since 2005, the voice of the Union has also been expressed by the euro area Executive Board members in the IMF, through a coordination mechanism of the Member State' representatives at the IMF headquarters in Washington called EURIMF, and by its appointed President since 2007. This coordination body holds regular meetings involving the executive directors of the countries of the euro area. The EURIMF interacts with, and is addressed by, a sub-committee on the matters of the Fund (SCIMF), established within the Economic and Financial Committee.[31] Furthermore, the position of the Union is officially presented to the Board of Governors of the Fund by the rotating presidency of the

[28] See the Eurosystem's contribution to the "Code of Good Practices on Transparency in Monetary and Financial Policies", adopted by the IMF Interim Committee on 26 September 1999, mentioned by T Padoa-Schioppa, 'Introductory statement at the Sub-Committee on Monetary Affairs European Parliament' (17 March 1999) www.ecb.europa.eu. On this topic, see also M López-Escudero, 'New Perspectives on EU-IMF Relations: A Step to Strengthen the EMU External Governance' (2016) European papers www.europeanpapers.eu 469-499.

[29] The ECOFIN Council, *i.e.*, the Council meeting of finance ministers, can take formal decisions related to the economic and financial policies of the EU. According to the TFEU Treaty, the President of the ECB attends Council meetings whenever the Council discusses matters relating to the objectives and tasks of the ECB. The Treaty also provides for the President of the Council to participate in the meetings of the Governing Council without a right to vote. The decisions of the ECOFIN Council are prepared by the Economic and Financial Committee (EFC), which brings together senior national representatives from finance ministries and central banks, as well as senior officials from the European Commission and the ECB. The EFC plays a key role in reviewing the economic and financial situation of the Member States and also coordinates the EU positions in international fora. The ECB is also a member of the Economic Policy Committee (EPC), which plays a key role in preparing the ECOFIN Council's deliberations in the area of structural reforms and enjoys an observer status in the Financial Services Committee (FSC), involved in the preparation of ECOFIN decisions in the field of financial services and supervision. The ECB is in regular contact with the Commission and exchanges views with Commission representatives; the Commissioner for Economic and Monetary Affairs may participate in the meetings of the Governing Council without the right to vote. Beyond these formal contacts, the ECB has established a number of informal working contacts with the Commission services (see e.g., the ECB, 'Monthly Bulletin "10th Anniversary of the ECB"' (2008) www.ecb.europa.eu 28).

[30] See JA Koops and D Tolksdorf, *The European Union's Role in International Economic Fora – Paper 4: The IMF* (October 2015) www.europarl.europa.eu 45, which refers to IMF staff as source.

[31] Established on the legal basis of art. 134 TFEU, the ECOFIN Committee is the preparatory body of the activities of the ECOFIN Council. See S Cafaro, 'Article 134 [Economic and Financial Committee]' in HJ

Council in annual and spring meetings, while the Commissioner for Economic and Monetary Affairs – who is generally competent to coordinate the member countries on their representation in international financial institutions – participates as an observer in the ministerial committees of the Fund.

Two documents by the European Commission address the goal of a more organic and coherent participation of the Union in the IMF decisional bodies: the Communication COM(2015) 602 final, and the Proposal COM(2015) 603 final.[32] Such documents were issued more than fifteen years after another Commission's Proposal COM(1998) 637 final,[33] adopted at the very beginning of European monetary unification, in 1998. What all these proposals have in common is the little or no follow-up by the Council.

In the Communication COM(2015) 602, the Commission pointed out how the current representation of the euro area in the IMF is weakened by several factors: *i)* the high fragmentation among eurozone member states, which are spread over six constituencies[34] and mixed up with non-euro or even non-European states; *ii)* the insufficient representation of the euro area as a whole, notwithstanding the coordination mechanism and the role of observer of the ECB; *iii)* the insufficient coordination at euro area level, meaning the lack of the common positions previously agreed. Hence a specific proposal aimed at establishing a unified representation of the euro area in the IMF. This aims at a single voice for the eurozone through a transitory stage, whereby IMF constituencies are re-organized, by grouping together the Member States of the euro area, so that it is possible for them to start speaking with one voice. On the final stage, "The Member States of the euro area, supported by the Commission and the European Central Bank (ECB), adopt all the necessary measures for the establishment, by 2025, of a unified representation of the euro area in the IMF".[35] In particular, the euro area is expected to be represented in the Board of Governors and in the International Monetary and Financial Com-

Blanke and R Böttner (eds), *Springer Commentaries on International and European Law Series* (2022) SpringerLink.

[32] Communication COM(2015) 602 final from the Commission to the European Parliament, the Council and the European Central Bank of 21 October 2015 *A roadmap for moving towards a more consistent external representation of the euro area in international fora*; Proposal COM(2015) 603 final from the Commission of 21 October 2015 for a Council decision laying down measures in view of progressively establishing unified representation of the euro area in the International Monetary Fund.

[33] Resolution COM(98)0637 − C4-0638/98 of the European Parliament of 7 December 1998 on a proposal for a Council decision on the representation and position taking of the community at international level in the context of economic and monetary union, which preceded the "Report to the European Council on the state of preparation for Stage 3 of EMU, in particular the external representation of the Community", annex II to the Conclusions of the European Council of 11-12 December 1998 in Wien. This proposal had no follow-up by the Council.

[34] In the IMF Executive Board each member is appointed by a state, or a group of states called constituencies.

[35] COM(2015) 602 final cit.

mittee by the president of the Eurogroup, and in the Board of Directors by its own executive director, appointed by the eurozone constituency. The 2010 IMF reform, in force since 2015, with an all-elected EB, eliminated legal obstacles to a consolidation of the EU Member State constituencies in the IMF.[36]

Yet, in those documents, a genuine single membership of the Union or of the eurozone does not appear as a goal. They reflect the *status quo*: the current impossibility for the Union to apply for a full membership in the IMF, as only States may do so, under art. II of the IMF Articles of Agreement. Nevertheless, the possible replacement of the Member States by the Union or the joint membership option are still debated solutions.[37]

b) The "Gs"

The position of the EU and of the ECB in the Groups of States (Gs) is completely different, as these are informal forums, and significant differences exist between one grouping and another.

Membership of different forums varies across the euro area Member States. France, Germany and Italy are members of the G7; the same countries along with Belgium and the Netherlands are part of the G10; France, Germany and Italy – alongside the European Union – are members of the G20, where Spain is a permanent guest invitee, together with one or more other European or non-European countries. In 2021, the euro area was also represented by the Netherlands as a permanent guest invitee. The ECB, always present whenever issues falling within its field of competence need to be discussed, represents both the monetary authority of the member countries and that of the eurozone as a whole, and as such, it presents its positions on monetary policy.

The G20 and G7 deal with broad economic and monetary policies, while the G10's focus on financial and monetary matters is narrower.

The participation of the Union's delegation in the G7 has been the result of pragmatic arrangements since the very beginning.[38] The EU's participation has been easier in the context of G7 Finances, where an understanding has been reached with the non-European

[36] An interesting precedent, pointed out by M López-Escudero, 'New Perspectives on EU-IMF Relations' cit. 498, is that all the euro-area Member States which are currently participating in the Asian Infrastructure Investment Bank agreed in January 2016 to form a single euro-area constituency in this Bank. See European Council, *Eurogroup of 14 January 2016* www.consilium.europa.eu.

[37] The joint membership option is the one which will result from the adoption of the Commission's proposal. It is also considered the best option by M López-Escudero, 'New Perspectives on EU-IMF Relations' cit. 497-498. The replacement of the Member States by the Union is suggested in JV Louis, *L'Union européenne et sa monnaie* cit. 162; S Cafaro, *Il governo delle organizzazioni di Bretton Woods. Analisi critica, processi di revisione in atto e proposte di riforma* (Giappichelli 2012) 143-177.

[38] Since monetary unification in 1999, "pragmatic solutions" have been found to address the need to represent the euro area, and channels to present agreed positions have been established. In 1998, a "Report to the European Council on the state of preparation for Stage 3 of EMU, in particular the external representation of the Community" became annex II to European Council conclusions of 11-12 December 1998.

members: the President of the European Central Bank (replacing the national central bank governors from the euro area) and the President of the Eurogroup take part in the meetings when the world economic situation, multilateral surveillance and exchange-rate issues are being discussed. The Commission can also take part in the meetings, represented by its presidency, to the extent required to enable it to perform its role.[39] Since 2005, with the appointment of a full-time Eurogroup President, the external representation of the euro area has enjoyed greater stability. When the Treaty of Lisbon came into force in 2009, the President of the European Council became the Union's representative in the meetings of Heads of State and Government, along with the President of the Commission. The High Representative for Foreign Affairs and Security Policy and/or the Commissioner competent for economic and financial matters represent the Union at a ministerial level.

The G20 took over some tasks of the G7 when the increased globalization and the impressive growth of some emerging market economies made the G7 less credible as a control room for the global economy, especially since the global financial crisis in 2008. Within that context, in the final Statement of the Pittsburgh meeting, it defined itself as "the premier forum for our international economic cooperation".[40] The participation of the Union in the G20 is not controversial, as it is one of the founding members of the Group and the only one that is not a State but a regional organization. Yet, this is not such a big difference given the soft law ground on which decisions are taken and the practice of consensus in both forums.

In the G20 Leaders' Summits, the delegation of the European Union is formed by the President of the European Commission and that of the European Council. While the President of the Commission represents the EU in economic and financial matters, the President of the European Council speaks on behalf of the EU in matters of foreign policy and security. At a ministerial level, the EU delegation is tripartite, comprising the European Commissioner for Economic and Financial Affairs, the Minister of Finance of the country holding the rotating Council presidency, and the President of the European Central Bank.[41] As part of the European Union delegation, the ECB participates in meetings of G20 finance ministers and central bank governors, as well as their substructures. It also takes part in meetings of G7 finance ministers and central bank governors and of G10 governors (the latter set up under the aegis of the BIS). The role of the Union's representation in the G20 and in the G7 is specifically relevant for those Member States – the large majority – that do not enjoy an autonomous membership of these fora.

[39] Council meeting (Economic and Financial Questions) held in Brussels on 12 July 1999, on file with the author.

[40] See the G20 Research Group, *G20 Leaders Statement: The Pittsburgh Summit* (24-25 September 2009) www.g20.utoronto.ca para. 50.

[41] See F Amtenbrink and others, *The European Union's Role in International Economic Fora – Paper 1: The G20* (European Parliament Directorate-General for Internal Policies 2015) 27, and the authors there mentioned.

Unlike what happens in other international financial institutions, in this case there is an overlap of representation with just a few Member States. Nonetheless, this could be perceived as unfair by third countries and as setting a double standard from the Union's inner perspective. In any case, following the silence accompanying the latest Commission's communication and proposal on the eurozone representation in the Groups of States, this can easily be identified as a highly politically sensitive issue. A compromise solution could be a single eurozone representation only in the G7, which is more focused on financial issues, and in the G20's working groups dealing with monetary policy, while the broader discussions in the G20 might go on accommodating the Union as a founding member alongside France, Germany and Italy.

c) The OECD

The ECB participates in several Organization for Economic Cooperation and Development (OECD) committees and working groups, thanks to an evolutionary interpretation of Supplementary Protocol No. 1 to the Convention of the OECD, which sets out a representation of the European Communities "in accordance with the institutional provisions of those Treaties": being the TFEU a direct evolution of the EC treaty, all its provisions and annexes are covered by this protocol. The role of EU representative originally attributed to the European Commission is now also fulfilled by the ECB, which has been added to the European Union delegation. Yet, the participation of the Union in the OECD remains weak compared to the substantial EU contribution to the organization's budget and activity.[42]

d) The autonomous representation of the eurozone in the IFIs: a role for the ECB?

The above-mentioned pieces of information may be summarised as follows. In intergovernmental organizations whose members are all or mostly Member States (IMF, OECD, G7), or Member States along with the Union (G20), the ECB is part of the Union's delegation, even when enjoying a status of its own (IMF).

The *status quo* is entirely different in transnational organizations whose members are central banks, such as the BIS or the coordination fora for national technical bodies like the FSB, as the participation of the ECB could qualify as genuine membership – a case which will be addressed in the following paragraphs. However, this is a general rule whose application must be verified case by case on the ground of agreements, protocols and practices regulating the ECB's participation or its specific status (as a member or as an observer).

It cannot be said that there is a complete absence of representation of the eurozone in international fora. Nonetheless, agreed political positions are often lacking, those to be adopted on the legal basis of art. 138 TFEU, as lacking is a strong single voice. The

[42] See E Hadzhieva, *The European Union's Role in International Economic Fora Paper 3: The OECD* (European Parliament Directorate-General for Internal Policies 2015).

current solutions show a fragmented Union where various institutional actors compete, and their role is hindered by their overlapping with Member States.

Over the last decade, this lacuna has been partly compensated informally by the increasing role of the European Summit, of the European Council and of the Eurogroup in discussing beforehand the economic and monetary points on the agenda of the Group of States. This routine allowed Member States to participate in a meeting having reached agreed positions or – at least – having had a first exchange of views.

The political stature of the Eurogroup increased significantly after the global financial crisis and especially the sovereign debt crisis in 2010. Following the entry into force of the Lisbon Treaty and under new art. 137 TFEU,[43] this body had an elected president. The Eurogroup's increasingly prominent role[44] makes it the natural forum for the discussion of political choices specific to the eurozone, even though decisions must be adopted through the ECOFIN Council, which could hardly reject positions already supported by a solid majority. This means that a role (or interference) of the Eurogroup can be imagined both upstream and downstream of a (possible) decision, pursuant to art. 138 TFEU. If this partially solves the riddle of common positions which the Council is not able to adopt based on art. 138 TFEU, another solution might be provided by a greater role for the Eurogroup and its President in the international representation of the eurozone, as the Commission suggested in its 2015 proposal.

Similarly, the Euro Summit, institutionalised by art. 12 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union,[45] could acquire greater significance on the international stage. Its President, who currently coincides with that of the European Council, is the natural spokesperson for common positions agreed in this body. Further possible evolutions are already being explored, such as the creation of an EU Minister of Economy and Finances.[46]

Authoritative doctrine, however, believes that the role of external representation of the euro area falls to the ECB in the first place.[47] In our view, in the case of international "political" representation, such an option should be set out in art. 138 TFEU. As a decision on this legal basis is lacking, the ECB may claim a sort of supplementary role.

[43] Art. 137 TFEU states that arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro. This is Protocol 14 on the Eurogroup, annexed to the TFEU, whose most interesting article, art. 2, provides for the election of a president for two and a half years.

[44] See R Baratta, 'Diritto e prassi evolutiva dell'Eurogruppo' (2015) Il Diritto dell'Unione Europea 223-251.

[45] This Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, sometimes referred to as the Fiscal Compact, was signed on 2 March 2012 by 25 EU Member States. The UK and Czech Republic did not sign it. The treaty came into force in January 2013.

[46] See the Communication COM(2017) 823 final from the Commission to the European Parliament, the European Council, the Council and the European Central Bank of 6 December 2017 'A European Minister of Economy and Finance'.

[47] See C Zilioli and M Selmayr, *La Banca Centrale europea* cit. 574 ff.

To this day, the ECB is present in several international fora as the central bank of the Union, or as part of the delegation of the Union, or as representative of the Eurosystem. Such different roles reflect not only the goals and tasks of the organizations, but also their legal nature, which could be either intergovernmental or transnational. Since in intergovernmental organizations the ECB complements other mechanisms of political representation (IMF) or is part of the Union's delegation (Groups of States, OECD), it can easily be observed that its presence in international fora is not considered sufficient to represent a union of States. The situation is different in technical bodies and transnational fora, such as the Bank for International Settlements (BIS) and the Financial Stability Board (FSB). In these cases, the role of the ECB does not need any political acknowledgement, and it can be perfectly grounded on its statutory provisions, as it will be seen in the following section.

IV. The external relations of the ECB under art. 6 of the ESCB statute: transnational technical monetary relations?

Under art. 6(1) of the ESCB Statute, "[i]n the field of international cooperation involving the tasks entrusted to the ESCB, the ECB shall decide how the ESCB shall be represented" and "[t]he ECB and, subject to its approval, the national central banks may participate in international monetary institutions". As it is clarified by the final para. 3, this is to be without prejudice to art. 138 TFEU, and the lack of its use clearly leaves more room for manoeuvre for the ECB, although its action is confined to *international cooperation involving the tasks entrusted to the ESCB*.

The first of the tasks listed in art. 23 of the ESCB Statute seems to vaguely respond to the need of defining such international cooperation: "[t]he ECB and national central banks may: (i) establish relations with central banks and financial institutions in other countries and, where appropriate, with international organizations". It appears to be an operational rule responding to the aims of the two "external" tasks allocated to the ECB in accordance with art. 127(2) TFEU: conducting foreign-exchange operations and managing official foreign reserves.

In legal terms, this could be translated into agreements, memoranda of understanding, joint projects, and other initiatives which enjoy at least a minimum degree of formalization involving the ECB and the national banks of third countries, or international financial institutions, and grounded on the ECB's legal personality.[48]

A legal criterion that could be used to distinguish the scope of action of art. 138 TFEU and that of art. 6 ESCB could reflect the difference between the international subjectivity of the Union, which would support the expression of positions adopted in compliance with the first of these legal bases, and the legal personality of the ECB under art. 282(3)

[48] Under art. 9(1) ESCB Statute, "The ECB which, in accordance with Article 282(3) of the Treaty on the Functioning of the European Union, shall have legal personality, shall enjoy in each of the Member States the most extensive legal capacity accorded to legal persons under its law; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings".

TFEU, which would allow the conclusion of agreements of a contractual or transnational nature (between homologous national authorities and international financial institutions) based on the second.

It is still debated whether the legal personality of the ECB, conferred *expressis verbis* to the ECB by the TFEU and specified by the ESCB Statute in art. 9(1), is also an international legal personality. Doubts have been expressed in the doctrine even though most scholars[49] have supported this option, grounded on the recognition of the international legal personality of the ECB by some international organizations and important third states – including the US – and based on a similarity with the status of the European Investment Bank (EIB). Doubts have become stronger after the latest revision of the EU Treaty, which lists the ECB as an institution of the Union. Therefore, should this thesis be still considered valid, at least an overlap of international legal personalities might occur.

The ECB website clarifies the field of action for technical cooperation in monetary matters and its interrelation with several tasks entrusted to the Eurosystem and to the Single Supervisory Mechanism.[50] Here is the list:

i) formulating and representing policy positions in its areas of competence.

ii) exchanging information and views and assessing economic developments with other policymakers in multilateral organizations and fora, as well as bilaterally.

iii) engaging with international institutions in their monitoring of the euro area and the ECB's monetary policy, such as the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD).

iv) participating in international efforts to develop rules and best practices to improve financial stability and the efficiency and transparency of policymaking.

In addition, the ECB website clarifies that there is an ECB Representation in London and in Washington D.C., and a Representative Office in Brussels, which contribute to international representation by preparing policy meetings and liaising with partner organizations.[51]

Tommaso Padoa Schioppa, addressing the Sub-committee on Monetary Affairs of the European Parliament in 1999, stated that:

> "[...] In preparing the external representation of the Eurosystem, the ECB took the view that Article 6 of the Statute of the ESCB, provided a proper and sufficient legal basis for developing arrangements with multilateral institutions and forums. Article 6.1 provides that 'in the field of international co-operation involving the tasks entrusted to the ESCB, the ECB shall decide how the ESCB shall be represented'. As I have already mentioned, the single monetary policy and the related tasks have been entrusted to the Eurosystem as an exclusive competence [...]".[52]

[49] See C Zilioli and M Selmayr, *La Banca Centrale europea* cit. 574 and footnote 358.

[50] European Central Bank, *International Relations and Analysis* www.ecb.europa.eu.

[51] Source: ECB staff.

[52] T Padoa-Schioppa, 'Introductory statement at the Sub-Committee on Monetary Affairs European Parliament' cit.

Yet, should the Commission eventually succeed in having a proposal on the matter approved by the Council (by qualified majority of the eurozone members), it may integrate, update or even overwrite the representation measures adopted by the ECB in international bodies such as the IMF and the OECD. It should be remembered, however, that the procedures envisaged by art. 138 TFEU to guarantee the projection of the euro area into the international monetary system and possibly the unified representation of the euro area require prior consultation with the European Central Bank, so that a prior agreement can be imagined between the Commission, the Council and the ECB on the respective delimitation of roles and responsibilities.

Nonetheless, as it has been previously pointed out, the ECB is likely to remain in charge of, and fully responsible for, the relations safely grounded on art. 6 ESCB. For instance, the ECB is a full member of the Bank for international settlements, alongside seventeen national central banks of the Eurosystem (all but those of Cyprus and Malta). As suggested by its name, the organization is international, although it does not show the intergovernmental features of the typical international organization, being rather a transnational organization, as its members are central banks in their full right. The latter definition applies to any kind of activity or collaboration – in this case among homologue national bodies – across national borders.

The ECB is a member and shareholder of the BIS;[53] it participates in governing and oversight bodies and in many Committees, such as the Basel Committee on Banking Supervision,[54] the Committee on Payments and Market Infrastructures, the Committee on

[53] The BIS was created as an international organization in the context of the Young Plan, adopted on 20 January 1930 at the Hague Conference to settle the question of reparation payments imposed mostly on Germany by the Treaty of Versailles following the First World War. Over time, it evolved into a bank for central banks, owned by 63 central banks, becoming an organization that serves central banks and other financial authorities to support their pursuit of monetary and financial stability through international cooperation.

[54] On the topic, see L Quaglia, *The European Union's Role in International Economic Fora – Paper 5: The BCBS* (European Parliament Directorate-General for Internal Policies 2015) 12-13. As the author has pointed out, "[t]he ECB and the ECB/Single Supervisory Mechanism (SSM) are full members of the main Committee, and the EBA and European Commission take part in an observer capacity. Decisions by the main Committee require the consensus of the full members, but not of the observers". Additionally, "[t]he ECB holds a two-seat membership in the BCBS on account of its tasks as (i) central bank and (ii) micro-prudential supervisory authority for the banking sector in the EU countries that participate in the SSM. This membership arrangement is in place since late 2014, when – as a result of the operationalization of the SSM – the ECB became a competent authority for banking supervision. Previously, the ECB held only one seat and also a different status in the BCBS (i.e. observer instead of member). In accordance with the BCBS Charter, the change in the membership status of the ECB aimed to reflect the importance of the euro area as a single supervisory jurisdiction. Moreover, the two-seat representation granted to the ECB reflects the separation principle between the supervisory and monetary policy functions. The two-seat membership is not an unusual arrangement in the BCBS for central banks that in addition have a supervisory authority […]. The representative of the ECB's central banking wing in the BCBS is the Executive Board member of the ECB responsible for overseeing the DG for Macro-Prudential Policy and Financial Stability; the representative of the ECB's SSM is the Executive Board member who is also the Vice-Chair of the Supervisory Board of the SSM and is

the Global Financial System and the Markets Committee. The permanence of the eurozone central banks in the shareholder structure of the BIS together with the ECB will be the subject of some reflection.

The ECB also participates in the Financial Stability Board[55] (FSB) and in several of its substructures as a reflection of the European Union participation in the G20 (since the FSB was created on the initiative of the G20). Its specific role in promoting international financial stability, by coordinating national financial authorities and international standard-setting bodies, has put it at the core of the ECB's mission since the establishment of both the European Systemic Risk Board and the European System of Financial Supervision. However, the FSB has all the characteristics of a transnational body governed by soft law. Being informal, it seems established on a more practical basis, involving several national central banks and surveillance authorities, together with relevant international organizations and fora. The legal nature of the ECB participation remains unspecified, yet it could be easily assimilated to a national central bank, for both its structure and tasks.[56] What is interesting is its double representation and participation as ECB (in the person of its Vice-President) and as ECB Banking Supervision (SSM) (in the person of the Vice Chair of the Supervisory Board). Here too, the ECB's membership is additional to that of the national authorities (comprising central banks) of the G20 members belonging to the eurozone: France, Italy, Germany, and Spain. Although many states are represented by two or three different authorities, they appear to be different facets of a single delegation, rather than two, contrary to what happens in the case of the ECB.

Consequently, the way in which the Eurosystem is represented in the BIS or the FSB is not a controversial political issue, as it refers to the international role of the European Central Bank or the Eurosystem, rather than that of the Union or the eurozone. The two organizations, despite being very different in legal nature, were conceived as fora for specialized (mostly national) authorities rather than for governments.

responsible – with the Chair of the Supervisory Board – for those business areas dealing with banking supervision. At the technical level (working groups, task forces) of the BCBS, the institutional representation is performed by senior members of staff with specialized expertise in banking and financial stability matters. In addition, the President of the ECB is currently the Chairman of the GHOS, which is the oversight body of the BCBS".

[55] The FSB was established by the G20 in 2009, by soft law, in order to create a dimension of transnational collaboration between international standard-setting bodies and the national supervisory authorities of the banking and financial sectors, with the aim of pursuing international financial stability.

[56] We prefer this interpretation to the one that assimilates the ECB to other international financial institutions, such as development banks, because in such cases the affinity is confined to the origin in an international treaty. Moreover, the ECB is an institution of the European Union (see art. 13 TEU), a legal order with several quasi-federal features, and it is the central bank of the Union. Conversely, the other financial institutions are mostly the result of autonomous international treaties and may be defined as international organizations.

The role of observer enjoyed by the ECB in the IMF is a more ambiguous one. In our opinion, it may be interpreted as a role of vicarious representation of the Union/eurozone (alongside the EURIMF and its President and the rotating presidency of the Council) – in the absence of a decision grounded on art. 138 TFEU – or as the ECB being part of a Union's delegation and having a technical role which could easily fall within the provisions in arts 6 and 23 of the ESCB Statute, when it participates in more operational and technical activities.[57] Although it could currently be interpreted in both ways, the above-mentioned Commission's proposal suggests maintaining it, but making it evolve into an observer status of the eurozone.[58] Nonetheless, the eurozone will be differently represented, once the proposal is adopted and displays its full effect by 2025 (if the proposed decision is adopted), as the President of the Eurogroup will be in charge of such representation both in the Board of Governors and in the IMFC, with the Executive Board and Executive director being appointed by the Eurogroup. Even though this is not expressly mentioned, a survival of the ECB's observer status in this final stage could fall within the provisions of art. 6 of ECB Statute for some technical bodies, while in other cases the ECB could support the above-mentioned organizations on behalf of the eurozone, expressing the agreed positions adopted at Council level under art. 138 TFEU.

Under any option, the Union could suffer, in this case as in others, for having too large a delegation, which does not improve the clarity of its positions.

It is true that the national states in the IMF are not usually represented by their central banks (contrary to what happens in the World Bank Group), but they enjoy full competence on both economic and monetary policies. By contrast, in the Union, these are separate competences, with the political institutions of the Union being in charge of the economic policy,[59] which is defined as a coordination of the economic policies of the Member States, despite being much more than just that.

A delegation of powers from Member States to the Union would significantly simplify the situation, without the need for an *ad hoc* protocol similar to the FAO one[60] in case of

[57] See, for instance, the participation of the ECB in the IMF Board discussions about global financial stability or the role of the Euro in the international monetary system.

[58] In the motivation for the Proposal COM(2015) 603 final cit. para. 13 it is clearly stated that "this status of observer of the ECB should benefit the euro area as a whole. Such a single status of observer in the Executive Board for the euro area as a whole would allow covering the full range of euro area matters. This would also allow the euro area to better organize its representation as observer". In the following para. 14, it is suggested that "The President of the Eurogroup, the Commission and the ECB should negotiate this observer status of the euro area with the IMF".

[59] In Title VIII, Economic and Monetary Policy, and particularly in the Chapter "Economic Policy", arts 120-125 TFEU.

[60] As regards the participation of the European Economic Community (now the Union), alongside its Member States, in the Food and Agriculture Organization (FAO), the definition of their respective roles was the subject of an interinstitutional agreement between the Commission and the Council of 19 December 1991, concerning the preparation of meetings, the right to speak and to vote. Commentators are unanimous in believing that the division of roles between the Union and its Member States is not easy to manage.

accession of the Union to the IMF. Nonetheless, any evolution related to the political participation of the Union and/or the eurozone in the IMF – regarding its representation in the Boards of Governance, Executive Board and Ministerial Committees – will also affect the level of technical collaboration.

The participation of the ECB in G7 and G20 meetings of Finance ministers and central banks governors (by sharing the EU seat with the European Commission and the EU Presidency) will not probably change, as the ECB participates in its own right, as the central bank of the eurozone, on equal footing with central banks of third countries. What is remarkable, once again, is the duplication of representation due to the participation of the member states of the eurozone, which – at least when central banks are concerned – can be seen as an overlap.

When the representation is that of the ECB alone (rather than the Union) – in the meetings among central bank governors – the position/comments are developed and approved within the ECB. If the issue affects the Eurosystem or the ESCB, the position of the ECB is based on prior discussions and on the conclusions reached in Eurosystem or ESCB formats, which may subsequently be approved in Governing Council or General Council formats. If the issue affects European Union members or euro area members – in the ministerial meetings or in meetings involving the Heads of Government – the position adopted by the ECB will be based on prior discussions and on the conclusions reached in meetings involving also the finance ministers of EU Member States, such as in the Eurogroup, or their representatives, such as in the Economic and Financial Committee.[61]

The G20 and the G7 hold sectoral meetings regularly. When they focus on monetary policy matters, in our opinion, arts 6 and 23 ESCB Statute are sufficient legal bases to enable the ECB to express its own position (the first option listed above).

Although there is no pending proposal at the moment for a Council decision on art. 138 TFEU concerning the Gs, it would be logical and consistent with the spirit of the TFEU that the ECB alone join the Groups as the monetary authority of the Union and of the eurozone member states, while the participation of eurozone states may be still contended as grounded on their residual economic policy competence.

The ECB's international role in central bank cooperation goes beyond its participation in international fora. It reflects its role as a major central bank on a global scale, as the central bank of the Union and the one governing the euro, the second most traded currency in the world. In general terms, the cooperation between central banks comprises the exchange of expertise, the sharing of best practices and capacity-building, including a wide range of activities, such as workshops and seminars, staff secondments, expert visits, and occasional training programs. The aim of this cooperation is to strengthen relations among central banks and foster sound central banking practices, thereby contributing to price and financial stability worldwide.

[61] Source: ECB staff.

Being involved in such a cooperation helps the ECB to explain its policies in an international context. All these activities are grounded on arts 6 and 23 of the ESCB Statute and do not represent an exhaustive list, as the two articles allow a broad interpretation: "international cooperation involving the tasks entrusted to the ESCB" (art. 6) and "relations with central banks and financial institutions in other countries and, where appropriate, with international organizations".[62]

As the ECB website explains, the ECB negotiates Memoranda of Understanding (MoUs) with national and international authorities outside the EU in the sphere of technical cooperation. A different kind of MoUs is also adopted for the coordinated supervision of the banks and their cross-border subsidiaries and branches, as banks directly supervised by the ECB are widely present in third countries through subsidiaries and branches. However, this specific aspect falls outside the scope of this analysis.[63] MoUs clearly have legal consequences although they are not generally thought to be binding instruments.[64]

Most technical cooperation requests are dealt with directly by the ECB's International Cooperation Office.[65] Furthermore, a Working Group on Central Bank Cooperation coordinates EU funded programs and cooperation on technical issues within the ESCB. It comprises experts from the ECB and national central banks and operates under the auspices of the International Relations Committee of the ESCB.[66] In December 2017, the working group published a best practice document outlining the rationale behind, and the principles underpinning the ESCB's international central bank cooperation activities, as well as examples of the format they take.[67] Such a document clarifies that international cooperation among central banks is voluntary, non-binding, often demand-driven (especially

[62] Art. 23 ESCB Statute.

[63] See www.bankingsupervision.europa.eu. MoUs are published on this page once consent has been granted by the partner authority.

[64] MoUs are increasingly being used in international relations and in the Union's Law. However, their precise legal status is unclear, as they cannot be compared to international treaties. Could they qualify as administrative agreements or, more correctly, as informal and non-binding statements of intent? The term MoU, which is not a strictly legal definition, might also encompass a range of different agreements. Yet, in some cases, the conclusion of a MoU is even required by EU legislation. For example, under the confidentiality regime laid down in the Capital Requirements Directive (2013/36/EU), the use of a MoU legalises information exchange that would be illegal in its absence, and under the SSM Regulation (EU 1024/2013) there is an obligation to conclude a MoU with the European Parliament. See Directive (2013/36/EU) of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC; Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[65] Source: ECB staff.

[66] Information available at European Central Bank, *International Central Bank Cooperation* www.ecb.europa.eu.

[67] See European Central Bank, *International Central Bank Cooperation: ESCB Best Practices* www.ecb.europa.eu 1.

when involving the central banks of emerging market economies and developing countries). In February 2020, the working group provided further insights into its approaches to evaluating international cooperation activities. These insights are the results of ESCB-wide discussions among staff members involved in these activities.[68]

V. Residual functions of national central banks: do they also pertain to external relations?

Under art. 14(3) of the ESCB Statute, dealing with national central banks, "[t]he national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB and shall require that any necessary information be given to it".

Yet, para. 4 provides that "[n]ational central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB".

For instance, *Banca d'Italia*, the Italian central bank, carries out services on behalf of the State in combating usury, or through its Financial Information Unit for Italy (UIF) which, in a position of specific autonomy, exercises functions for the prevention of money laundering and the financing of terrorism. Another example is provided by the Banque de France, whose economic services towards households and businesses include assistance to people in severe financial difficulty, company ratings, credit mediation and support for very small enterprises. It also conducts national and regional surveys of economic conditions that are widely sought after by business leaders. Another area of competence for some national central banks is banking supervision, which falls outside the scope of this study.[69]

The previous analysis leads one to wonder whether national central banks of the euro area, being national authorities, could carry out tasks in the field of international cooperation. And, if so, to what extent that would be in compliance with the provisions of art. 6 of the ESCB Statute.

Art. 6 provides that the governing bodies of the ECB decide *how* the Eurosystem shall be represented, and it is possible for it to be represented by ECB officials or by NCBs.

[68] European Central Bank, *Approaches to Evaluating the International Cooperation Activities of the European System of Central Banks (ESCB)* www.ecb.europa.eu.

[69] The area of banking supervision is a shared competence between European and national authorities, with some of them (such as in Italy) being central banks. The ECB directly supervises the 114 significant banks of the euro area, while banks that are classified as "less significant" continue to be supervised by their national supervisors, which cooperate with the ECB and apply the European Single Rulebook provided by the European Banking Authority (EBA).

Accordingly, art. 6(2) ESCB Statute specifies that the NCBs' participation in international monetary institutions is subject to the approval of the ECB.

Even though the practice of duplication of representation (national and European) in several international fora stands as a difficult precedent to break, some caveats are important from a legal standpoint.

In the area of (possible) political representation – such as G7 and G20 meetings, with the exclusion of technical working groups and gatherings – the presence of eurozone member states and national central banks governors results from the absence of a decision under art. 138 TFEU. If any of the proposals and initiatives in this field – from the Five Presidents' Report to the Commission's proposals and Parliamentary documents – succeeds, the political solution will be provided by a Council Decision. This will be a decision committing to coordinated or single representation, entrusting the task of representing the eurozone to one or more institutions (ECB, Eurogroup, Commission) forming a single delegation.

The wide range of activities covered by the BIS could more easily justify the role of members and shareholders played by national central banks of the euro area (skipping the approval of the ECB required by art. 6 ESCB Statute for their participation in international monetary organizations). However, it is our opinion that their permanence might add to confusion and undermine the possibility for the Eurosystem to speak with one, stronger voice.

Yet, there is little doubt about the full competence of the ECB to carry out its tasks autonomously in the area of technical cooperation with central banks of third countries outside international fora, under arts 6 and 23 of the ESCB Statute. The fact that art. 23 ESCB Statute entrusts this task to both the ECB and national central banks should be read in connection with the wider provisions of art. 6 ESCB Statute: in the field of international cooperation involving the tasks entrusted to the ESCB, the ECB shall decide how the ESCB shall be represented. As the wider scope seems to be to strengthen relations with central banks outside the EU, foster sound central banking practices, and hence contribute to price and financial stability worldwide, the European Central Bank could easily defend its supremacy. Not only does this activity fall within its mission as stated in art. 6 ESCB Statute, but the ECB may also allow national central banks to carry out such technical international cooperation activities only after its authorisation or delegation. A decision of the Governing Council on "how the ESCB shall be represented" could be based on art. 6(1), and an authorisation to the national central banks to "participate in international monetary institutions" is "subject to its approval".[70]

On the other hand, the whole area of development cooperation remains a reserved competence of the Member States and their central banks, for two main reasons. Firstly, the EU Treaties and the ESCB Statute do not attribute to the ECB any specific competence in the area. Secondly, that is in compliance with the specific reserved competence of

[70] Art. 6(2) ESCB Statute.

Member States provided for in art. 4(4) TFEU.[71] Therefore, the voice and representation of the Union and the eurozone in the group of the World Bank and in the many international banks for cooperation and/or development – such as the EIB and the EBRD – may be the result of *ad hoc* decisions but is not forced by arts 6 and 23 of the ESCB Statute.

The interrelation between monetary policy and development cooperation is nonetheless significant, as these two areas are both related to global financial stability. This appears to be a challenging opportunity for the application of the principle of sincere cooperation stated in art. 4 TEU, which, as it has often been clarified by the ECJ, does not apply only to the EU and its Member States, but to the whole set of institutions and authorities within European and national legal orders.

VI. Political and technical obstacles to a unified external representation, and the advantages of speaking with one voice

As it has already been observed, there is a clear political gap in the external representation of the eurozone, due to the lack of use of the legal basis in art. 138 TFEU and because of confusing and redundant practical arrangements which allow the member states of the eurozone to keep their international visibility, a consequence they do not seem to regret.

To bridge similar gaps in other areas of EU external relations, the ECJ applied a reasoning grounded on the general principles of EU law. In the absence of formal agreements, in all cases in which the Union is not entitled to participate in an international organization despite its activity falling within its sphere of competence, States should refrain from taking positions that harm its external competences. In this case, the principle of sincere cooperation comes into play, stating that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".[72]

The Court of Justice has repeatedly recalled this principle, specifying that it is possible for the Union to adopt its own position (on the legal basis of art. 218(9) TFEU) when the specific activity of the organization falls in its area of competence. In this case, the Member States that are part of the organization will act "jointly in its interest".[73] In such cases, if the external competences of the Union do intersect with those of the States, the Court of Justice has held that the Member States may cast their vote only after a European decision,[74] and that the Member States are required to act on behalf of the Union once a position has been expressed.[75]

[71] "In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs" art. 4(4) TFEU.

[72] Art. 4(3) TEU.

[73] Case C-399/12 *Federal Republic of Germany v Council* ECLI:EU:C:2014:2258 para. 52.

[74] Opinion 2/91 *Convention 170 of the International Labour Organization (ILO)* ECLI:EU:C:1993:106.

[75] Case C-45/07 *Commission v Greece* ECLI:EU:C:2009:81 para. 52 states that "Where an area of law falls within a competence of the European Union, such as the one mentioned in the preceding paragraph, the

Yet, the position of the ECJ on the specific area of European economic governance is still unknown.

Several programmatic documents have provided a glimpse into the possible evolution of external representation. In the fifth chapter of the Five Presidents' Report (2015) concerning institutional matters, a paragraph was specifically dedicated to the goal of "consolidating the external representation of the euro". There, it has been stated that

> "As EMU evolves towards Economic, Financial and Fiscal Union, its external representation should be increasingly unified [...]. However, in the international financial institutions, the EU and the euro area are still not represented as one. This fragmented voice means the EU is punching below its political and economic weight as each euro area Member State speaks individually. This is particularly true in the case of the IMF despite the efforts made to coordinate European positions".[76]

There is little doubt that these clear statements inspired the Commission's proposals regarding the euro area representation in the IMF formulated in the same year. Nonetheless, not much has changed since then. Recently, the "legislative train" seems to be *en marche* again, as the Commission pushed forward its proposal in its 2017 work programme, when it invited the Council to accelerate the adoption of the proposal.[77]

Even the European Parliament has strongly pushed for this relaunch. In its resolution of 17 December 2015, the European Parliament asked the Commission "to ensure that the international representation of the euro is subject to the democratic scrutiny of Parliament".[78] A further initiative has been the Report on the EU Role in the Framework of International Financial, Monetary and Regulatory Institutions and Bodies.[79] Interestingly, the EP asked for a "progressive streamlining of the EU representation [...] through enhanced coordination and then, after an assessment, through the unification of seats".[80]

fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest".

[76] European Commission, *The Five President's Report: Completing Europe's Economic and Monetary Union* ec.europa.eu.

[77] Communication COM(2016) 710 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 25 October 2016 'Commission Work Programme 2017 Delivering a Europe that Protects, Empowers and Defends'.

[78] Resolution 2015/2936 (RSP) of the European Parliament of 17 December 2015 on completing Europe's Economic and Monetary Union. See also Resolution 2015/2060(INI) of the European Parliament of 12 April 2016 on the EU role in the Framework of International Financial, Monetary and Regulatory Institutions and Bodies.

[79] Report 2015/2060(INI) of the European Parliament of 17 March 2016 on the EU Role in the Framework of International Financial, Monetary and Regulatory Institutions and Bodies.

[80] *Ibid*. para. 19.

The Parliament calls for high standards of democratic legitimacy, transparency and accountability to be developed via "an interinstitutional agreement with the aim of formalizing a 'financial dialogue', to be organized with the European Parliament for the purpose of establishing guidelines regarding the adoption and the coherence of European positions in the run-up to major international negotiations, making sure that these positions are discussed and known *ex ante* and ensuring a follow-up, with the Commission reporting back regularly on the application of these guidelines and scrutiny".[81]

Yet, the obstacles do not lie all on the European side. Much confusion in the international representation of the eurozone comes from the conservative structure of the international community and the fact that many founding treaties and charters of international organizations do not reflect the current role of international organizations properly: the IMF Articles of Agreement were signed in 1944, the OECD Convention in 1960, the BIS was established in 1930.

After WWII, institutions such as the IMF and the OECD were created on the assumption that only states could be sovereign. The one country-one currency relation and the assumption – which was accepted throughout the twentieth century – that (almost) each state has a corresponding central bank that manages its monetary policy is no longer true in Europe and is soon likely to be untrue in other regions as well. However, some exceptions were found in the past – despite not being accompanied by non-state monetary sovereignty[82] – and others may occur in the future,[83] so that the European monetary union and the ECB are currently playing a pioneering role.

[81] *Ibid*.

[82] Prior to the European Economic and Monetary Union, also other monetary unions had been established, including the Monetary Union of Western Africa (Benin, Burkina Faso, the Ivory Coast, Guinea Bissau, Mali, Niger, Senegal and Togo), whose currency is the "*franc de la Communauté Financière de l'Afrique*", the Monetary and Economic Community of Central Africa (Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon), whose currency is the "*franc de la Coopération financière Africaine*", and the Eastern Caribbean Currency Union (Anguilla, Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St Kitts and Nevis, Saint Lucia, and St Vincent and the Grenadines), with an Eastern Caribbean Central bank issuing the Eastern Caribbean dollar. However, these Unions did not enjoy full monetary sovereignty, as the CFA franc was linked to the French franc (and now to the euro), while the Eastern Caribbean dollar is pegged to the US dollar.

[83] Among the possible, future, monetary unions there is the Gulf Monetary Cooperation Organization (GMCO), founded in March 2010 as a regional economic organization. The GMCO's membership is open to countries of the Gulf Cooperation Council (GCC) only. The current membership of GMCO includes the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the State of Qatar, and the State of Kuwait. Another example is offered by the African Monetary Union (AMU), the proposed creation of an economic and monetary union for the countries of the African Union, administered by the African Central Bank. Such a union would call for the creation of a new unified currency (such a currency union has been foreseen by the Abuja Treaty signed in 1991). In the continent, in 2000, a smaller group formed the West African Monetary Zone (WAMZ), whose six countries, within ECOWAS, plan to introduce a common currency called the Eco. The six member states of WAMZ are Gambia, Ghana, Guinea, Nigeria and Sierra Leone, which founded the organization together in 2000, and Liberia, which joined it on 16 February 2010.

In fact, the IMF Articles of Agreement are not written in stone – they have recently been amended and they could be again – and European Countries, with their significant package of voting rights, are in the position to push for the needed update.[84] Challenging the *status quo* does not appear impossible. Even though no one denies that it would lead to a consistent loss of chairs for the EU Member States in the decisional bodies and a reduction of shares and votes in the organization,[85] the European position would become more solid. Despite this institutional gap, the euro is the second leading global currency after the US dollar, thereby taking on a far more important function than that of the currencies it has replaced. Its role is especially significant in countries that have agreements with the EU, such as associated countries and countries bound by agreements under European trade policy and development policy. The EU is paying the political price of its low profile in economic and financial international fora, as the Union as a full member would easily match the political stature of the United States, which are now majority shareholders, holding 16.5 per cent of the votes, while the EU members hold one third of the whole amount of (now dispersed and unassembled) shares. Reversing such a situation might open unexpected scenarios, including the possibility of a radical renewal of the institution itself.

Furthermore, as many small countries complain about the European overrepresentation – due to it having its roots in colonial times – they might support such a change, which would result in a smaller, consolidated, but more effective European voice.[86]

And here is another obstacle: to this date, the Member States in the eurozone still have not declared their will to take the appropriate measures that would leave room for the Union or the eurozone to claim membership. This lack of political will has also prevented the Council of the Union from approving the Commission's two proposals

[84] By jointly suggesting a revision of the Articles of Agreement based on art. XXVIII "a) [a]ny proposal to introduce modifications in this Agreement, whether emanating from a member, a Governor, or the Executive Board, shall be communicated to the chairman of the Board of Governors who shall bring the proposal before the Board of Governors. If the proposed amendment is approved by the Board of Governors, the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members".

[85] Obviously, the single euro-area States would no longer have their number of basic votes. Each member State had 250 basic votes plus a far more important number of votes calculated through a formula. On 28 April 2008, a large-scale quota and voice reform resulting from a two-year-long process was adopted by a wide margin by the Board of Governors, tripling the number of basic votes. A second important effect on the quota formula that would affect the European votes is that intra-European trade would no longer appear as international trade (an important indicator of openness of a country).

[86] The perceived over-representation of this region is pointed out (*ex multis*) by the so-called Manuel Report. See T Manuel and others, *Report of the Committee of Eminent Persons on IMF Governance Reform* (24 March 24 2009) International Monetary Fund www.imf.org para. 27 and 41; and by F de Larosière, *Report of the High-Level Group on Financial Supervisions in the EU* ec.europa.eu para. 256.

grounded on art. 138 TFEU.[87] Yet, the mere existence of a specific legal basis in the treaty for the purposes of speaking with one voice leads to reflect on how desirable this outcome was considered to be by the authors of the Treaty of Maastricht in 1992 and in the years to come. This seems to be even truer in the area of economic global governance than in other chapters of the TFEU, which include less-specific provisions.

Moving beyond historical ties with third countries, Member States have significantly taken advantage of presenting themselves as a single block in the global arena. This has happened in global trade and may happen in other areas of geopolitical importance. The possible hindrances to the EMU, the banking union or even the single market of this still fragmented external representation cannot be fully explored in this contribution, which brings us back to the intricacies generated by the double standard of *ins* and *outs* and the blurred boundaries between monetary union and economic coordination. In these times of crisis, economic governance is being influenced by the centripetal force of monetary unification, which is encouraging the stretching of TFEU articles to cover an increasing economic integration and fiscal solidarity.[88]

The differentiation in the Union between the *ins* and the *outs* does not cast its shadow only on the external dimension of the EU.[89] The countries of the euro area, the most exposed to crisis contagion due to a greater integration of their financial markets, created intervention mechanisms and signed international treaties that do not involve countries outside the euro area (except on a voluntary basis).[90] The Eurogroup and the Euro Summit[91] became the specific institutional dimension of the eurozone and the place to discuss bilateral loans and control tools, such as the Troïka.[92]

[87] L Bini Smaghi, 'Powerless Europe: Why is the Euro Area Still a Political Dwarf?' (2006) International Finance 16: "[t]he real obstacle to stronger [euro area] representation does not reside in the aversion of its citizens but rather in its national institutions and policy makers' reluctance to leave their seats at the table [...]".

[88] S Cafaro, 'The Evolving Economic Constitution of the European Union: Eulogy to Stability?' in G Grigoire and X Miny (eds), *The Idea of Economic Constitution in Europe, Genealogy and Overview* (Brill 2022) 505.

[89] V Beneš and M Braun, 'An Ever-Closer Eurozone and Its Consequences for Differentiated Integration in Europe' in S Blockmans (ed.), *Differentiated Integration in the EU: From the Inside Looking Out* (CEPS 2014) 12-19.

[90] Treaty on Stability, Coordination and Governance [2012].

[91] The Euro Summit was mentioned for the first time by the Treaty on Stability, Coordination and Governance signed in 2012, whose art. 12 states that "1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings. The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office. 2. Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area".

[92] The term "troïka" has been used, especially in the media, to refer to the group formed by the European Commission, the European Central Bank and the International Monetary Fund in the context of the

Not surprisingly, several recent official documents – such as the Five Presidents' Report, the Bresso-Brok Report on improving the functioning of the European Union building on the potential of the Lisbon Treaty,[93] the Verhofstadt Report on possible evolutions of and adjustments to the current institutional set-up of the European Union,[94] the Protocol of Frankfurt: a new treaty for the eurozone, presented by Andrew Duff in 2016,[95] as well as many think tanks' and academics' contributions[96] – all point up the need to strengthen the institutional dimension of the euro area, which would result in the opening of new solutions to its external representation. The proposal by the European Commission for an EU Finance minister on December 2017[97] was a move in the same direction and likely to add complexity to the unresolved dispute about the external representation of the eurozone, until now governed by keywords such as "practical" and "pragmatic".

Until then, the external projection of the eurozone will still be weak in monetary and financial international relations and not commensurate with its economic weight and with the position of the euro as the second international currency after the US dollar.[98] The weakness of the external projection of the euro area is particularly evident in the IMF, where EU countries are overrepresented in the Executive Board, with one-third of Executive Directors and a high voting share (more than 30 per cent), but the EU is less influential than the US, which have half the EU's quota of voting rights.[99] This explains

"bailouts" of Cyprus, Greece, Ireland and Portugal. The origin of this informal gathering can be traced back to the Greek loan package in May 2010.

[93] Procedure 2014/2249(INI) of the European Parliament of 16 February 2017 Improving the Functioning of the European Union building on the Potential of the Lisbon Treaty.

[94] Procedure 2014/2248(INI) of the European Parliament of 16 February 2017 on Possible Evolutions and Adjustments of the Current Institutional set up of the European Union.

[95] A Duff, 'The Protocol of Frankfurt: A New Treaty for the Eurozone' (EPC Discussion Paper 2016).

[96] See, among others, the manifestos by the Glienicke Group (October 2013), by the Groupe Eiffel (February 2014), and Le Monde, *Manifeste pour une Union Politique de l'Euro* www.lemonde.fr; B Lechat, 'For a Political Community for the Euro' (1 May 2014) Green European Journal www.greeneuropeanjournal.eu.

[97] See the Communication COM(2017) 823 final from the Commission to the European Parliament, the European Council, the Council and the European Central Bank 'A European Minister of Economy and Finance', spelling out the possible functions of a European Minister of Economy and Finance who could serve as Vice-President of the Commission and chair the Eurogroup, as it is possible under the current EU Treaties by bringing together existing responsibilities.

[98] M López-Escudero, 'New Perspectives on EU-IMF Relations' cit. 471-498; R Smits, 'International Representation of Europe in the Area of Economic and Monetary Union: Legal Issues and Practice in the First Ten Years of the Euro' (2009) European Banking and Financial Law Journal 297-333.

[99] See S Cafaro, *Il governo delle organizzazioni di Bretton Woods* cit.; M López-Escudero, 'New Perspectives on EU-IMF Relations' cit. 475 and footnote 16: "The clearest way to explain this contradiction is to use power index analysis, which political scientists use to measure the power of an institution's member by taking into account not only its voting share but also its real possibilities to influence the final outcome of the voting process. Applying the Banzhaf Index, the Coleman's Power Index, and the Shapley and Shubik Index, some economists have analysed the voting power of the EU and the Eurozone in the IMF. These

why the euro area representation in the IMF is the only object of the 2015 Commission's proposal and why it is considered a priority. The evolving balance in the global economy, and the ongoing inevitable decline of Europe due to the growth of other areas, speak volumes in favour of a consolidation of the European external representation aimed at having a stronger voice.

VII. Concluding remarks: The ECB and other actors

The role played by the ECB in the external relations of the eurozone can be considered significant in various ways, despite being vicarious in several international fora, such as the IMF and the OECD, due to a lack of clear political representation. The role of the ECB can be regarded as a supporting one, insofar as external representation revolves around the tasks and objectives of the ESCB, or as an exclusive one (that is representing the ESCB) when the international activity falls entirely within the remit of the ECB.

Arts 219 and 138 TFEU prefigure the first hypothesis: the ECB is involved in the procedures, may possibly be delegated by the Council of the Union, but it is not the principal or the only actor.

In the absence of decisions taken based on art. 138 TFEU, practical arrangements for the external representation of the euro area within the IMF, G7, G20 and OECD also fall into the same category. Indeed, it can be observed how the ECB – despite having a defined status as an observer in the IMF – is part of a larger delegation representing the Union.

On the other hand, the activities carried out in several fora for cooperation among central banks – such as the BIS – or those for transnational technical collaboration among homologue national authorities – such as the FSB – fall into the category provided for in art. 6 ESCB Statute in which the ECB acts *jure proprio*. It includes the so-called technical cooperation and the ESCB cooperation projects with the central banks of third countries.

The fact that such activities are currently being carried out also by national central banks within the ESCB does not prove the ECB incompetent.[100] Moreover, if any conflict of competence had existed, the ECB Governing Council – where governors of national central banks sit – would not have carried out so many international activities so far. On the contrary, it seems that the ESCB Statute is not fully applied, and the ECB's competence is not fully exercised. The fact that art. 23 ESCB Statute entrusts this task to both the ECB and the national central banks must be read in connection with the wider provisions in art. 6 ESCB Statute: in the field of international cooperation involving the tasks entrusted

analyses show that the US has more real voting power in the current IMF decision-making process than its voting share would suggest".

[100] The competence of the ESCB and the attention dedicated by its staff to these activities seem further proved by the analysis, evaluation, and feedback that can be found on the ECB website. See the two documents: European Central Bank, *International Central Bank Cooperation* cit., and European Central Bank, *Approaches to evaluating the international cooperation activities of the European System of Central Banks* cit.

to the ESCB, the ECB shall decide how the ESCB shall be represented. Therefore, the national central banks may well conduct bilateral cooperation with the national central banks of third countries, but still within a delegation of competence or an authorization by the ECB. The silence on the point by the ECB Governing Council may be considered some tacit acquiescence that can always be retracted.

The fact that such an activity is often carried out “on demand” and reflects historical ties is not an obstacle *per se*, as it has not been an obstacle for the Union to renegotiate previous monetary agreements with third countries which had significant ties with single Member States. Nothing would prevent such privileged relationships from being maintained under a "European umbrella" in the form of authorisation or delegation.

A specific exception could be found in the area of development cooperation which, according to the general rules of European Union law, is a parallel competence that both the Member States and the Union have. When national central banks act with a national mandate for this area, they can still be considered national bodies acting in a national capacity.

ARTICLES

REINFORCING THE EU ENLARGEMENT POLICY TOWARDS WESTERN BALKANS: ACCESS TO THE SINGLE MARKET AS A CREDIBLE GOAL

LEPOSAVA OGNJANOSKA*

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ABSTRACT: The promised European future for the Western Balkans still seems to be distant and uncertain, in spite of the many geo-strategic, political, economic and security arguments in favour of completing the process of unification. On the one side, the European integration process through economic and political reforms should lead these countries to become EU members and set high expectations of what the prospects of membership should deliver in the region. On the other hand, the countries are still far from ready for membership while the EU political commitment is not accompanied by more tangible action which questions the credibility of enlargement policy. Over the recent years, there is a growing need for a renewed narrative to revive and sustain the incentives for the states of the Western Balkans to continue their European integration journey and overcome an apparent impasse over accession prospects. The main argument of this *Article* is whether the EU accession process with regard to the Western Balkans can be reinforced in a manner of a merit-based process that offers a credible goal by granting access to the EU single market as an interim accession goal that inspires real change, while reducing the sense that further EU enlargement is risky endeavour. In order to provide a relevant conclusion, the *Article* reviews the economic effects of previous rounds of enlargements and the relevant instruments employed towards the Western Balkans, to examine the plausible limitations and prospects.

KEYWORDS: enlargement policy – Western Balkans – EU credibility – single market – economic integration – Europeanisation.

I. INTRODUCTION

EU enlargement policy means completing the idea of a united Europe whereby Western Balkans is its indispensable part and this link goes beyond geographic proximity. At the

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Thessaloniki Summit in June 2003, EU leaders declared the unambiguous support for the European perspective of the Western Balkans states, stating that "the future of the Balkans is in the European Union",[1] while the term "European perspective" meant membership and full inclusion in the EU institutional and political structure.[2] The promised European perspective became a reality only with regard to Croatia as the last country to join the EU in 2013 – one decade after it applied in 2003, more concretely it became an official candidate one year later in 2004, then started the accession negotiations another year later in 2005 and concluded six years later in 2011. In 2014, the EU path for the Western Balkans faced a major turning point when the EU enlargement stalemate was openly declared by the European Commission,[3] as one of many signals and indications of reduced credibility of the promise in the EU's conditionality.

On the other side, North Macedonia applied for accession in 2004 and became an official candidate within one year in 2005, but 17 years later it has not yet opened the accession negotiations although there is an official decision in that regard by the Council of the EU,[4] endorsed by the European Council in March 2020. Albania which has been a candidate country since 2014 is also covered by this decision that has yet to be operationalized. Among the countries that have already opened accession negotiations, Montenegro has already been negotiating for more than nine years as it started in June 2012, that is four years after the accession application from 2008 (already longer than Croatia), while Serbia applied for accession in 2009 and started five years later, in 2014. In the case of Montenegro, by June 2020 all 33 screened chapters have been opened, three of which are provisionally closed. With regard to Serbia as of October 2020, 18 out of 35 chapters have been opened, two of which are provisionally closed. Kosovo and Bosnia and Herzegovina are still considered as potential candidate countries.

Hence, it was no surprise that the Commission's 2021 Enlargement Package[5] stressed the issue with the EU credibility, although the Enlargement Methodology revised in 2020 aimed at further strengthening the accession process by making it more credible in the first place, as well as more predictable, more dynamic and subject to stronger political steering.[6] On the contrary, the accession process is not delivering and the EU transformative power as a basis for its role as a global actor is fading. Along with the well-known attitude that

[1] European Council Presidency Conclusions of 19 and 20 June 2003.

[2] Communication COM(2003) 285 final from the Commission of 21 May 2003 on The Western Balkans and European Integration.

[3] European Commission, *Press Release – The Juncker Commission: A Strong and Experienced Team Standing for Change (Press Release)* ec.europa.eu.

[4] Council of the European Union, General Affairs Council Conclusions of 25 March 2020 on Enlargement and Stabilisation and Association Process – Albania and the Republic of North Macedonia.

[5] Communication COM(2021) 644 final from the Commission of 19 October 2021 on EU Enlargement Policy.

[6] Communication COM(2020) 57 final from the Commission of 5 February 2020 on Enhancing the Accession Process – A Credible EU Perspective for the Western Balkans.

further enlargement to the Balkans seems to be an undesirable development for a large part of EU citizens, the reputation and attractiveness of the EU in the Western Balkans has suffered as well. According to the Balkan Barometer results, 56 per cent in 2018 and 59 per cent in 2019 are endorsing accession while in 2021 a subtle increase is noted with 62 per cent, but every year, the EU integration expectations in the Western Balkans dissipate notably, with only one-fourth of respondents remaining optimistic about the EU accession by 2025.[7] For the Western Balkans' citizens, EU membership is still perceived as embodiment of European values and principles of democracy and rule of law, but the economic prosperity remains the most important association with the EU membership that exceeds the improved democratic standard as desired benefit.[8] The Copenhagen criteria, also known as accession criteria, contain both political and economic conditions that should be fulfilled in order to obtain EU membership and there is clear linkage between both. Democracy and the rule of law cannot make lasting inroads into the enduring poverty in the Western Balkans, thus the EU must offer a realistic plan to tackle the lack of economic growth and social progress in the region in the context of the Europeanisation process.[9] Estimation by the World Bank indicates that at current growth rates, it would take about six decades for average per capita Western Balkan income to converge with the EU average.[10]

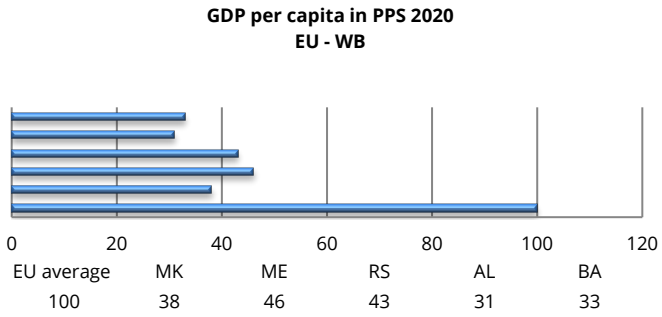

FIGURE 1. GDP per capita in Purchasing Power Standard (PPS) 2020, WB countries compared to EU = 100. Source: Eurostat[11] (Data for Kosovo N/A).

[7] Regional Cooperation Council, *Balkan Barometer 2021 Public Opinion Analytical Report* rcc.int 44.

[8] *Ibid.* 45-46.

[9] M Bonomi and D Reljić, 'The EU and the Western Balkans: So Near and Yet So Far – Why the Region Needs Fast-Track Socio-Economic Convergence with the EU' (SWP Comments 53/2017) 1.

[10] *Ibid.* 3.

[11] The volume index of GDP per capita in PPS is expressed in relation to the European Union average set to equal 100. If the index of a country is higher than 100, this country's level of GDP per head is higher than the EU average and vice versa.

The latest available data for 2020 showed that Western Balkans countries ranged between 31 per cent (in Albania) to 46 per cent (in Montenegro) of the average level of GDP per capita at PPS in the EU that is much lower compared to the range of the three countries that last joined the EU which is from 55 per cent (in Bulgaria), 64 per cent Croatia and 72 per cent in Romania. The level of real convergence of the Western Balkans in 2020 is only comparable to the convergence of Bulgaria and Romania after the entrance in the EU (35 per cent for Romania and 37 per cent for Bulgaria) in 2005.[12] Afterwards, both countries intensified their real convergence to the EU average, which is in line with the arguments that the EU entrance provides additional support to the growth and convergence, considering the benefits of the economic union as well as positive perceptions of the investors about the countries' prospects.[13] In October 2020, the European Commission adopted a comprehensive Economic and Investment Plan for the Western Balkans that also offers a path for a successful regional economic integration to help accelerate convergence with the EU and close the development gap between our regions, ultimately speeding up the process of EU integration.[14] This instrument is a recognition by the EU that it needs to do more than use political conditionality if it is to maintain traction with the Western Balkan enlargement process and can foster the single market demand for strong economies.

The single market project is at the heart of the European project, which according to the neofunctionalists created pressure for integration in other areas (*spillover* effect) so that this complex process imposed the deepening of the degree and scope of integration that goes beyond the economic and even political union. The concept of a "common market" of 1958 was central in the Treaty of Rome,[15] which founded the European Economic Community (EEC) whereby art. 3 agreed: *i)* the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; *ii)* the establishment of a common customs tariff and of a common commercial policy towards third countries; *iii)* the abolition, as between member states, of obstacles to freedom of movement for persons, services and capital. However, the freedom of trade in goods and services and the freedom of establishment were still limited due to continuing anti-competitive practices that led the EEC to consider a more thorough approach to the objective of removing trade barriers: the internal market, defined

[12] A Krstevska, 'Real Convergence of Western Balkan Countries to European Union in view of Macroeconomic Policy Mix' (2018) Journal of Central Banking Theory and Practice 187, 190.

[13] A Krstevska, 'Real Convergence of Western Balkan Countries to European Union in view of Macroeconomic Policy Mix' cit. *ibid*.

[14] European Commission, *Western Balkans: An Economic and Investment Plan to Support the Economic Recovery and Convergence (Press Release)* ec.europa.eu.

[15] The common market, the Treaty of Rome's main objective, was achieved through the 1968 customs union, the abolition of quotas, the free movement of citizens and workers, and a degree of tax harmonisation with the general introduction of value-added tax (VAT) in 1970. However, the freedom of trade in goods and services and the freedom of establishment were still limited due to continuing anti-competitive practices imposed by public authorities.

by the Single European Act of 1986 as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".

Along with this, one of the most significant contributions of the still ongoing single market project to the European integration may, in the long term, be that it jolted the Community out of the Euro-pessimism of the 1970s and early 1980s.[16] It is without prejudice that the EU was explicitly established not just to be a community based on the common interests of its Member States, but also a community of values, reflected in the way in which integration progresses.[17] However, it was the creation of market legislation that imposed some non-market values[18] that are today contained in art. 2 TEU, or in the words of the 1950 Schuman Declaration – the economic integration of the Member States would then lead to their mutual solidarity. This way, the market has not only strongly contributed to increasing living standards in the EU, but it has also become a key pillar of tangible EU integration. The level of market integration has evolved significantly over time and EU is still committed on deepening the EU single market and reaching its full potential.[19] Both in the EU[20] and in the Western Balkans,[21] free movement is perceived as the main EU achievement and membership benefit.

Given this context, the main argument of this *Article* is whether the EU accession process with regard to the Western Balkans can be reinforced in a manner of a merit-based process by granting access to the EU single market as an interim accession goal that inspires real change, while reducing the sense that further EU enlargement is risky endeavor. In order to produce a relevant conclusion, first, the process of market integration within the previous rounds of enlargement will be reviewed in order to assess the effects. Second, the *Article* proceeds with analyses on the economic integration between the EU and the Western Balkans in the framework of the existing instruments. The third part will explore the proposal for reinforcing the EU Enlargement policy through single market access as a credible goal, perspectives of this concept and expected outcomes.

II. Expanding the single market with(out) the EU enlargement

Single market is the cornerstone of the economic interest of enlargement and this issue has been reflected in the accession process. The establishment of the single market gave the EU an important tool to align third countries to its rules and values, often through

[16] P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (5th edition OUP 2011) 609.

[17] C Closa, D Kochenov and JH Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (EUI Working Paper RSCAS 2014/25) 2.

[18] B de Witte, 'Non-Market Values in Internal Market Legislation' in NN Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006) 61, 75.

[19] European Council Conclusions of 21-22 March 2019.

[20] European Commission, *Spring 2019 Standard Eurobarometer: Europeans Upbeat About the State of the European Union – Best Results in 5 Years (Press Release)* ec.europa.eu.

[21] BiEPAG, *Public Opinion Poll in the Western Balkans on the EU Integration* (8 November 2021) biepag.eu.

conditionality in exchange for market access.[22] Externalization of the internal market was declared at the Hannover European Council in June 1988 when it was decided that "the internal market should not close in on itself" but "be open to third countries" and "seek to preserve the balance of advantages accorded, while respecting the unity and the identity of the internal market".[23] Through the European Economic Agreement (EEA) and increasingly through the European neighbourhood policy the rules and standards of the single market stretch beyond the borders of the EU.[24] The export of internal market norms has become most extensive in the enlargement process whereby for many candidate countries (partial) participation in the single market was considered a reward for reforms and an intermediate step in the preparation for full membership.

II.1. EEA CONTRIBUTION

Close economic integration without decision-making powers as the second best to membership itself, has already been promoted within the EEA signed on 2 May 1992.[25] The aim of the EEA Agreement, as laid down in art.1, is to: "promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area".

Basically, the EEA accession of the candidates was just a matter of extending the internal market, having in mind that it comprises the establishment of an internal market between the EU Member States and three countries of the European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway, excluding Switzerland. The acceding countries have to apply to become members of the EEA arrangement which nevertheless means that everything that has been agreed with the candidates during the negotiations will concern the three EEA-EFTA states as well, as far as EEA related matters are concerned.[26] The EEA Agreement entails the elimination of (mainly technical) barriers for the free movement of goods, services, capital and persons that constitutes the "four freedoms" through which the single market is extended. In addition to rules concerning the so-called four freedoms, the Agreement entails application of competition rules and also covers so-called "flanking and horizontal policies", with the intention of strengthening the internal market. These additional fields of cooperation include social policy, consumer protection, environment, education, research and development, statistics, tourism, small

[22] F Schimmelfennig and U Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) Journal of European Public Policy 661.

[23] European Council Conclusions of the Presidency of the Hanover European Council of 27-28 June 1988.

[24] Communication COM(2007) 60 final from the Commission of 21 February 2007 on A Single Market for Citizens – Interim report to the 2007 Spring European Council.

[25] European Parliament, *Briefing n. 32 on The European Economic Area (EEA) and the Enlargement of the European Union* europarl.europa.eu.

[26] *Ibid.*

and medium-sized enterprises, culture, information, and audio-visual services. Cooperation between the European Community and the EEA-EFTA states outside the four freedoms is covered by Protocol 31 of the EEA Agreement.

Generally speaking, the provisions of the EEA Agreement constitute a re-transcription of those concerning the four freedoms as laid down in the EU founding treaties and one of the special features of the EEA Agreement is that it is continuously updated by adding new EU legislation.[27] The institutional framework under the EEA also resembles the EU structure, consisting of EEA Joint Committee which is the body responsible for the day-to-day management, made up of ambassadors of the EEA-EFTA states and representatives of the EU Member States and the European Commission; EEA Council as the highest political body, which consists of ministers from each of the participating states as well as representatives of the Commission, whose meetings take place at least twice a year and decisions are taken by consensus; EEA Joint Parliamentary Committee (JPC), comprising Members of the European Parliament (MPs) as well as MPs from the EEA-EFTA states, provides democratic supervision and power to pass formal resolutions on EEA matter; while the judicial control with regard to the implementation, application and interpretation of the EEA rules as well as dispute settlement is provided by the Court of Justice of the EU together with EFTA Surveillance Authority and the EFTA Court which carry out the surveillance and enforcement on the EFTA side.[28] The principles of primacy and direct effect of EEA law apply and in order to secure a uniform interpretation of EEA rules, the EEA Joint Committee reviews the development of the case law of the European Court of Justice and the EFTA Court. In terms of institutionalization, the EEA offers the closest internal market association as a far-reaching association agreement which extends the internal market and the *acquis communautaire* to the EFTA countries.[29] Therefore, the EEA represents a comprehensive "policy integration" into the internal market but with limited participation in the decision-making process in a way that the EEA legislation mirrors the *acquis* but EEA-EFTA side lacks a real right of co-decision.

To explain the context of EEA, it is worth mentioning that the ability of the EU to enlarge and the euro-scepticism were present also in the previous rounds of enlargement. On 14 July 1989, Austria submitted its application for accession, which was followed by Sweden on 1 July 1991 and then Finland on 18 March 1992. However, because of the focus on deepening European integration, and in the hope of completing the single market on time, the

[27] *Ibid.*

[28] This two-pillar system of surveillance and judicial control was endorsed by the CJEU in Opinion 1/92 *EFTA Agreement* ECLI:EU:C:1992:189. It was later reaffirmed in the judgment of the General Court of the European Union in the *Opel Austria* case. See case T-115/94 *Opel Austria GmbH v Council of the European Union* ECLI:EU:T:1997:3 para. 108.

[29] S Gstöhl, 'Political Dimensions of an Externalisation of the EU's Internal Market' (EU Diplomacy Papers 3/2007) 9.

European Community back then put widening on hold.[30] Instead, the (Delors) Commission proposed a new dimension to the relationship – EEA, which provided access to the single market but excluded involvement in any decision-making. Participating countries became members of the Single Market on 1 January 1994 while Austria, Finland and Sweden acceded to the EU a year later – on 1 January 1995, only 23 months after EU membership negotiations had started in February 1993. Only through the EEA membership such a quick accession to the EU was possible – the EEA process instigated the adoption of the *acquis communautaire* that covered: the free movement of goods, persons, capital and services; harmonised Community rules and standards on fair competition and taxation; common policies such as the Common Agricultural Policy, the Customs Union, and Development and Regional Policies; the Economic and Monetary Union; and the new Maastricht elements, the Common Foreign and Security Policy, Cooperation in the fields of Justice and Home Affairs, and Citizenship of the Union.[31] The export of the broad and deep Union *acquis* was a condition of market access in the context of a fully reciprocal free trade agreement. By all this, the EU institutions on the other side were then adjusted so as to accommodate the three new Member States because adopting all the legislation, setting up all the institutions and implementing all the policies required for membership of the single market meant that the countries have already made the largest part of the reforms necessary to become an EU member. In the case of Sweden and Finland, the EEA Agreement and process leading up to it, was "a stepping-stone towards full membership of the EU"[32] that "greatly facilitated and accelerated the process".[33] In terms of Austria, the country had made it clear from the beginning of the EEA process that it was perceived not as an alternative to the EU membership but merely as a transitional arrangement.[34]

However, one must take into consideration that European integration process in that period was mostly focused on the economic aspect and completing the single market on the one side, while on the other side the applicant countries were considered as "European States" in political terms. The EEA process was envisaged as an "easy" exercise between partners that knew each other from the many years of the cooperation and share the same basic economic and political systems.[35] As highly ambitious experiment in achieving a high level of economic integration without institutional integration, the EEA

[30] E Whitfield, 'The 1995 Enlargement of the European Union: The Accession of Finland and Sweden' (2015) European Parliamentary Research Service 16.

[31] *Ibid.* 23.

[32] See A Olander, 'What We Learned From the EEA Negotiations' in Marius Vahl (ed), *European Economic Area 1994-2009* (EFTA Commemorative Publication 2009) 30.

[33] See V Sundbäck, 'The EEA Negotiations: Bumpy Road, Worth Travelling' in Marius Vahl (ed), *European Economic Area 1994-2009* cit. 30.

[34] S Gstöhl, 'EFTA and the European Economic Area or the Politics of Frustration' (1994) Cooperation and Conflict 333, 353.

[35] A Michalski and H Wallace, *The European Community: The Challenge of Enlargement* (Royal Institute of International Affairs 1992).

was at one stage seen as a possible answer to the urgent questions the Union was facing concerning the structure and priorities of its relations, especially in the light of the emergent democracies of Central and Eastern Europe following the collapse of the Soviet Union.[36] Nevertheless, accession of Austria, Finland and Sweden proved that the level of economic integration within the EEA inevitably imposed a need for political integration since it is hard to decouple the economic from political integration and is important to adequately match the substance and institutional structure.[37]

II.2. CEECs transformative experience

In the case of the EU accession of the Central and Eastern European states (CEECs), integration process also included transformation both politically and economically. Their economic and political state of play was not suitable and much diverse to allow direct transposition of the EEA concept. Hence, the EU recognized the need to provide an institutional set up while postponing full (economic) integration, introducing the Copenhagen criteria on the basis of which the enlargement policy on the concept of conditionality was established. The economic Copenhagen/accession criterion requires functioning market economy and capacity to cope with competition and market forces which, with regard to the CEECs, meant to transform the centrally planned economies into functioning market economies and capacity to compete with the European single market. In that context, three main areas of reforms have been identified, namely macroeconomic stabilisation, real adjustment at the microeconomic level and creation of an institutional framework.[38] The Europe Agreements were initiated in the early 1990s to provide a framework for the gradual economic (and political) integration of the CEECs aiming for full EU membership in the long run, thus the basic objective of these agreements was namely to give incentives for economic reforms in CEECs through reductions in trade barriers, co-operation in the economic, financial, technical and cultural fields, and as a forum for political dialogue.[39]

	Europe Agreements signed	Interim/Free Trade Agreements into force	Europe Agreements came into force	Application	Opinion of the Commission	Start of Negotiations	Accession
HU	16.12.1991	01.03.1992	01.02.1994	31.03.1994	16.07.1997	30.03.1998	01.05.2004
PL	16.12.1991	01.03.1992	01.02.1994	05.04.1994	16.07.1997	30.03.1998	01.05.2004
CZ	04.10.1993	01.03.1992	01.02.1994	17.01.1996	16.07.1997	30.03.1998	01.05.2004

[36] M Cremona, 'External Relations and External Competence of the European Union' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edition OUP 2011) 237.

[37] S Gstöhl, 'EFTA and the European Economic Area or the Politics of Frustration' cit. 360.

[38] H Siebert, *The New Economic Landscape in Europe* (Blackwell 1991).

[39] D Piazolo, 'EU Integration of Transition Countries: Overlap of Requisites and the Remaining Tasks' (2000) Intereconomics Review of European Economic Policy 264, 267-268.

	Europe Agreements signed	Interim/Free Trade Agreements into force	Europe Agreements came into force	Application	Opinion of the Commission	Start of Negotiations	Accession
SI	01.06.1996	01.01.1997	01.02.1999	10.06.1995	16.07.1997	30.03.1998	01.05.2004
EE	12.06.1995	01.01.1995	01.02.1998	24.11.1995	16.07.1997	30.03.1998	01.05.2004
LV	12.06.1995	01.01.1995	01.02.1998	13.10.1995	13.10.1999	15.02.2000	01.05.2004
LT	12.06.1995	01.01.1995	01.02.1998	08.12.1995	13.10.1999	15.02.2000	01.05.2004
SK	04.10.1993	01.03.1992	01.02.1995	22.06.1996	13.10.1999	15.02.2000	01.05.2004
BG	01.02.1993	01.05.1993	01.02.1995	14.12.1995	13.10.1999	15.02.2000	01.01.2007
RO	08.03.1993	31.12.1993	01.02.1995	22.06.1995	13.10.1999	15.02.2000	01.01.2007

TABLE 1. Overview of the CEECs accession to the EU in relation with the instruments used. Source: Eurostat.

The Europe Agreements together with the Interim Agreements, signed in order to bridge the period for entering into force, are characterized by asymmetry with the CEECs reducing trade barriers more slowly than the EU.[40] The CEECs were allowed to keep tariffs for a restricted list of manufactured products from the EU when the Interim or Free Trade Agreements entered into force, but had to gradually reduce these tariffs according to a preset timetable and by January 2000, virtually all industrial exports from the EU to the CEECs were duty-free. The Agreements also contain specific arrangements for sensitive industries and established gradual liberalization for farm products, processed farm goods and fisheries for trade between the EU and the CEECs, with January 2002 scheduled as the date when all tariffs and quantitative restrictions have to be eliminated. The process of European economic integration was supported by the creation of Central European Free Trade Agreement (CEFTA) in 1993 to strengthen intra-regional trade ties, having in mind that whereas the EU and the individual CEECs reduced the bilateral trade barriers according to the Europe Agreements, tariffs among the Eastern European countries were not affected.[41] However, accession to the internal market was a much more important issue than the elimination of bilateral trade tariffs and the introduction of common external tariffs as in a customs union.[42]

[40] D Piazolo, 'EU Integration of Transition Countries: Overlap of Requisites and the Remaining Tasks' cit. *ibid.*

[41] D Piazolo, 'EU Integration of Transition Countries: Overlap of Requisites and the Remaining Tasks' cit. *ibid.*

[42] A Lejour, R de Mooij and R Nahuis, 'EU Enlargement: Economic Implications for Countries and Industries' in H Berger, T Moutos and H W Sinn (eds), *Managing EU Enlargement* (MIT Press 2004) 217-255.

The Europe Agreements were signed with the intention of full EU membership for the CEECs and their effects should be analyzed mainly in the context of the gradual consequences of full EU membership. Reorientation of the Europe Agreements from the aim of association to that of accession was achieved also with the Accession Partnerships that set out the single framework for each country, reaching all areas of the EC and EU *acquis*. There is no doubt that the horizontal provisions on the approximation of laws should be regarded as a core of the Europe Agreements, by the horizontal provision contained in the relevant chapters on approximation (*lex generalis*) and with the vertical rules scattered in the various provisions of the agreements (*lex specialis*).[43] The EU basic freedoms as *acquis communautaire* items, especially the ones regulating "free and fair" competition within the Union have determined the model of CEECs' economic development, assuming that CEECs can grow and develop through their transformation which means even without any traditional active trade or industrial policy.[44] Some elements of this "integrative model of CEEC development" were put into practice well ahead of EU accession. Trade liberalization and the prospect of EU accession, together with the geographical proximity of some of these candidate states to the present EU Member States,[45] have led to a considerable intensification of trade integration with the EU – imports from and exports to the EU on average account for around two-thirds of the candidate countries' total imports and exports. The solemn imperative to guarantee the unobstructed freedom of movement of goods within the enlarging Union was not a great difficulty to the CEECs while negotiating the EU accession agreements and neither was it too much of a problem to safeguard the freedom of capital movements, while on the other side, it was far more difficult for the Member States to accept free movement of the CEEC nationals within the enlarged EU.[46] To address these concerns, the EU introduced preventive and remedial mechanisms in a form of safeguard clauses which empower the Commission to sanction non-compliance and lack of sufficient progress that could cause a serious breach to the functioning of the internal market.[47] In addition, the existence of transitional arrangements with regard to the free movement of workers in both the 2003 and 2005 Treaties

[43] A Lazowski, 'Approximation of Laws' in A Ott and K Inglis (eds), *Handbook on Europe Enlargement: A Commentary on the Process of Enlargemen*t (TMC Asser Press 2002) 631-638.

[44] L Podkaminer, 'Development Patterns of Central and East European Countries (in the course of transition and following EU accession)' (Vienna Institute for International Economic Studies Research Reports 388/2013) 26-27.

[45] Speech by Prof H Remsperger, 'Enlargement of the European Union and European and Monetary Union: Maastricht meets Copenhagen' (2001) Bank for International Settlements bis.org.

[46] L Podkaminer, 'Development Patterns of Central and East European Countries' cit. 26-27.

[47] Art. 38 of the Treaty between the Member States of the European Union and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic

of Accession along with the last one from 2012, meant that in the area of free movement the accession became a process staged over a number of phases.

	1999	2007	Change 1999-2007	2009	2011	2013	2015	2017	2019	2020
Estonia	42	68	26	65	72	77	77	80	84	86
Lithuania	39	60	21	57	67	74	75	79	83	87
Latvia	36	55	19	53	58	63	65	67	69	72
Slovakia	51	67	16	72	76	78	78	71	70	71
Romania	26	42	16	52	52	55	57	64	69	72
Czech Rep.	70	80	10	87	84	86	89	91	92	94
Bulgaria	27	37	10	44	46	46	48	50	53	55
Hungary	53	63	10	65	67	68	70	69	73	74
Slovenia	81	89	8	86	84	83	83	86	89	89
Poland	49	53	4	60	66	67	69	70	73	76

TABLE 2. Real GDP per capita in PPS and current account changes with regard to CEECs. Source: Eurostat.

Rank in Ease of Doing Business (World Bank)	2006	44,4
	2009	42,8
Index of Economic Freedom (Heritage Foundation)	1999	60,6
	2008	66,9
Corruption Perception Index (Transparency International)	1999	4,3
	2007	5,0

TABLE 3. Quality of institutions in CEECs.[48]

of Poland, the Republic of Slovenia and the Slovak Republic to the European Union [2003]; art. 37 of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union [2005].

[48] See F Keereman, S Steinlein and IP Székely, 'Five Years of an Enlarged EU. Macro-Financial Stability' (Conference EU Enlargement – 5 Years After, Prague, 2 March, 2009) as cited in M Piatkowski, 'The Coming Golden Age of New Europe' (Central Europe Policy Analysis Report 26/2009). Note: Ease of Doing Business: the lower, the more favorable. Index of Economic Freedom (from 0 to 100): the higher, the better; Corruption Perception Index (between 0 and 10): the higher, the less corruption.

The presented data suggest that growth and living standards among new members have undoubtedly increased, although this achievement is not equally sustainable everywhere. These trends occurred in the pre-accession period in the framework of the economic transition and integration towards the single market and achieved significant convergence that further increased after accession. Moreover, the process of economic integration to the EU contributed to increasing the quality of institutions which indicates a linkage between the economic and political criteria and proves the transformative power of the EU in the accession process (Table 3). On the other side, the effects of the enlargement on the single market were overall positive – the Commission study reviewed the economic dimension of the 2004 enlargement, concluding that the enlarged internal market has become, despite the increased economic divergence among its current members, more integrated and dynamic.[49] In particular, the accession of the CEECs has increased the potential benefits of the internal market, by increasing the pool of consumers but providing the companies with additional opportunities to draw on the wider range of comparative advantages that characterize the different Member States. Many old EU member countries made use of the possibility to delay the free movement of labour from the new member countries, at least for a transition period, but others have benefited from a large inflow of labour from new member countries. [50] The transitional arrangements resulted from political rather than market mechanisms and empirical analyses claim that they proved to be not optimal choices, having in mind that lifting would yield even higher gains in terms of aggregate output when compared to a prolongation due to disproportional "loss" of skilled workers.[51] Hence, enlargement contributes to a more dynamic and efficient internal market leading to a stronger European economy that is better equipped to face the increasing global competition. Strength of the EU single market has been proved in combatting the COVID-19 crisis. In its resolution of 17 April 2020, the European Parliament stressed that the single market, as the source of European prosperity and well-being, is best positioned to deliver a response to the coronavirus outbreak,[52] while this position was later endorsed in experts' assessments.[53] Single market integration is the benefit of the enlargement that is most praised and least disputed, despite the developments that impose concerns with regard to the European values crisis.

[49] European Commission-Directorate General for Economic and Financial Affairs and the Bureau of European Policy Advisers, 'Enlargement, Two Years After: An Economic Evaluation' (Occasional Paper 24/2006).

[50] JM Arnold and others, 'Structural Reforms and the Benefits of the Enlarged EU Internal Market: Much Achieved and Much to Do' (OECD Economics Department Working Papers 694/2009) 11.

[51] See A Fihel and others, 'Free Movement of Workers and Transitional Arrangements: Lessons from the 2004 and 2007 Enlargements' (University of Warsaw Centre of Migration Research 2015).

[52] European Parliament resolution 2020/2616(RSP) of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences.

[53] G Grevi, 'Europe's Path to Strategic Recovery: Brace, Empower and Engage' (EPC Discussion Paper 2020); J Bjerkem, 'Europe's Hidden Weapon in Combatting COVID-19: The Single Market' (30 April 2020) European Policy Centre epc.eu.

III. WB-EU Economic Integration and (limited) access to the single market

One of the main reasons behind the prosperity gap of the Western Balkans lies in the failure of these countries over the years to be competitive, meaning they lack the appropriate factors and institutions needed for high levels of long-term productivity.[54] The Stabilisation and Association Process (SAP) launched by the EU with the aim of eventual EU membership, seeks to address the broad issue of the European integration of the Western Balkans and, within this framework, to tackle the weaknesses in economic regimes. The process, committing a less developed partner to upgrading its institutions to European standards and governance on the basis of certain incentives, serves as both an anchor making the reforms more credible and a guide to institutional reforms.[55] Based on strong political conditionality, the SAP offers trade liberalisation, financial assistance and new contractual relations in the form of Stabilisation and Association Agreements (SAAs), an extensive part of which relate to internal market issues.[56] Among the Western Balkans countries, only Croatia confirmed the credibility of EU's Stabilisation and Association Process and that EU membership can be achieved by following the enlargement template. The paper proceeds with analysis on the SAP prospects and limits, in order to spur better economic convergence performance and overcome the impasse.

III.1. SAP as a (new) frame of enlargement

SAAs as the main instruments of SAP process, are designed to be an incentive to accelerate the restructuring of the states' economies and to adjust to new market conditions, while at the same time this will provide the opportunity to accelerate social and economic development, as well as to establish and maintain permanent political and economic relations with all EU Member States. In addition, various EU-funded programs of bilateral assistance tied to the progress in convergence of respective countries economic regimes to EU institutions and policies provide an extra incentive to implement structural reforms. One of the most prominent dimensions is the creation of the free-trade area and harmonisation of legislation in areas essential for functioning of the free-trade area and for future participation in the EU internal market. Nevertheless, by naming these agreements differently from those with Central-European countries the EU reaffirmed that the SAAs do not necessarily lead to membership, as was the case with the Europe Agreements.

[54] P Sanfey, J Milatovic and A Kresic, 'How the Western Balkans Can Catch Up' (European Banks for Reconstruction and Development Working Paper 185/2016).

[55] B Kaminski and M Rocha, 'Stabilisation and Association Process in the Balkans: Integration Options and Their Assessment' (Policy Research Working Paper 3108/2003) 2.

[56] C Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality' (2004) European Foreign Affairs Review 219.

North Macedonia was the first country from the region to sign the Stabilisation and Association Agreement in April 2001, which entered into force in April 2004.[57] The text is divided into 10 chapters, starting from general principles, political dialogue, regional cooperation, free movement of goods, movement of workers, establishment of businesses, services and capital, approximation of legislation and law enforcement, justice and internal affairs, cooperation policy, institutional and financial cooperation and general provisions. The part of the SAA that governs the free movement of goods is the most comprehensive and most detailed (annexes, protocols) in terms of its volume and had a direct impact on the dynamics of the development of the economy, industry and the direction of the commercial relations with the EU. The approach is asymmetric, which meant that products from North Macedonia had immediate free access to the European market without customs duties and quantitative restrictions or small and temporary restrictions with exceptions for certain products and areas, while domestic market has been opening to EU products with a gradual reduction of customs duties and other restrictions for a certain period of time and, by the end of ten years, this asymmetric approach established a free trade zone.

The part of the SAA related to the free movement of workers defines terms, modalities and the treatment of persons, while regarding the establishment of enterprises, it defines the methods of the establishment and functioning of legal entities – companies, subsidiaries and subsidiary companies in the territories of both sides. The provision of services defines mutual obligations aimed at the further liberalisation of transport services in the area of land, air and water transport and mutual access to markets on both sides, while the parts of the agreement covering current payments and movement of capital define the terms of payments and transfers on the accounts. Hence, the SAAs provide for free trade in goods and quite liberalised conditions for investment, as well as cooperation in labour and capital mobility, business establishment rights between SAA signatories, and the liberalisation of trade in services. Along with free trade provisions, the SAAs also cover competition, protection of intellectual property rights, and enhanced cooperation in customs matters. They also include rules on public procurement, legislative "approximation" (including standardisation), and provisions for services.

One of the fundamental pillars of the SAA is art. 68, which clearly stipulates the harmonisation of the overall existing and future national legislation with the *acquis communautaire*, as well as building the institutional capacity for its efficient application in parallel with this process. This way, the SAA offered a systematised framework for the reconciliation of national legislation with the EU *acquis* and for institutional restructuring in accordance with the EU key administrative structures. Hence, the SAAs constitute the legal instrument for alignment to the EU *acquis* and limited integration into selected sectors of the EU market. Complementary to the SAA is CEFTA 2006, the second EU instrument for economic development of the Western Balkans region by re-establishing and building

[57] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Macedonia, of the other part [2004].

economic and trade relations among Western Balkans countries themselves. Regional cooperation is much more emphasized with regard to the EU approach towards Western Balkans than in the case of CEECs.[58]

The existence of SAAs has had a positive impact on inward foreign direct investment (FDI) flows and exports for the Western Balkan countries. The exports to the EU from a country with a SAA were 70 per cent higher than would otherwise have been the case[59], although the region's share of overall EU trade is only 1.4 per cent. This reflects the strong reduction in trade barriers during the accession process, accompanied by other reforms potentially improving the competitiveness of countries with SAAs in force, as well as the scale and wealth of the EU market relative to those of individual countries. Given the free movement of capital in the EU as well as the comparatively high level of investment protection there are some strong and positive results for FDI inflows. The SAAs provide assurance to foreign investors that the country is on its way to EU membership and their implementation can be perceived by investors as a sign of strong willingness to implement all the reforms required to become an EU member.

The EU embedded the monitoring of the SAA within its monitoring and reporting system of the EU integration process overall, which was gradually also developed and modified – following the Regional approach reports until 2001, the Stabilisation and Association reports were issued in the period 2002-2004 and from 2005 the regular progress report that since 2015 are titled just "reports". Integration in the internal market is of outmost importance for the economic development which is also part of the "Fundamental first" approach. Furthermore, new Enlargement Methodology aims at the transformation of the Western Balkans into functioning market economies able to integrate fully into the EU's single market, whereby the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union are covered under the first cluster "Fundamentals" and second cluster "Internal Market", which consists of chapters 1 (free movement of goods), chapter 2 (freedom of movement for workers), chapter 3 (right of establishment and freedom to provide services), chapter 4 (free movement of capital), chapter 6 (company law), chapter 7 (intellectual property law), chapter 8 (competition policy), chapter 9 (financial services), and chapter 28 (consumer and health protection).

[58] A Gugu, 'Main Features of Stabilisation and Association Agreements and the Differences with Europe Agreements' (2003) CEU Policy Documentation Centre pdc.ceu.edu.

[59] S Weiss, 'Pushing on a string? An Evaluation of Regional Economic Cooperation in the Western Balkans' (Bertelsmann Stiftung 2020).

Country	The existence of a functioning market economy				The capacity to cope with competitive pressure and market forces within the EU			
	progress		*alignment*		*progress*		*alignment*	
	2015	2021	2015	2021	2015	2021	2015	2021
North Macedonia	no progress 0	some progress 2	good level of preparation 4	good level of preparation 4	some progress 2	some progress 2	moderately prepared 3	moderately prepared 3
Montenegro	some progress 2	some progress 2	moderately prepared 3	moderately prepared 3	some progress 2	some progress 2	moderately prepared 3	moderately prepared 3
Serbia	good progress 3	some progress 2	moderately prepared 3	moderately prepared / at a good level of preparation 3,5	some progress 2	some progress 2	moderately prepared 3	moderately prepared 3
Albania	some progress 2	some progress 2	moderately prepared 3	moderately prepared 3	some progress 2	some progress 2	some level of preparation 2	some level of preparation 2
Kosovo	some progress 2	limited progress 1	at an early stage 1	at an early stage 1	no progress 0	limited progress 1	at an early stage 1	at an early stage 1
Bosnia and Herzegovina	some progress 2	limited progress 1	at an early stage 1	at an early stage 1	some progress 2	limited progress 1	at an early stage 1	remains at an early stage 1

TABLE 4. WB countries and market-related Economic criteria under Cluster "Fundamentals". Source: Author's calculations based on the EC Reports/Enlargement Package 2021.

	North Macedonia		Montenegro		Serbia		Albania		Kosovo	Bosnia and Herzegovina
	2015	2021	2015	2021	2015	2021	2015	2021	2021	2021
1 – free movement of goods	3	3	3	3	3	3	3	3	2	1
2 – freedom of movement for workers	1	1	1	2	3	3	1	2	3	2
3 – right of establishment and freedom to provide services	3	3	3	3	3	3	3	3	3	1
4 – free movement of capital	3	3	3	3	3	3	3	3	2	3
6 – company law	4	4	3	4	4	4	3	3	2	2
7 – intellectual property law	3	3	5	4	4	4	2	3	2	3
8 – competition policy	3	3	3	3	3	3	3	3	2	2
9 – financial services	3	3	3	3	3	3	3	3	3	3
28– consumer and health protection	3	3	3	3	3	3	1	1	1	1
	2.88	2.88	3	3.11	3.22	3.22	2.4	2.66	2.22	2

TABLE 5. WB countries alignment with regard to Cluster 2 – Internal Market. Source: Author's calculations based on the EC Reports/Enlargement Package 2021.[60]

[60] Comparison with 2015 is made in order to provide more consistency, having in mind that Enlargement Strategy 2015 introduced a new methodology to quantify the progress and alignment.

Even though the SAAs already provide for free trade in goods as well as quite liberalised conditions for investment and the Western Balkans already has a high level of economic integration with the EU, there are more steps that should be taken. In addition, CEFTA has had a positive impact in terms of increasing competitiveness, rebuilding the regional market and increasing the flow of goods, but the regional economic integration itself is not enough.[61] Therefore, the efforts towards economic integration through the CEFTA 2006 have not increased the shares of trade within the Western Balkans at the expected levels, and the EU has remained the dominant export market for all the Western Balkans.[62] Presented data shows that the effectiveness of the overall accession process and of its implementation must be improved further and the ongoing dynamic is not satisfactory. In terms of fulfilling the economic criteria under Cluster 1, the level of alignment has almost without exemption not been improved and has been standing still for years hence the level of progress is even decreasing. Comparison on the level of alignment regarding Cluster 2 on internal market in 2015 and in 2021 shows little or no progress even in the countries that are already negotiating such as Montenegro and Serbia, while North Macedonia has not even started the accession negotiations yet, although it stands on a similar level.

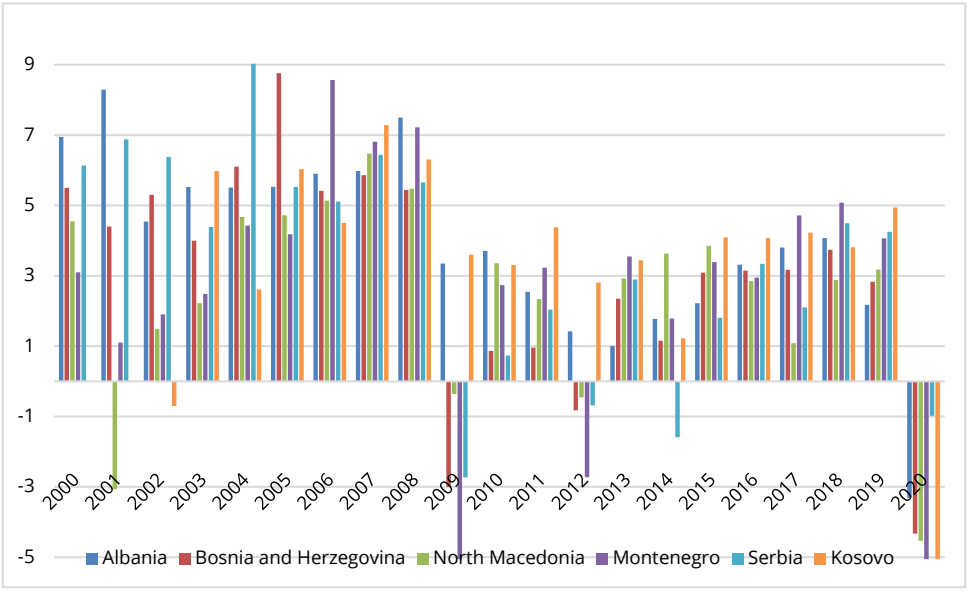

FIGURE 2. Real GDP growth in Western Balkans. Source: IMF.

[61] S Weiss, 'Pushing on a String? An Evaluation of Regional Economic Cooperation in the Western Balkans' cit.

[62] World Bank, 'Coping with Floods, Strengthening Growth' (South East Europe Regular Economic Report 7/2015).

The transition blueprint of rapid market liberalisation and privatisation, in combination with the progressive transposition of EU laws, which has been (to a certain extent) successful in CEECs and has helped economic and institutional reforms to proceed hand in hand, has failed to deliver more concrete results in the Western Balkans as it can be seen from the data presented above.[63] Although it was intended to serve as a precondition for accession or a new frame of enlargement, not only that the Stabilisation and Association process has not yielded the expected results in terms of obtaining EU membership but also has reached its limits with regard to the association and economic development in particular.

III.2. Way forward perspectives

Amid the enlargement impasse, the Berlin Process was initiated in 2014 to serve as a temporary mechanism to fill the gap with regard to a credible European perspective and deliver tangible results with focus was put on economic and regional integration. The main aim of this process was to send the message that even without further EU enlargement, accession prospects will continue to drive long overdue reforms and democratization in the region. Not by accident, the Berlin Process was initially projected to last for four years, probably predicting that by that time accession process will be strengthened and the European perspective will become much more credible and tangible. Within the framework of Berlin Process, in 2017 the EU launched the Regional Economic Area (REA) for the Western Balkans, under which the integration is structured along four main areas: a common market for goods, services and capital; free flow of skilled workforce integrated into professional and academic EU networks; a common digital market; a dynamic investment space. Literature showcase that REA was created by the EU due to its internal challenges and as a mechanism for diminished involvement of the EU in the Western Balkans rather than to find a specific model for supporting the developments in the Western Balkans in the frame of regional institutions.[64] Political, economic and institutional environments in the Western Balkans remain fragile, thus there is a need for continuous direct support from the EU institutions, while the regional cooperation and regional institutions could be as complementary instruments.[65]

Building up on the REA as first regional initiative of this kind, in 2020 the Common Regional Market (CRM) has been launched as another "stepping stone" to better integrate the region more closely with the EU already before accession. However, these regional initia-

[63] M Bonomi and D Reljić, 'The EU and the Western Balkans' cit.

[64] G Qorraj, 'Towards European Union or Regional Economic Area: Western Balkans at Crossroads' (2018) Naše gospodarstvo/Our Economy 11.

[65] *Ibid*.

tives can have only limited impact due to the small size and low level of economic development of the region's economies that severely limits the upside that integration will bring.[66] It lacks strong motives as credible approach in terms of EU perspective is still missing while the regional ownership shifts the EU direct engagement so its leverage, thus it cannot be expected to contribute to building functional institutions in line with the European standards and criteria as a pre-requisite for any economic integration. Taking into consideration political challenges between the countries of the region, specifically the unresolved bilateral issues, regional initiatives put the Western Balkans at yet another crossroad especially if the European perspective is uncertain. The region can overcome the divisions and unite only on the basis of the European narrative and the prospect of EU membership that is without its alternative. If the strategy for economic convergence is reduced to its regional dimension, it is not likely that the process will remain concentrated on a single initiative as a mechanism. Such an example is the Open Balkan Initiative[67] which further builds on an already achieved level of regional cooperation and trust established with the implementation of CRM and offers a substantial contribution to further regional integration with a desire to completely abolish border controls and enabling all labour to be employed across the region with one work permit being sufficient, but this in-depth integration is so far accepted only by three countries from the region composed of six.

Having in mind this context, the only resort is the enlargement policy that unites foreign policy, assistance, and conditionality in a package of tools and incentives whereby the accession process needs to adapt in order to foster the transformative power of the EU with regard to the candidate states. According to the new Enlargement methodology, the core objective of the EU's engagement with the Western Balkans is to prepare the countries to meet all the requirements of membership, namely supporting fundamental democratic, rule of law and economic reforms and alignment with core European values as the key pillars of the accession process. However, the membership prospect still remains distant generating enlargement impasse while the EU is starting to lose the region with the increased presence and influence of other geo-strategic actors which are filling the vacuum created by fading of the European idea.[68] On the other side, the Western Balkans countries are more advanced in economic reform than in the rule of law which are more specific and challenging, thus take time to be proven deeply embedded and irreversible.

[66] R Grieveson, 'Western Balkan Economic Integration with the EU: Time for More Ambition' (14 October 2021) The Balkans in Europe Policy Advisory Group biepag.eu.

[67] Government of the Republic of North Macedonia, Joint statement of the leaders of "Open Balkan" of 29 July 2021 vlada.mk.

[68] European Political Strategy Centre, *Engaging with the Western Balkans: An Investment in Europe's Security* op.europa.eu 3.

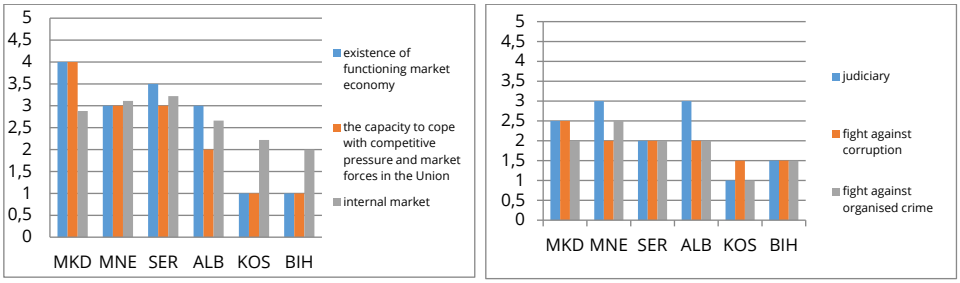

FIGURE 3. WB Economic criteria alignment and Chart 10. WB Rule of law alignment. Source: EC 2021 Reports.

There seems to be a clear necessity to redefine the enlargement policy in a way which is going to help achieve enlargement in the more immediate future and to mitigate the impasse on the both sides – the EU and the Western Balkans. At the same time, the new enlargement approach should continue to insist on and support fundamental reforms as before, but with a better understanding of realities on the ground and of the need for much stronger and more imminent incentives for reforms.[69] Having in mind the state of play (Figure 3) and the expected positive impact of greater economic integration with the EU as elaborated, one solution could be to grant gradual access to specific EU membership benefits and joining the EU single market seems to be a realistic goal.[70] This step should also be conditional with the achievement of certain reform benchmarks with focus on the rule of law, but it will make the process more dynamic and elevate the level of commitment considering the fact that fulfilling the single market criteria also requires ambitious and demanding reforms. At present, new EU entrants gain access to all policy areas under EU competence on the day of their accession, except for those policies for which exceptions are stipulated in the general treaty framework, such as the European Monetary Union and the Schengen Agreement for which fulfilment of additional criteria is needed, beyond those stipulated for EU membership. Hence, the idea of gradual (and more conditional) access to EU policies is not much controversial or that unusual, moreover it can be observed in terms of transitional measures with regard to the free movement of labour.

Although not explicitly, this approach is also contained within the new Enlargement Methodology which prescribes that "by providing clear and tangible incentives of direct interest to citizens, the EU can encourage real political will and reward results arising from demanding reforms and the process of political, economic and societal change" and "if countries move on reform priorities agreed in the negotiations sufficiently, this should

[69] M Lazarevic, 'Away with the Enlargement Bogeyman' (2018) European Policy Centre Discussion Paper cep.org.rs.

[70] European Stability Initiative, 'Hamster in the Wheel Credibility and EU Balkan policy' (15 January 2020) ESI Report esiweb.org.

lead to: closer integration of the country with the European Union, work for accelerated integration and "phasing-in" to individual EU policies, the EU market and EU programmes, while ensuring a level playing field".[71] This advance should be stimulated and supported with increased funding and investments, thus Western Balkan countries should be provided with a volume of resources proportional to the levels of integration with the EU that they have already achieved, considering ways of opening structural funds even before membership. In order to maintain the EU leverage in most pressing areas, accessing the single market should be conditioned not only with the required level of alignment in chapters under the Cluster 2 (internal market) but also with certain progress and preparedness in terms Cluster 1 (fundamentals) and sanctioning mechanisms in case of any stagnation or serious backsliding. This approach will also imply deepening of regional ties that is more a consequence of – rather than prerequisite for – EU accession,[72] but it is for sure a much needed step towards overcoming the bilateral issues that disrupt the accession process.[73] Finally, from a legal point of view, EU enlargement is based on a single provision in the primary law serving as the legal basis for accession to the EU (art. 49 TEU), hence the policy has developed through Commission opinions on the application for EU membership, strategy papers, annual reports, Council conclusions, and specific agreements such as SAA. In that context, access to the single market as an approach for reinforcing the Enlargement policy can be introduced and based on the same acts by the Commission and the Council along with separate agreements that will set the institutional arrangements and define the relations in details.

IV. Concluding remarks

This *Article* has outlined the effects of economic integration and its impact in terms of overcoming the enlargement constraints. The case of EEA showed that there had been a way to "reconcile the successful integration of the Twelve without rebuffing those who are just as entitled to call themselves Europeans"[74] by establishing more structured partnership through expanding the single market. Moreover, the contribution of the EEA became apparent in the accession process of Austria, Sweden and Finland, proving the initial founding theory that close economic cooperation imposes a need for political integration and common decision-making process, hence pointing out the future prospects and the perspective of the access to the single market as a (sole) goal.

[71] Communication COM(2020) 57 final from the Commission of 5 February 2020 on Enhancing the Accession Process 5.

[72] S Richter, 'Changes in the Structure of Intra-Visegrad Trade after the Visegrad Countries' Accession to the European Union' (Vienna Institute for International Economic Studies Statistical Report 5/2012).

[73] The case of North Macedonia's integration process towards the EU is particularly indicative in that manner, twice blocked because of bilateral disputes (previously the name dispute with Greece, while more recently the blockade imposed by Bulgaria).

[74] J Delors, 'Statement on the Broad Lines of Commission Policy' extracts reprinted in Marius Vahl (ed), *European Economic Area 1994-2009* cit. 12 ff.

The EU Eastern enlargement in 2004 which proceeded with the accession of Bulgaria and Romania in 2007, represents a milestone in the evolution of European integration seen as a tool to consolidate economic and political transitions. The instruments employed in the process accomplished significant convergence that further increased after accession along with the positive effects on the side of the single market which despite the increased economic divergence among its current members, has become more integrated and dynamic. Moreover, economic development of CEECs contributed to increasing the quality of institutions which indicates a linkage between the economic and political criteria. However, this approach achieved only limited impact with regard to the Western Balkans, whereby one of the main reasons is the impaired credibility of the enlargement process and the membership perspective. Stabilisation and association process have not delivered many of the economic benefits of accession ahead of full membership and to overcome the gap in economic development in terms of EU-CEE. What is at stake today is rather consolidating what the EU has already achieved so far, including what was achieved through previous rounds of enlargement.

Hence, this *Article* argued that offering access to the single market as an intermediary goal could serve as a strong incentive and inspire real reforms, while at the same time it would also enhance the accession process and the EU leverage in the region. Credible accession perspective is the key incentive and driver of transformation in the region. Other alternatives such as the regional cooperation do not have the capacity to yield results that will contribute greatly to improving the living standards of the citizens and overcoming the convergence gap. Moreover, greater economic integration with the EU could in fact spur deepening of regional economic integration. While this option may be feared as second-class membership, it is certainly better than the actual *status quo* and the ongoing uncertainty of the process which is not delivering. In order to maintain the focus on the democracy and rule of law promotion, which are also the main engines of economic integration, gaining access to the single market should be made conditional upon progress in terms of these criteria as well. Finally, the EU has nothing to lose but much to gain.

ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

Edited by Matteo Bonelli, Monica Claes, Bruno De Witte *and* Karolina Podstawa

USUAL AND UNUSUAL SUSPECT IN PROTECTING EU VALUES: AN INTRODUCTION

MATTEO BONELLI[*], MONICA CLAES[**], BRUNO DE WITTE[***] AND KAROLINA PODSTAWA[****]

TABLE OF CONTENTS: I. Protecting EU values: The state of affairs. – II. Protecting EU values: The debate. – III. The *Special Section*. – IV. The contributions.

ABSTRACT: This *Article* introduces the *Special Section* "Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values" which collects four *Articles* originally presented at the NOVA workshop "EU Democracy and the Rule of Law" in June 2021. The four *Articles* all reflect of how the EU institutions may protect and promote the common values in the Member States, in particular in the context of the ongoing constitutional crises in Hungary and Poland, but looking also at the medium and long-term efforts the EU is called to put in place to prevent new crises and promote a stronger rule of law culture in the Member States and civil society. This *Article* serves to place the considerations offered in those four contributions against two backgrounds: the current and evolving state of affairs, in which democratic and rule of law questions seem to emerge more and more strongly; and the institutional and academic debate that has taken place in the last decade. We argue that the *Articles* of this *Special Section* bring an original and innovative perspective to the debate, showing that the EU response must be based on a combination of political, judicial and financial tools, and that the EU needs to both try to respond to ongoing crisis and construct a stronger toolkit for the future.

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KEYWORDS: EU values – rule of law – Court of Justice – conditionality – peer review – constitutional crises.

I. PROTECTING EU VALUES: THE STATE OF AFFAIRS

In October 2021, the Polish Constitutional Tribunal delivered its highly controversial ruling in case K3/21, firmly rejecting the primacy of EU law in the Polish constitutional system and directly confronting the Court of Justice and its attempt to protect the judicial independence of Polish judges.[1] The decision triggered a deluge of reactions, which went as far as arguing that the ruling could be seen as an implicit declaration of the Polish intention to withdraw from the European Union under art. 50 TEU.[2] Many commentators called on the Commission to react promptly and firmly, and the Commission did so, opening a new infringement procedure in December 2021 targeting the judgment of the Constitutional Tribunal but also questioning whether the latter could be considered a court "established by law".[3]

Meanwhile, discussions in and on Hungary concentrated on what tools could be used by the opposition to "restore constitutionalism" in the country following a possible electoral victory in the spring 2022 elections.[4] The decision of different opposition parties from the left to the center and even the right of the political spectrum to join forces and form a common electoral list seemed able to finally create a powerful challenge to Viktor Orban and Fidesz.

At the EU level, on the "values front" the most important piece of news of the last months of 2021, together with the launch of the already mentioned infringement action against Poland, was the Opinion of Advocate General Campos Sánchez-Bordona on the new rule of law budgetary Conditionality Regulation.[5] In his opinion,[6] the AG dismissed the challenges brought by the governments of Hungary and Poland against the new instrument, confirming *inter alia* that the legal basis of the Regulation – art. 322 TFEU – was correct, that the Regulation did not circumvent the procedures of art. 7 TEU, and that it adequately protected legal certainty. The final judgment of the Court of Justice was then expected in the first months of the following year.

[1] Polish Constitutional Tribunal decision of 7 October 2021 case K 3/21.

[2] HCH Hofmann, 'Sealed, Stamped and Delivered: The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw Under Art. 50 TEU?' (13 October 2021) Verfassungsblog verfassungsblog.de.

[3] European Commission, *Rule of Law: Commission Launches Infringement Procedure against Poland for Violations of EU law by its Constitutional Tribunal* ec.europa.eu. See also ECtHR *Xero Flor v Poland* App. 4907/18 [7 May 2021].

[4] See debate at Verfassungsblog, *Restoring Constitutionalism* verfassungsblog.de.

[5] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[6] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2021:974, opinion of AG Campos Sánchez-Bordona and in case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2021:975, opinion of AG Campos Sánchez-Bordona.

The developments of those months seemed to lead to a truly decisive moment in the now decade-long[7] battle to protect the rule of law and EU values in the Member States. On the one hand, the national threats to EU values and to the EU judicial order were becoming more and more acute. On the other hand, the EU institutions had become certainly more aware of the need to find robust answers and more equipped to develop effective responses. Even from the Member States' side, after much reluctance to take clear stances and to directly confront their peers in the Council,[8] we could finally witness a "closing of ranks" in rule of law protection.[9]

When the Court of Justice then delivered its decisions on the new Conditionality Regulation in mid-February 2022, siding with the Advocate General and green lighting the new instrument, expectations grew even further. Both politicians[10] and academics[11] immediately called the Commission to move swiftly and trigger the new Regulation against Hungary and Poland. To the disappointment of some, the Commission stressed however that before activating the Regulation, it remained necessary to adopt Guidelines,[12] as was agreed in the much-debated European Council Conclusions of December 2020.[13] In any event, the time seemed ripe for robust action at the EU level.

The context however changed dramatically in the following days. Russia's invasion of Ukraine shifted the attention of the institutions and the Member States to the greatest foreign policy challenge since the creation of the Union's Common Foreign and Security Policy and forced to deal with the internal spillover effects of the conflict, from refugee

[7] The new Hungarian constitution entered into force in January 2021. The literature on the crises is extensive: on the earlier debates, see e.g. A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015); C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); on Poland: W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

[8] P Oliver and J Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) JComMarSt 1075.

[9] J Morijn, 'A Closing of Ranks: 5 Key Moments in the Hearing in Cases C-156/21 and C-157/21' (14 October 2021) Verfassungsblog verfassungsblog.de.

[10] European Parliament Resolution 2022/2535(RSP) of 10 March 2022 on the rule of law and the consequences of the ECJ ruling.

[11] L Pech, 'No More Excuses: The Court of Justice Greenlights the Rule of Law Conditionality Mechanism' (16 February 2022) Verfassungsblog verfassungsblog.de.

[12] The Guidelines have ultimately been adopted on March 2nd 2022: Communication C(2022) 1382 final from the Commission 'Guidelines on the Application of the Regulation (EU, EURATOM) 2020/2092 on a General Regime of Conditionality for the Protection of the Union Budget'.

[13] European Council Conclusions EUCO 22/20 of 11 December 2020. For a critical analysis of the conclusions, see e.g. A Alemanno and M Chamon, 'To Save the Rule of Law you Must Apparently Break It' (11 December 2020) Verfassungsblog verfassungsblog.de; KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) Verfassungsblog verfassungsblog.de; for more nuanced takes, HT Nguyen, 'The EU's New Rule of Law Mechanism: How it Works and Why the "Deal" did Not Weaken it' (17 December 2020) Jacques Delors Centre www.hertie-school.org; B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 3.

management[14] to energy policies, to new discussions on the Union's enlargement policy. By virtue, most obviously, of their geographical positions, Poland and, to a lesser extent, Hungary are central players in the EU's reaction to the conflict and they play a key role in operationalizing the Union's common strategies, in terms for example of providing defence assistance to Ukraine or managing refugees inflow. In this complex scenario, rule of law and values protection seemed to lose some of its urge and the Commission, while not providing any official statement on the issue, seemed more reluctant to take further action. If not justified, the Commission's prudence was at least understandable, considering the size and gravity of the Ukrainian's conflict and the key role of Poland and Hungary in operationalizing the EU's reaction to the crisis. A moment of reflection on the timing, scale and scope of the EU's intervention was certainly needed.

At the time of writing, the momentum may have shifted once more. The landslide victory of Fidesz and Viktor Orban in the April 2022 elections, after an electoral campaign characterized by an evident disparity in terms of media access between governmental and opposition forces,[15] put the theme of values protection firmly back on the EU agenda. The Commission, which probably feared being criticized for excessively meddling in national democratic processes and thus refrained from taking formal action before election day, after the elections finally decided to activate the new Conditionality Regulation against Hungary.[16] And while the Commission seemed ready to greenlight the Polish Recovery Plan under the RRF Regulation – until today the approval has been halted due to rule of law concerns – the most recent suggestions seem to indicate that the process might take longer, and the Commission might want to wait until clearer indications arrive from Warsaw on the possible reform of the much-discussed Disciplinary Chamber of the Supreme Court.

The situation is therefore extremely dynamic. But even if political considerations and contingencies influence the immediate institutional reactions, and may call for caution and restraint at times, the need of finding effective answers to the threats to the common values of the EU project is only becoming more evident. The underlying questions that have occupied the institutional and academic discussion in the last decade are not going away. On the contrary: whether or not the EU will be able to contribute to restore democracy and the rule of law in its Member States and ensure the common values of the EU project across the Union continues to be a defining question for the future of the integration process.

[14] See e.g. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

[15] See the concerns expressed by OCSE in its request for a full-scale election observation mission: OSCE, 'Hungary: Parliament Elections 3 April 2022' (4 February 2022) www.osce.org.

[16] As reported e.g. by L Bayer, 'In Major First, EU Triggers Power to cut Hungary's Funds over Rule-of-Law Breaches' (27 April 2022) Politico www.politico.eu.

II. Protecting EU values: the debate

It would be impossible to summarize in this brief *Article* the steps taken by the institutions in the last decade, or the suggestions that have been advanced in the institutional, policy and academic debate. To just offer a brief sketch of the main directions and trends of the discussion, we can first highlight that the EU has put in place different strategies. It has made use of existing mechanisms, including both "direct"[17] and "indirect"[18] infringement procedures, and also activated art. 7(1) TEU, even if no formal decision has been adopted under it. But it has also created new mechanisms, including the Commission Rule of Law Framework[19] and Rule of Law Reports, the Council Peer Review Mechanism[20] and more recently the Conditionality Regulation. Despite these efforts, the general consensus (though not without differences in the degree of criticism expressed)[21] is that the EU response has been most often inadequate and disappointing.

As for the academic debate, this has been extremely lively as well. Soon after the start of the Hungarian crisis and even before the situation started to deteriorate in Poland, many different approaches have been suggested on how to respond to the attacks to democracy, the rule of law and human rights. In legal scholarship in particular, the focus has been first and foremost on strengthening the judicial responses to the crises.[22] For example, much attention has been given to the use of the infringement procedure as a tool to protect the

[17] I refer here in particular to the actions based on art. 19 TEU that the Commission started against Hungary: case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; case C-791/19 *Commission v Poland (Disciplinary Regime)* ECLI:EU: C:2021:596; and those based on the Charter of Fundamental Rights against Hungary: case C-78/18 *Commission v Hungary (Transparency of Associations)* ECLI:EU:C:2020:476; case C-66/18 *Commission v Hungary (Higher Education)* ECLI:EU:C:2020:792.

[18] Borrowing the language of M Dawson and E Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' (2013) German Law Journal 10; see in particular case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687 and discussion in G Halmai, 'The Case of the Retirement Age of Hungarian Judges' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 471.

[19] European Commission, 'A New EU Framework to Strengthen the Rule of Law' (2014).

[20] Discussed by in this *Special Section* by T Conzelmann, 'Peer Reviewing the Rule of Law? A New Mechanism to Safeguard EU Values' (2022) European Papers www.europeanpapers.eu 671.

[21] See *e.g.* the highly critical analysis of R Uitz, 'The Perils of Defending the Rule of Law Through Dialogue' (2019) EuConst 1; L Pech and K L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3; K L Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3. For a less critical analysis: C Closa, 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance' (2019) Journal of European Public Policy 5.

[22] See however for different approaches: JW Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) ELJ 2; M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU' (2017) Journal of European Public Policy 3.

rule of law and EU values,[23] even reinventing it as a tool of militant democracy,[24] or also on the broadening of the scope of application of the Charter of Fundamental Rights to foster individual and collective litigation.[25] Of course, the key procedure of art. 7 TEU has been explored in detail as well.[26] Many of these academic suggestions have also found support in the institutional "bubble", most notably by the European Parliament that has endorsed several of these possible solutions in some of its Resolutions.[27]

While the debate has been rich and insightful, one of its pitfalls has been that it has too often focused on finding a "silver bullet" that could address ongoing crises: [28] a single solution that could be activated at the EU level and that would be able to restore, top-down, democracy and the rule of law in the Member States.[29] This is reflected both in the institutional practice and in the academic debate. As for the first, EU institutions in the last decade have gone through an almost constant cycle consisting in introducing new instruments; using them, most often half-heartedly;[30] realizing that the new instrument had not fundamentally changed the situation on the ground; and then designing and introducing yet

[23] M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) CMLRev 4, and, of the same authors, 'Ascertaining the "Guarantee of Guarantees": Recent Developments Regarding the Infringement Procedure in the EU's Rule of Law Crisis' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 207; KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit. 3; P Pohjankoski, 'Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-Off' (2021) CMLRev 431; M Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice' (2022) EuConst 30; T Boekenstein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) German Law Journal 431.

[24] K L Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit. 3.

[25] A von Bogdandy and others, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) CMLRev 2; A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law Against EU Member States' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* cit. 187.

[26] L Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), T*he Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 187; and the earlier contribution of W Sadurski, "Adding Bite to a Bark: the Story of Article 7, E.U. Enlargement, and Jorg Haider' (2010) ColumJEurL 3.

[27] See e.g. see European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary (2013); Resolution on the Need for a comprehensive Democracy, Rule of Law and Fundamental Rights mechanism, Strasbourg, 14 November 2018, Doc. 2018/2886(RSP).

[28] Not without exceptions: for different approaches, well showing the different dimensions and possibilities of EU intervention, see L Pech and others, Research Paper 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' (April 2016) European Parliamentary Research Service www.europarl.europa.eu; M Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017); A von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) CMLRev 3.

[29] For a similar view, M Dawson, *The Governance of EU Fundamental Rights* cit. 175, who criticizes "the folly of seeking a magic bullet to the EU's rule of law dilemma or placing excessive faith in a single mechanism or set of institutions".

[30] Take, for example, the decision not to use the Rule of Law Framework against Hungary.

another instrument. The academic discussion mostly followed the same steps, critically discussing the new mechanisms proposed or introduced by EU institutions or suggesting new possible avenues that might perhaps prove to be more effective. Some of the main academic collections on the subject are good examples of how the discussion proceeded: as insightful as they were, they mostly offered a "menu" of possible – and alternative - different choices but did not attempt to provide a single comprehensive solution.[31]

Another shortcoming of the discussion is that there has been relatively little clarity in terms of the goals that can and should be achieved by EU intervention. Can the EU truly restore democracy and the rule of law in the Member States? Or should it rather focus on sanctioning and excluding "rogue" Members? What is exactly the role of the EU and its institutions? Most importantly, how do different mechanisms contribute to achieving those objectives? In the legal discussion, perhaps we may have also overstated the ability of legal tools and judicial procedures to force change, overlooking the political, societal and cultural dimension of the constitutional backsliding phenomena.[32]

III. The *Special Section*

The *Articles* presented in this *Special Section*, based on the contributions discussed in the NOVA-MCEL workshop "EU Rule of Law and Democracy" of June 2021, aim to contribute to that debate, but offering a different and original perspective that we hope could contribute to addressing some of the pitfalls of earlier approaches. First, the *Articles* all take for granted that no single mechanism could ever solve the crises and restore democracy, the rule of law and fundamental rights in Hungary, Poland, or any other Member State. Rather, they understand the EU system to protect the common values as a broad toolkit. Within that toolkit, each of the mechanisms, even those that at first sight might look much softer in nature, may play a significant yet different role: some will be harder "enforcement" tools; other serve to monitor the situation; and yet other to promote the values and spread a democratic and rule of law culture across the Union.

Second, the *Articles* do not insist on the more "traditional" instruments of the EU values-protection's toolkit, such as art. 7 TEU or the infringement procedure, but consider a wider range of actors, roles and procedures. These include both "usual suspects", such as the Court of Justice, which however, as Bornemann suggests, is actually able to modulate its responses to "autocratic legalism" cases; or also the Conditionality Regulation,

[31] See e.g. the approach followed in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* cit. or A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* cit.

[32] Highlighted however in a number of contributions: D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) CMLRev 623; JHH Weiler, 'Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit.; B Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) ICON 219.

which should also be seen in a broader context, especially after the reforms introduced in the legislative process and the judgment of the Court. Then, the Peer Review mechanism in the Council or the "spending powers" of the Union can instead be considered truly "unusual suspects" that while potentially able to strengthen the Union's toolkit, have so far remained in the shadow of other instruments.

Third, the *Articles* of this *Special Section* consider tools of different nature. Of course, judicial mechanisms are of fundamental importance and the Court of Justice (supported by national courts) is certainly a key player in rule of law protection. But it is only one actor in a broader framework. Political mechanisms, not only art. 7 but also softer instruments such as the Council's peer review systems, are also crucial. And finally, especially in a context of significant growth of the Union's spending powers, financial tools may also become essential. Seen together, the *Articles* map the emergence of new actors and new mechanisms, or in some cases old actors with new roles, and reflect on how they can contribute to the Union's values-protection toolkit. They do so by combining a legal analysis with political science methodologies and reminding us of the importance of looking at the interaction between the legal, political and socio-cultural dimensions of the on-going challenges.

IV. The contributions

The first *Article* (Bornemann) focuses on the judicial dimension.[33] Bornemann reflects on an "old" actor – the Court of Justice – but conceptualizes the new role it has acquired in recent times as (often) "last soldier standing"[34] in fighting illiberal policies of autocratic governments. The *Article* reflects on the strategies and judicial responses that the Court has put in place and assesses what responses have proved to be more effective. By distinguishing one "constitutional" and two "administrative" types of responses, the *Article* shows that the Court is able to modulate its answers in different cases and argues that it should measure its approach against the strategic objectives that autocratic legalists pursue.

The second *Article* (Conzelmann) analyses a more "political" way to protect EU values.[35] It looks in particular at the role of the Council, but not within the traditional context of the art. 7 TEU procedure; rather, it explores one of the recent additions to the Union's values-protection toolkit, the Council's peer review on the rule of law. While of course softer in nature than other tools, it is argued that the peer review system could still complement other mechanisms and bring added value in particular when it comes to preventing future crises and promoting a rule of law culture across the Union, provided

[33] See J Bornemann, 'Judicial Responses to Autocratic Legalism: The European Court of Justice in a Cleft Stick?' (2022) European Papers www.europeanpapers.eu 651.

[34] D Kochenov and P Bárd, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU' in EH Ballin, G van der Schyff and M Stremler (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (Asser 2020) 243.

[35] See T Conzelmann, 'Peer Reviewing the Rule of Law? A New Mechanism to Safeguard EU Values' cit.

however that its design and institutional choices are adequate. The *Article* suggests possible reforms that could be implemented to bolster the peer review scheme.

The other two *Articles*, Staudinger and Fisicaro, concentrate on budgetary and financial tools to protect and promote EU values and the rule of law, in the context of the new Multiannual Financial Framework as well as the Next Generation EU Recovery Plan. Staudinger focuses on the much-discussed 2020 Conditionality Regulation.[36] She argues that while originally designed as a true "rule of law" conditionality mechanism, the Regulation has turned out to be rather a "budgetary" conditionality, as the conditions for its activation have become more stringent following the amendments pushed through by the Council. This has been confirmed by the recent judgments of the Court of Justice which are also analyzed in the piece. At the same time, the conditionality tools constructed within the Recovery and Resilience Facility Regulation may prove to be a better way to enforce a genuine rule of law conditionality.

Fisicaro's *Article* also reflects on the rule of law conditionality possibilities offered by the RRF system, but his *Article* takes a broader perspective and maps how the growth of the Union's spending powers creates new opportunities to protect, promote and enforce EU values through financial means.[37] The *Article* thus explores also the so-called "enabling conditions" in the Structural and Investment Funds, and in particular the condition related to the EU Charter of Fundamental Rights; and the new "Justice, Rights and Values fund" through which the EU can finance and support civil society organization. As in the case of the Council's peer review, these instruments may be softer in nature, especially when compared to the conditionality regulation, but nonetheless have a role to play in the Union's toolkit.

As argued earlier, when seen together, these *Articles* remind us that the protection of EU values is not, and cannot be, assigned to a single actor, via a single mechanism. There is no silver bullet, so to say, and seeking one would be fruitless. Rather, the protection of EU values is a shared responsibility, in at least three different senses. First, it is shared in a vertical sense, as it must involve both EU and national actors. Second, it is shared in a horizontal sense, as different actors are called to intervene: the Court of Justice (Bornemann), the Council (Conzelmann), but also of course the Commission as the executive and administrative body in charge of managing EU funds (Staudinger, Fisicaro), and civil society at both EU and national level also has a key role to play (Fisicaro). Third and finally, it is a shared responsibility of judicial (Bornemann), political (Conzelmann) and "budgetary" actors (Staudinger, Fisicaro). Furthermore, when read together the contributions highlight that short-term reactions to threats and breaches to EU values (such as those of the Court of Justice or under the Conditionality Regulation) must be combined with medium and long-

[36] See I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) European Papers www.europeanpapers.eu 721.

[37] See M Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values' (2022) European Papers www.europeanpapers.eu 697.

term efforts of prevention and promotion of democracy, the rule of law and human rights (for example, with the Council's peer review system or through civil society funding). This is not, or at least not only, an issue of tackling on-going crises, but a continuous process of building a true, Union of Values', an effort which inevitably will take time.

Now that the toolkit has become more robust, it is time to develop a governance framework that allows for concerted, and hopefully more effective, action. Both "softer" and "harder" tools can contribute to the framework, and each of them might have a slightly different function: preventing new crises; promoting rule of law, human rights and democratic culture; but also of course sanctioning breaches. The key is thus less to find *the* right solution, but to combine old and, where necessary, new mechanisms, maximizing their effectiveness also by designing a common strategy to be followed by the institutions. We hope that this *Special Section* and the four *Articles* it contains offer ideas in that direction.

ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

Edited by Matteo Bonelli, Monica Claes, Bruno De Witte *and* Karolina Podstawa

JUDICIAL RESPONSES TO AUTOCRATIC LEGALISM: THE EUROPEAN COURT OF JUSTICE IN A CLEFT STICK?

JONAS BORNEMANN*

ABSTRACT: In recent years, the Court of Justice has become one of the most pronounced voices of opposition to illiberal projects in Europe. Its tenacity, however, has turned the Court into the target of national lawmakers who seek to undermine the authority of the Court and Union law more generally. The present investigation suggests that these attacks share recurrent features and may be qualified as "autocratic legalism". It will be argued that, above all, attacks of this nature are aimed at calling into question the authority of the European Court of Justice among national audiences. For European judges, consequently, this raises the question how to appropriately respond to such efforts. Although there may be no ideal solution in this regard, the present investigation discerns three responses in the jurisprudence of the Court and assesses these approaches in the light of the strategic objectives pursued by autocratic legalists.

KEYWORDS: autocratic legalism – European Court of Justice – rule of law – refugee crisis – Poland – Hungary.

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I. Introduction

It is a characteristic feature of modern illiberalism that it seeks to keep intact a façade of lawfulness.[1] "Autocratic legalism" of that kind capitalises on the normative force attributed to the law, allowing lawmakers to disguise their autocratic intentions as regular applications of the law. Scheppele has forcefully argued in this regard that "constitutional democracies are being deliberately hijacked by a set of legally clever autocrats who use constitutionalism and democracy to destroy both".[2] Whereas autocratic legalism is therefore strategically aimed at the dismantling of safeguards in law, it goes to great lengths to present a mirage of legality in doing so. Unlike strategies of undisguised violence and terror, autocratic legalists secure a firm grip on power by tapping into the law as a source of legitimacy.[3]

Autocratic legalism constitutes a well-rehearsed tactic in national legal systems.[4] Within the European Union, this phenomenon has been described most thoroughly in relation to Poland and Hungary.[5] As the growing body of litigation before the European Court of Justice (ECJ) indicates, such strategies are equally aimed at safeguards in supranational law. In responding to autocratic legalism of that nature, the ECJ walks a tightrope. On the one hand, European judges may be one of the last remaining actors voicing resounding opposition to illiberal policies in national systems.[6] On the other hand, autocratic legalism may call into question the authority of the Court itself. By spelling out autocratic counter-interpretations of Union law, autocratic legalists deliberately attempt to disparage the Court *vis-á-vis* national audiences, to the effect that the ECJ's authentic interpretation of Union law is no longer viewed as authoritative by national lay persons. How should the ECJ respond to such strategies of autocratic legalism?

[1] See A Lührmann and S Lindberg, 'A Third Wave of Autocratization Is Here: What Is New about It?' (2019) Deomocratization 1104 ff.

[2] KL Scheppele, 'Autocratic Legalism' (2018) The University of Chicago Law Review 545, 547.

[3] See A Puddington, 'Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians' (Freedom House Report 2017).

[4] One of the first accounts on strategies of autocratic legalism considered the situation in Venezuela, see J Corrales, 'Autocratic Legalism in Venezuela' (2015) Journal of Democracy 37, 38 ff.

[5] On Hungary's constitutional reforms, see Z Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 459 ff.; on Poland's rule of law crisis, see M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) Hague Journal on the Rule of Law 421, 428 ff. This focus should not, however, gloss over the fact that autocratic legalism is by no means limited to these two prominent examples.

[6] For this perspective, see D Kochenov and P Bárd, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU' in EH Ballin, G van der Schyff and M Stremler (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (Asser 2020) 249.

Although there may be no ideal solution in this regard, the Court has several options at its disposal, nonetheless. The following investigation will explore different judicial responses to autocratic legalism in the jurisprudence of the ECJ[7] and their ability to counter strategies of autocratic legalism. In this vein, it will put forward the view that the ECJ is not in a cleft stick when drafting a response to autocratic legalism. Rather, several elements may render its response more (or less) suitable to dispel strategies of autocratic legalism. To underscore this finding, the following investigation combines two logical steps. It will, first, analytically discern different approaches in the jurisprudence of the Court. Throughout the investigation, specific attention will be drawn to the procedure giving rise to the Court's judgments, since its response to autocratic legalism is partially contingent on the question whether it was raised in the context of an indirect or a direct action, particularly a preliminary reference or an infringement procedure.

Second, the following investigation sets out to qualitatively assess these approaches in the light of the strategic objectives of autocratic legalism. With a view to such a benchmark, it should be borne in mind that the strategic objectives of autocratic legalism constitute no precise measurement. Rather, both the label of autocratic legalism as well as its strategic objectives are based on attempts to theorise developments in the respective legal systems and must, as such, remain tentative. This being noted, the following investigation will nonetheless use such theory-informed insights to reveal aspects that may render the ECJ's response more (or less) apt to dispel autocratic legalism's strategic objectives. Accordingly, it will not empirically measure societal implications of illiberal policies or judicial interventions, respectively. Instead, it conducts a multiple case study analysis of ECJ judgments, exploring the suitability thereof in the light of theory-informed presumptions regarding autocratic legalism.

This *Article* proceeds as follows. At the outset, it will reflect on the strategic objectives that illiberal lawmakers pursue by virtue of autocratic legalism (section II). In the light thereof, it will distinguish and discuss three approaches developed by the ECJ in response to such strategies. It will argue, in the first place, that the ECJ's principal (and natural) response to autocratic legalism is constitutional (section III). A crisis of values must be met with profound constitutional reasoning.[8] However, the following investigation will highlight that the ECJ likewise has at its disposal alternative ways of responding to autocratic legalism (section IV). Accordingly, the Court may, in the second place, endorse a decentralised response by putting national courts in a position to counter strategies of autocratic legalism in national legal systems. A third approach adopts a similarly decen-

[7] For a tentative exploration of that phenomenon with regard to the ECtHR, see already B Çalı, 'Autocratic Strategies and the European Court of Human Rights' (2021) European Convention on Human Rights Law Review 11, 12 ff.

[8] See P Van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) EuConst 8, 31.

tralised solution, but one that centres on individualised decision making of national administrative bodies. By analytically discerning these options, the following investigation examines the benefits of the respective judicial response in relation to the strategic objectives of autocratic legalism, possible ramifications thereof, and areas of application.

II. Autocratic legalism: a threat to the ECJ's authority

Autocratic legalism enables illiberal lawmakers to dismantle safeguards of law, while benefitting from the legitimacy that lawful conduct implies.[9] Whereas this strategy has been put to a test on several occasions in domestic contexts, it is equally applied in relation to Union law. For illiberal lawmakers, membership in the EU continues to resemble an extremely important legitimacy asset that is not light-heartedly given away.[10] Accordingly, autocratic legalists go to great lengths to present reforms as conforming with Union law, even where their contempt of the latter is rather evident. To do so, autocratic legalism routinely endorses specific interpretations of Union law that tend to the needs of the illiberal project at hand.

It may be argued that, above all, this marks an attack on the ECJ. To be sure, the Court of Justice operates at a relatively safe distance from illiberal efforts in national legal systems. Unlike some national courts, it is not at risk of being institutionally hijacked by national autocrats.[11] Autocratic legalism, however, constitutes a strategy to undermine the authority of the ECJ by other means. By advocating for an interpretation of Union law that diametrically opposes that of the Court, autocratic legalists may seek to strategically call into question the latter's (monopolistic) claim to authentically interpret Union law.

At first glance, autocratic legalism may thus present itself as a specific form of interpretative pluralism. The ECJ is certainly not the only actor interpreting Union law, and there are good reasons to presume that "co-interpretations" by national courts and governments may inspire the Court in several ways.[12] However, autocratic legalism is different from pluralism in as much as it specifically refutes one of its principled normative foundations, namely, the dialectic openness of one actor to another.[13] Autocratic legalists

[9] KL Scheppele, 'Autocratic Legalism' cit. 562.

[10] For Hungary and Poland, this effect has been explored by T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) German Law Journal 1140, 1150.

[11] A different conclusion may be warranted with regard to the influence of the Member States collectively, see D Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2022) ELJ 262.

[12] See G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) ELJ 358, 362 ff.

[13] On this philosophical foundation of pluralism, see M Avbelj, 'Constitutional Pluralism and Authoritarianism' (2020) German Law Journal 1023, 1028.

do not further a pluralistic paradigm but, instead, pursue a strategy of "deliberate, systemic and sustained repudiation of [...] supranational standards".[14] Accordingly, autocratic legalists engage with Union law in a selective fashion. They utilise specific patterns of justification to present national reforms in conformity with supranational law (section II.1) but do so on false pretence. Instead, autocratic legalism may be viewed as a tool to contest the authority of the ECJ with national audiences (section II.2).

II.1. Autocratic counter-interpretations of Union law

Autocratic legalism presumes that national lawmakers try to keep intact a façade of legality while drafting reforms that undermine core guarantees of supranational law. Accordingly, national reforms of that nature are not simply developed in blatant disregard of Union law. Instead, autocratic legalists go to great lengths to present their actions in accordance with the applicable law. In the context of safeguards in Union law, they tend to endorse specific (and frequently: formalistic)[15] interpretations of supranational law that corroborate the conformity of national reforms and safeguards therein. Curiously, these arguments often follow similar patterns, and thus, an "autocrats' playbook" so to say.[16]

Autocratic legalists routinely resort to one of three justifications in supranational law. First, national governments may bend over backwards to justify illiberal policies through an excessive security rhetoric. As cases in point, the Hungarian government presented the so-called *leges NGO* and *CEU* in the lights of allegedly imminent security threats.[17] The Transparency law, on the one hand, was motivated by the presumption that NGOs receiving funding from foreign sources would intrinsically be liable to undermine public security.[18] The case concerning the Central European University, for its part, was based on the allegation that deceptive practices would be prevalent at the university premises and that only an international agreement concluded between the Hungarian government and the US (as the CEU's home State) could put a halt thereto.[19] Unsurprisingly, the Court

[14] See M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis' cit. 429.

[15] Which may constitute a recurrent tradition in post-socialist Member States, see M Matczak, M Bencze and Z Kühn, 'Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland' (2010) Journal of Public Policy 81, 86 ff.

[16] D Kochenov and P Bárd, 'The Last Soldier Standing?' cit. 254 ff., upon which the following distinction is based.

[17] Both policies ended up in the Luxemburg court; case C-78/18 *Commission v Hungary (Transparency of associations)* ECLI:EU:C:2020:476 and case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792 respectively.

[18] *Commission v Hungary (Transparency of associations)* cit. para. 93.

[19] *Commission v Hungary (Enseignement supérieur)* cit. paras 136 ff.

squarely rejected both arguments. As a method of autocratic legalism, however, a security-centred rhetoric allows governments to fall back onto art. 4(2) TEU, which stipulates that "national security remains the sole responsibility of each Member State".[20]

This links to a second avenue of justifying autocratic legalism in the light of Union law, namely, national sovereignty claims. Legally speaking, these claims take different forms. In defence of reforms of the judicial system, for instance, the Polish government submitted that a dynamic interpretation of Union law[21] would violate the principle of conferral; that the organisation of the national justice system constituted an exclusive competence of Member States;[22] or that these matters would fall within Member States' procedural autonomy.[23] The ECJ firmly rejected all these arguments, reminding Member States of their duty to comply with obligations deriving from Union law. Accordingly, Union law does not arrogate the competence of Member States to organise their justice systems.[24] Rather, it imposes certain limits on Member States' faculty to do so, without prescribing the features thereof in positive terms.

A third pattern of justification of autocratic legalism finally revolves around lavish references to Member States' national identities.[25] Whereas this is a well-known phenomenon in European constitutional law, amid the so-called refugee crisis, the argument was slanted as a "legal fig leaf" to disregard the mandatory EU relocation scheme of asylum seekers.[26] The 2018 Hungarian constitutional amendment, for instance, introduced a passage stipulating that "[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State".[27] This may be a showcase example of autocratic legalism. By virtue of this constitutional amendment, the Hungarian government has a strong constitutional argument at its disposal to reject supranational law arguably impairing the protection of Hungarian constitutional identity.

[20] This strategy has been insightfully described by R Uitz, 'The Return of the Sovereign: A Look at the Rule of Law in Hungary - and in Europe' (5 April 2017) Verfassungsblog verfassungsblog.de.

[21] For details, see *infra* section III.1.

[22] Both arguments were raised in case C-619/18 *Commission v Poland (Independence of Supreme Court)* ECLI:EU:C:2019:531 para. 38 and later supported by the Polish Constitutional Tribunal in its judgment of 7 October 2021 in the case K 3/21.

[23] Case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924 para. 93.

[24] *Commission v Poland (Independence of Supreme Court)* cit. para. 52; *Commission v Poland (Independence of ordinary courts)* cit. para. 102.

[25] See T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' cit. 1158.

[26] D Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) Cambridge Yearbook of European Legal Studies 59, 68.

[27] The unofficial translation of art. R) of the Fundamental Law which entered into force on 29 June 2018. Initially, the Hungarian government failed to reach a majority for constitutional reform to that end; for an overview of events, see R Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades' (11 November 2016) Verfassungsblog verfassungsblog.de.

II.2. An autocratic contestation of the ECJ's authority

The preceding overview suggests that, by and large, arguments in defence of autocratic legalism are of no avail before the ECJ. In all infringement cases mentioned, the Court unequivocally sided with the Commission, holding that national reforms violate Union law.[28] Against this background, it may be reasonable to brush aside national governments' arguments as "boundless imagination".[29] Yet, from the perspective of autocratic legalism, such a view may jump to conclusions. If it is accepted that autocratic legalists seek to strategically undermine safeguards of Union law, it may be presumed that such strategies of defence are not primarily aimed at persuading an unconvinced supranational tribunal of legal experts such as the ECJ. Rather, by creating a mirage of lawfulness, it is first and foremost addressed to laypersons in the wider national audience and press.[30]

This points to a change in perspective. Autocratic legalism allows national governments to put up a smokescreen of lawfulness *vis-á-vis* national electorates. Paradoxically, a smokescreen of such nature may even be upheld where the ECJ explicitly finds national reforms to conflict with Union law. In this vein, autocratic legalists may emphasise a national measure's conformity with supranational law, despite all evidence indicating otherwise. By establishing a counter-interpretation of EU law, autocratic legalists pretend that several "correct" interpretations of Union law exist and that the ECJ's authoritative interpretation thereof merely reflects one view among many.

In this vein, autocratic legalists seek to strategically undermine the authority vested in the Court by national audiences. They do so by making the interpretation of Union law a matter of political contestation. This resonates with an effort to politicise Union law (and law more generally).[31] Autocratic legalism enables national governments to present an alternative standard of interpretation which may diametrically oppose that of the Luxemburg court. Provided autocratic legalists' interpretations resonate with national audi-

[28] In the context of judicial reforms in Poland, *Commission v Poland (Independence of Supreme Court)* cit.; *Commission v Poland (Independence of ordinary courts)* cit.; case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596. In the context of the Hungarian *leges* enemies, *Commission v Hungary (Enseignement supérieur)* cit.; *Commission v Hungary (Transparency of associations)* cit. Similarly, the Court accepted the legality of the Council's relocation decisions in the annulment procedure in joined cases C-643/15 and C-647/15 *Slovakia v Council* ECLI:EU:C:2017:631.

[29] E Frasca and FL Gatta, 'Court of Justice of the European Union, Judgment of 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257: Rebel Rebel, How Could They Know? The Boundless Imagination of Poland, Hungary and the Czech Republic in Opposing the Relocation Mechanism' (2020) Cahiers de L'EDEM 13.

[30] On this perspective, see M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' cit. 430.

[31] On the populist criticism of the depoliticised nature of law, see P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) European Constitutional Law Review 519, 532.

ences, this strategy may in fact yield success. To that end, national lawmakers have several techniques at their disposal, *inter alia* exploiting opposition to unpopular measures of Union law (sub-section *a)*) and presenting the ECJ as biased against the respective national audiences (sub-section *b)*).

a) Exploiting opposition to unpopular measures of Union law

Autocratic legalism does not just operate at an interpretative level in court rooms. Rather, it aims at reversing the structures of legitimacy in national societies more fundamentally.[32] Such a strategy may be particularly promising where national reforms defiant of safeguards of Union law resonate with electoral preferences. Autocratic legalism permits national governments to endorse an interpretation of Union law that legally buttresses the preferences of national electorates, irrespective of the ECJ's verdicts to the contrary. As a case in point, the Hungarian government went out of its way to couch a plain denial of binding Union law (*in casu* the refugee relocation scheme) into a costly strategy of constitutional reform and, ultimately, successfully so.[33]

Whereas this may be viewed as opportunistic,[34] it equally bears testimony to autocratic legalists' more strategic consideration to exploit public opposition against a measure of Union law for their own purposes. By presenting constitutional reform as a necessity to fend off an unpopular measure in Union law, the Hungarian government created the perfect pretext for future strategies of autocratic legalism. Whenever suitable, the newly introduced constitutional identity clause will allow autocratic legalists to rhetorically couch their disregard for Union law in terms of constitutional necessity.[35]

b) Presenting the ECJ as a biased court

The establishment of a counter-interpretation of Union law by autocratic legalists may furthermore be particularly successful where the ECJ can be presented as biased against national audiences. To that end, autocratic legalists have effective techniques up their sleeves. By stitching together some of "the worst practices from liberal democracies to create something illiberal",[36] they may justify their policies by way of reference to other Member States.

[32] On this effect, see P Blokker, 'Response to "Public Law and Populism"' (2019) German Law Journal 284, 288, with further references.

[33] See B Bakó, 'Hungary's Latest Experiences with Article 2 TEU: The Need for 'Informed' EU Sanctions' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 35, 46 ff.

[34] See KL Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism' (2019) German Law Journal 314, 331.

[35] Whereas the Constitutional Court of Hungary's recent judgment in X/477/2021 accepted, in principle, the primacy of Union law, it did not unequivocally refute an overly far-fledged interpretation of the newly introduced constitutional identity clause, which constitutes, according to the Constitutional Court, a mirror-provision of art. 4(2) TEU; Constitutional Court of Hungary, judgment in X/477/2021, 31.

[36] See Scheppele, 'Autocratic Legalism' cit. 567.

Where the ECJ rejects these national policies, a "shrewd exploitation of comparative reasoning"[37] allows national governments to accuse the Court of adopting a double standard.[38] As a case in point, the ECJ rejected a Polish legal arrangement that afforded the President of the Republic a discretionary power to decide whether judges may continue their duties beyond a certain age threshold.[39] Despite the fact that similar legal arrangements exist in other Member States, the Court's refusal in the context of Polish reforms buttresses the sentiment that the ECJ would deny Poles what is acceptable for other nations.[40]

Underlying that view is the populist contestation of the neutrality of law.[41] In this regard, interventions of foreign actors concerned with the rule of law are discredited as desperate attempts of jumping to the aid of domestic opposition. Whereas this criticism has been prominently levelled at the Venice Commission, it may apply at equal measure to the ECJ's interventions to the benefit of Polish judges. In the view of this populist narrative, the Luxemburg court takes sides with domestic opposition, be it left-liberal parties or alleged post-communist forces seeking to undermine national unity.[42] In adopting a strong response to the restructuring of national judicial systems, the Court may thus be accused of complicity with domestic opposition groups.

III. A constitutional response to a crisis of values

In many respects, the ECJ does not have to fend off autocratic legalism empty-handed. It has tools at its disposal to forestall at least some of the impulses of illiberal law-making. An effective strategy in this regard centres on procedural measures. As a case in point, the Court utilised art. 279 TFEU to impose interim measures putting a halt to the ongoing reform of the judicial system in Poland,[43] the continuous lignite mining in Turów,[44] or the logging of trees in Białowieska forest –including by imposing severe pecuniary penalties to that end.[45] Whereas it is not yet entirely clear whether such measures are capable of

[37] A Vincze, 'Talking Past Each Other: On Common Misperceptions in the Rule of Law Debate' in A Lorenz and L Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave 2021) 218.

[38] Explicitly, in this regard, *Commission v Poland (Régime disciplinaire des juges)* cit. para. 69.

[39] *Commission v Poland (Independence of Supreme Court)* cit. para. 119.

[40] The same argument can be made with a view to Hungarian constitutional reforms, see R Uitz, 'Can You Tell When an Illiberal Democracy Is in The Making?: An Appeal to Comparative Constitutional Scholarship From Hungary' (2015) International Journal of Constitutional Law 279, 280.

[41] For an insightful account of this critique, see P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' cit. 532 ff.

[42] *Ibid*. 534.

[43] Case C-619/18 R *Commission v Poland (Independence of Supreme Court)* ECLI:EU:C:2018:910; case C-791/19 R, *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2020:277.

[44] Case C-121/21 R *Czech Republic v Poland (Mine de Turów)* ECLI:EU:C:2021:752.

[45] Case C-441/17 R *Commission v Poland (Białowieża Forest)* ECLI:EU:C:2017:887 para. 118; case C-204/21 R *Commission v Poland and vie privée des juges* ECLI:EU:C:2021:878 para. 64.

resolving a constitutional crisis such as the one in Poland, it signals a growing willingness on the side of the Court to explore avenues to put a halt to national reforms.

Besides procedural manoeuvres, the Court has undertaken significant efforts to develop strategies that seek to debunk arguments of autocratic legalism in substance. In doing so, however, it has come a long way. In 2012, it pronounced itself on the Hungarian judicial reforms which foresaw the lowering of the retirement age of judges, to the effect that multiple judges' terms were ended prematurely. Despite AG Kokott's indications to the systemic threat thus posed to judicial independence,[46] the ECJ considered Hungary's reforms merely in the light of equal treatment law, aside from a vague reference to its "legislative background" and the hardship suffered by the persons concerned thereby.[47] In the fairway of this judicial intervention, neither did a general climate of harassment subside, nor did the ruling re-establish a *status quo ante.* Instead, it prompted national lawmakers to introduce a new method for calculating term limits of undesired judges and stripped judges requesting reinstatement from the leading positions they previously held.[48]

In contrast, the ECJ's more recent response to the ongoing judicial reforms in Poland is marked by full recognition of the severe attack that is waged thereby at some of the foundational safeguards of Union law. Unlike half-hearted actions taken against Hungary years earlier, the Court has spelled out a resolute response to threats to the Polish judiciary's independence. This suggests that, in the view of the Court, a crisis of values such as the unfolding rule of law crisis in Poland warrants a firm judicial intervention. By firmly tying together some of the most foundational safeguards in Union law, it developed a set of standards that Member States must respect when designing their national judicial systems.

In this vein, the ECJ's role resembles that of a federal constitutional court, safeguarding the rule of law in its component sub-systems as a matter of common interest.[49] Interventions to the Polish judicial reform therefore resonate with some of the Union's core constitutional guarantees, specifically, the values upon which it is founded. Rhetoric of that sort is particularly pronounced in the Court's assertion that Member States "freely and voluntarily committed themselves to the common values referred to in Article 2 TEU", as previously explicated in the context of the United Kingdom's withdrawal from the EU.[50]

[46] Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:602, opinion of AG Kokott, paras 54 ff.

[47] Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:687 para. 66.

[48] See P Sonnevend, 'The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraint' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit. 164; see equally G Halmai, 'The Early Retirement Age of the Hungarian Judges' in F Nicola and B Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 471.

[49] See P Van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order' cit. 10; referring to the works ofM Claes and M de Visser, 'The Court of Justice as a Federal Constitutional Court: A Comparative Perspective' in E Cloots and others (eds), *Federalism in the European Union* (Hart 2012), 98 ff.

[50] *Commission v Poland (Independence of Supreme Court)* cit. para. 42, with a reference to case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999 para. 63; *Commission v Poland (Régime disciplinaire des juges)* cit. para. 50.

By reproducing this reasoning *vis-á-vis* the Polish judicial reforms, the Court indicates that it is fully aware of the underpinning crisis of values. It recognises the systemic implications of the judicial reform, thus exposing autocratic legalism for what it is – a strategic effort to effectively set aside any limits to national law-making power by virtue of "legal" reforms. The measures adopted by Poland therefore teeter on the brink of the abyss of shared values. By emphasising the voluntary commitment of Member States to safeguard these values, including the rule of law, the Court rhetorically highlights the fact that the Polish judiciary reform threatens to undermine one of the core commitments upon which membership in the EU rests.

The Court's reasoning in this regard centres on a substantive interpretation of the second sub-paragraph of art. 19(1) TEU, stipulating that Member States must ensure effective legal protection in the fields covered by Union law. Based on the doctrinal groundwork in a previous case,[51] the ECJ stresses that art. 19(1) TEU "gives concrete expression to the value of rule of law affirmed in Article 2 TEU".[52] Effective legal protection – read in the light of art. 47 of the Charter – presupposes the independence of national courts.[53] This interpretation has two significant repercussions. It allowed the ECJ, first, to assert jurisdiction on matters of judicial independence in Member States' legal orders, which may not have been evident from the outset. That competence, second, coincided with the power to flesh out the substance of the requirement of judicial independence, thus allowing the Court to develop standards that Member States must follow in this regard.[54]

The interplay of constitutional norms in the Court's response to the Polish judicial reforms therefore firmly rebutted sovereignty arguments put forward by national governments.[55] In contrast to its previous case-law concerning Hungary, the Commission's stepped-up efforts against Poland allowed the Court to spell out a resolute constitutional response. This, in itself, may not suffice to counter the strategic efforts of autocratic legalism. As will be argued in the following, however, the ECJ's response to the unfolding rule of law crisis is marked by two characteristics that may be particularly suitable to discourage autocratic legalism in the context of the Polish judicial reform. The Court's response essentially rests on EU law's *effet utile* – a method of interpretation diametrically opposed to the formalism inherent in autocratic counter-interpretations of Union law (section III.1). In addition, it provides the flexibility needed to put a halt to incremental readjustments of the national legal framework; a tactic recently employed by Polish lawmakers (section III.2).

[51] See M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary. ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) European Constitutional Law Review 622, 636 ff.

[52] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 50 ff.

[53] *Ibid*. para. 53.

[54] See P Van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order' cit. 24.

[55] See equally *supra* at II.1.

III.1. A DYNAMIC RESPONSE TO THE FORMALISM OF AUTOCRATIC LEGALISM

The Court's response to judicial reforms in Poland illustrates that it adopts an interpretation of Union law that diametrically opposes that of autocratic legalism. In the literature, two rationales have been proposed to explain the Court's interpretation in this regard. On the one hand, it is evident that its reasoning is strongly motivated by the *effet utile* of Union law. By highlighting judicial independence as an essential prerequisite for the smooth operation of the EU's decentralised judicial system, including the preliminary reference procedure, the Court utilises one of the most characteristic interpretative yardsticks of Union law.[56] A second rationale presents the Court's response as a value-based reasoning, borne out by various references to art. 2 TEU.[57] Both modes of interpretation, however, contrast starkly with interpretations endorsed by autocratic legalists.

Autocratic legalists engage with Union law in a selective fashion, routinely relying on a formalistic reading of derogations or limitations playing to their advantage. Accordingly, it is not surprising that the Polish and Hungarian governments opposed the Court's interpretation on the grounds that it would upset the division of competences between the Union and Member States.[58] On this point, commentators need not unequivocally agree with the Court to accept that its reasoning signals a significant step forward in putting a halt to the Polish judicial reforms.[59] As a response to autocratic legalism, however, this reasoning yields two advantages. In the first place, it sends a clear sign to national audiences, indicating that the illiberal policies in question threaten the very foundation of values underlying EU membership. Accordingly, the Court removes the legal façade set up by autocratic legalism that reforms would merely concern some technicalities in the running of the national justice system. In the second place, the ECJ's response showcases the specificities of the legal tradition developed in the EU legal order. By rejecting autocratic legalism's counter-interpretations of Union law, the Court reminds national governments of the autonomy of the EU legal order and the legal traditions established thereby, including prominently its *effet utile*.[60]

[56] See already M Bonelli and M Claes, 'Judicial Serendipity' cit. 631; the *effet utile* of Union law may be viewed as a meta-rule of interpretation that notably diverges from traditional notions of interpretation in Member States' legal orders, seeS Mayr, 'Putting a Leash on the Court of Justice: Preconceptions in National Methodology v Effet Utile as a Meta-Rule' (2012) European Journal of Legal Studies 3, 15 ff.

[57] Distinguishing these rationales and favouring the latter, see LD Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit. 249 ff.

[58] *Commission v Poland (Independence of Supreme Court)* cit. para. 52.

[59] For a discussion of possible points of criticism, see LD Spieker, 'Defending Union Values in Judicial Proceedings' cit. 254 ff.

[60] *Commission v Poland (Independence of Supreme Court)* cit. para. 44.

III.2. A FLEXIBLE RESPONSE TO A CRISIS OF VALUES

There is no denying that autocratic legalists are skilful masters of their trade. Accordingly, the ECJ may occasionally see its interventions outmanoeuvred by national lawmakers. Autocratic legalists may take pride in finding clever legal workarounds that formally accommodate requirements inferred from the ECJ's judgments, without abandoning an illiberal project altogether. This phenomenon features pronouncedly in the context of reforms threatening national judges' independence. In recent years, Polish lawmakers have adopted several measures to effectively sidestep the interventions of the Court, including the infamous "muzzle law".[61] This points to an unsettling truth. Analyses centred primarily on the jurisprudence of the ECJ may easily overlook the wide array of tools that autocratic legalists have at their disposal to undermine EU values.

The ECJ's constitutional response, however, may make some amends for this incapability. It affords the Court significant flexibility to finetune its interventions in the light of readjustments in national law. In the light of a supranational safeguard of judicial independence of national courts, the Court found that Member States must have in place rules on the composition of the body concerned, appointment procedures, the length of service, grounds for abstention, rejection, and dismissal of members that "dispel any reasonable doubts in the minds of individuals as to the imperviousness of that body".[62] By virtue of this encompassing safeguard, the Court found both the involvement of the Polish Council of the Judiciary in the appointment of judges and the establishment of an additional Disciplinary Chamber as part of the Supreme Court to conflict with Union law.[63]

IV. ALTERNATIVE RESPONSES TO AUTOCRATIC LEGALISM

Autocratic legalism compels the Court of Justice to engage with arguments intended to undermine the authority of Union law.[64] There are, however, different ways of doing so. In the context of its firm response to the Polish judicial reform, the Court came close to calling a spade a spade, highlighting its doubts "surrounding the true aims of the [judicial] reform".[65] On other occasions, the ECJ responded differently. Notably, in the context of

[61] See L Pech and others, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) Hague Journal on the Rule of Law 16 ff.

[62] *Commission v Poland (Independence of Supreme Court)* cit. para. 74; *Commission v Poland (Independence of ordinary courts)* cit. para. 124; joined cases C-585/18, C-624/18 and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982 para. 123; see M Krajewski and M Ziólkowsi, 'EU Judicial Independence Decentralized: *A.K.*' (2020) CMLR 1107, 1114 ff.

[63] *Commission v Poland (Régime disciplinaire des juges)* cit.

[64] See *supra* section II.

[65] *Commission v Poland (Independence of Supreme Court)* cit. para. 87; for an empirical investigation regarding Hungary, see L Anders and S Priebus, 'Does It Help to Call a Spade a Spade? Examining the Legal Bases and Effects of Rule of Law-Related Infringement Procedures Against Hungary' in A Lorenz and L Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* cit. 235.

the preliminary reference procedure, the Court reverberated the substance of its constitutional reasoning, but left the final implications thereof to national judicial authorities (section IV.1). By way of contrast, the following exploration will highlight that the Court may equally adopt a decentralised solution of that kind with a view to national administrative authorities, which may be capable of rebutting some of the strategic efforts of autocratic legalism (section IV.2).

IV.1. Decentralised solutions to a crisis of values

Unlike the firm constitutional response to the Polish judicial reforms in direct actions, the Court has adopted a more deferential stance in the context of preliminary references. In this regard, the ECJ emphasised that it is for the national court to take the final decision on the matter. This need not compromise the resounding criticism levelled at national reforms. However, the degree of guidance instructing national authorities in this regard is subject to judicial finetuning and follows a conscious choice by the ECJ.[66] With a view to that strategy of response to autocratic legalism, two instances may be discerned: first, the judicial reminder that national courts are empowered by virtue of Union law to set aside any national provision conflicting with the former (sub-section *a)*) and, in the second place, the ramification of a crisis of values relating to the smooth operation of systems of transnational cooperation, *in casu* the system of extradition established under the European Arrest Warrant (EAW) Framework Decision (sub-section *b)*).

a) Empowering national courts

In the context of the preliminary reference procedure, the ECJ reverberates the firm constitutional response in opposition to national measures inflicting a crisis of values. As its response to the Polish Supreme Court's Labour and Social Insurance Chamber in *A.K. et al.* illustrates,[67] however, it may refuse to apply the standard of judicial independence to national bodies itself. Instead, the ECJ almost apologetically explains that the preliminary reference procedure does not empower it to apply rules of EU to a particular case and that it was therefore for the referring court to draw the relevant conclusions from its guidance.[68]

In spelling out that guidance in substance, the Court's demonstrates its increased vigilance to strategies of autocratic legalism. On the one hand, it highlights that Union law does not, in principle, preclude a national system whereby a specialised body is involved in the appointment of judges. On the other hand, this holds true only insofar as that body

[66] On this phenomenon, see T Tridimas, 'Constitutional Review Of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) International Journal of Constitutional Law 737, 749.

[67] *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* cit. paras 114 ff.

[68] *Ibid*. paras 131 ff.

itself is sufficiently independent.[69] In this vein, the ECJ reproduces its jurisprudence on judicial independence with a view to bodies involved in the appointment of judges. Against this background, it recognised and dismantled one of the characteristic features of autocratic legalism. Whereas individual elements of the Polish reform may be acceptable under Union law, "when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges".[70] In essence, this reflects a method of autocratic legalism, stitching together various elements borrowed from other contexts to pursue an illiberal objective.[71]

Such a strategy of deference, however, it is not risk free. Admittedly, the explicit affirmation that national courts may disapply any provision of national law in conflict with Union law is of vital importance given the dire straits of independent Polish judges. Yet, in drafting a response to autocratic legalism, the ECJ must be cautious of the relative distance at which it operates to national legal systems. In the case at hand, the referring court's conclusion that the body involved in appointing judges lacked sufficient guarantees of independence was simply ignored by Polish authorities, until the (already-captured) Constitutional Tribunal vindicated that practice[72] and Polish lawmakers adopted the muzzle law to neutralise some of the most tangible effects of the Court's ruling in *A.K. et al*.[73]

Whereas the ECJ subsequently jumped to the aid of the referring judges in the context of an infringement procedure,[74] this warrants two conclusions: first, supranational judicial interventions may dismantle strategies of autocratic legalism without forcing national authorities to abandon the illiberal efforts in practice.[75] Second, the empowerment of national courts by virtue of primacy and direct effect may only cater to the effective enforcement of Union law where judges are independent and willing to use that power. By institutionally hijacking national courts, autocratic legalists ensure that this is only the case where they intend it to be.

b) Transnational judicial cooperation

The ECJ has moreover opted for a decentralised response to autocratic legalism in the context of the European Arrest Warrant system. Autocratic legalists seek to keep this system of extradition intact while pulling through with national judicial reforms. To that end,

[69] *Ibid.* paras 136 ff.; this contextual interpretation may be viewed as a significant evolution in the ECJ's case law, see L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case* (SIEPS report 2021), 89.

[70] *Ibid*. paras 142 and 152.

[71] See KL Scheppele, 'Autocratic Legalism' cit. 567.

[72] See L Pech and others 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit. 10.

[73] See *Ibid*. 16 ff.

[74] *Commission v Poland (Régime disciplinaire des juges)* cit. paras 85 ff.

[75] See on this phenomenon, *supra* section III.2.

they may have compelling arguments in Union law at their disposal; above all the principle of mutual trust, establishing a presumption that all Member States respect Union law, including its values. What is more, the EAW Framework Decision explicitly highlights that only a decision adopted by the European Council under art. 7(2) TEU could lead to an automatic suspension of the execution of an EAW based on a persistent breach of values.[76] In the absence thereof, the Court of Justice performs a balancing act: on the one hand, it must respect the letter of the Framework Decision; on the other hand, it cannot let autocratic legalists get away. As a result, the Court adopted a response that invested in a decentralised solution in *LM*.[77]

This case was the first to apply the value-based constitutional reasoning to a situation relating to the judicial reforms in Poland. Since the case concerned the European Arrest Warrant system, the Court reproduced the two-pronged test developed elsewhere,[78] accordingly compelling the executing authority, first, to establish whether there are systemic or generalised deficiencies in the issuing Member State, for the purpose of which it may rely on the Commission's reasoned opinion adopted pursuant to art. 7(1) TEU.[79] In a second step, the executing authority must establish "specifically and precisely" that surrender would result in a violation of the fundamental rights of the person concerned.[80] In practice, this decentralised solution renders suspension of extradition extremely unlikely (even though not impossible).[81] Viewed in isolation, the Court's decentralised solution in this case fails to establish an effective mode of opposition to autocratic legalism. The Court clearly does not forfeit the transnational system of extradition established by the EAW Framework Decision by precluding Polish courts *tout court*.[82] As a milestone in the Court's response to a crisis of values, however, its reasoning is of paramount importance.

In this context, it should be noted that the two-pronged test reproduced in *LM* equally entails a procedural dimension. It compels national courts to engage in an inter-judicial dialogue by virtue of which the executing court requests information from the issuing court on the latter's independence. As a response to autocratic legalism, this solution is

[76] *Minister for Justice and Equality (Deficiencies in the system of justice)* cit. para. 72; as is well-known, Hungary and Poland politically block the adoption of such a decision in the European Council.

[77] *Ibid*.

[78] Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 para. 88.

[79] *Minister for Justice and Equality (Deficiencies in the system of justice)* cit.

[80] *Ibid*. para. 68.

[81] See D Kochenov and P Bárd, 'The Last Soldier Standing?' cit., 274; this threshold appears to be deliberately strict, thus keeping the risk of impunity to a minimum; joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033 para. 64. However, it need not be insurmountable in practice, see L Mancano, 'You'll Never Work Alone: A Systemic Assessment of The European Arrest Warrant and Judicial Independence' (2021) CMLR 683, 701 ff.

[82] On this effect, see M Bonelli, 'Intermezzo in the Rule of Law Play: The Court of Justice's LM Case' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit., 470 ff, with further references.

not ideal. It exposes Polish judges struggling to maintain their independence to harassment once they negatively assess their own independence. At the same time, the Court's decentralised solution is unlikely to convince hijacked courts to discuss their own partisanship with actual judges in other Member States.[83] In fact, the Polish "muzzle law" was intended to precisely neutralise the Court's intervention in this regard, attributing exclusive jurisprudence on whether a Polish court may fail to meet the supranational standard of independence to a hijacked chamber of the Supreme Court.[84]

IV.2. Administrative reasoning as a response to autocratic legalism

In the context of the Polish judicial reforms, the Court invested in a response that resembles that of a federal constitutional court.[85] Whereas this strategy may be vital to counter an unfolding crisis of values, it does not necessarily thwart the strategic objective of autocratic legalism, namely, to undermine the authority of Union law altogether. Unlike the role of (federal) constitutional courts in national legal systems, however, the Court of Justice is not limited to constitutional interpretations. Rather, as the case in *LM* illustrates, the Court equally interprets secondary Union law, which may allow for adjustments to its response to autocratic legalism in some instance. This effect may be illustrated with a view to the Court's response to strategies of autocratic legalism justifying the disregard of the EU relocation mechanism for asylum seekers.

In the field of migration law, the ECJ developed an alternative response to autocratic legalism, namely one that is reflective of an "administrative mindset". Such a mindset manifests in statutory (instead of constitutional) interpretation, seeking to ascertain the position of the political authors of the measure.[86] As a response to autocratic legalism, the Court of Justice put this approach to the test in the context of the mandatory asylum seeker relocation schemes.

After the Court upheld the validity of the Council Relocation Decisions in an initial judgment,[87] the Polish and Hungarian governments employed strategies of autocratic legalism to justify the persistent disregard for binding Union law in this respect.[88] In the subsequent infringement procedure, the Court squarely rejected these arguments. Instead of engaging with the selective constitutional interpretations of arts 72 TFEU and

[83] See S Biernat and P Filipek, 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit., 423 ff.

[84] See L Pech and others 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit. 17.

[85] See *supra* section III.

[86] For this notion, D Thym, 'Between "Administrative Mindest" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) European Law Review 139, 148 ff.

[87] *Slovakia v Council* cit.

[88] See *supra* section II.2.1.

4(2) TEU, it focused its response on the Relocation Decisions specifically.[89] To that end, the Court revisited the wording and recitals thereof to conclude that the Council, by adopting the Relocation Decisions, intended to leave "wide discretion" to national authorities to determine whether a person may be considered a threat to national security or public order or not.[90] This wide discretion, however, notably applies "in respect of each applicant", and accordingly, in relation to the individual case concerned.[91]

In this vein, the Court may have stumbled upon a strategy to effectively dispel some of the strategic objectives of autocratic legalism. By recognising, to some extent, the possibility to refuse relocation on a case-by-case basis, the administrative mindset of judges in Luxemburg resonates with fears of national audiences.[92] Whereas this reasoning resolutely opposes arguments of autocratic legalism, namely the disapplication of a measure of binding Union law altogether, the Court's affirmation of wide discretion afforded to national decision makers rhetorically emphasises the fact that Member States may very well refuse the relocation of third country nationals. Unlike the excessive security-rhetoric endorsed by autocratic legalists, however, the Court effectively recognises that reasonable security concerns are legitimate under Union law, provided they relate to persons individually.

In addition, the Court's reasoning shifts focus away from principled dissent of national governments to administrative decision-making *vis-á-vis* individuals. In this vein, the Court depoliticises the litigation (albeit by catering to the politicisation of national administrations' discretionary powers). This will be to the detriment of autocratic legalists, who have a keen interest in politicising Union law.[93] By adopting an administrative reasoning in this regard, the ECJ thus proposes a solution that may resonate with national audiences – at the same time ascertaining its uncompromised authority to authentically interpret Union law, including secondary law. In a Union "based on the rule of law", the Court highlighted, Member States cannot rely on their responsibilities to safeguard national security or public order to justify their refusal to implement the provisions in the Council Relocation Decisions.[94]

Despite this strategy's advantages in relation to autocratic legalism, it is no silver bullet solution. The Court's response is highly contingent on the applicable legal framework, including the existence of pertinent secondary law, and requires a thorough understanding of political preferences among national electorates. In the context of mandatory relocation of asylum seekers, far-fledged opposition among national electorates was rather

[89] Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257 paras 148 ff.

[90] *Ibid*. para. 158.

[91] *Ibid*. para. 159.

[92] See inter aliaE Goździak and P Márton, 'Where the Wild Things Are: Fear of Islam and the Anti-Refugee Rhetoric in Hungary and in Poland' (2018) Central and Eastern European Migration Review 125, 133 ff.

[93] On this effect, see *supra* section II.2. and the literature mentioned.

[94] *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. paras 139 and 169.

evident. On a more principled note, however, the ECJ has good reason to refuse adjusting its jurisprudence to the whim of national audiences. Judgments of courtesy run the risk of falling into the trap of autocratic legalism once again, namely by showcasing the subjectivity of the ECJ's interpretation of Union law.

V. Conclusion

Autocratic legalism constitutes a method of drafting illiberal policies while benefitting from a mirage of lawfulness in doing so. In the context of safeguards in supranational law, this strategy advocates for specific counter-interpretations of Union law that seek to justify national reform measures in the light thereof. Whereas such strategies have, by and large, failed to convince the Court of Justice, it may be argued that autocratic legalism is not genuinely aimed at resonating with European judges but with wider national audiences of laypersons instead.[95] In this vein, autocratic counter-interpretations may be seen as a strategic effort to undermine the authority of the Court of Justice to authentically interpret safeguards of supranational law with national audiences.

Against this background, it may be reasonable to conclude that there is no ideal judicial response to such tactics. Nonetheless, as the previous investigation has indicated, the ECJ can employ different strategies to tackle autocratic legalism. On the one hand, the Court has taken on the role of a federal constitutional court, resolutely opposing reforms in national systems that would threaten the very foundation of the Union, in particular the value of the rule of law. On the other hand, it has equally endorsed decentralised responses to autocratic legalism. In this regard, the Court effectively left to national authorities the decision as to which consequences should follow from the incompatibility of national autocratic reforms with Union law. In the context of the EAW system, the Court directed this strategy of deference to national courts. In the field of migration law, in contrast, it focussed on the "wide discretion" of administrative bodies. In the latter instance, the Court's response adopts an administrative reasoning whereby its focus lies with the national public officials' decision-making *vis-á-vis* individuals.

This illustrates that the Court may respond in different ways to autocratic legalism. Whereas no approach may be preferable from the outset, some characteristics render certain judicial responses more suitable than others for dispelling the strategic objectives of autocratic legalism. First, it is crucial for the Court to acknowledge the existential threat that reforms pose to safeguards in law, including Union law.[96] In this regard, the Court has come a long way from initial rulings plainly disregarding the systemic implications in the context of the Hungarian judicial reform.[97] Nowadays, the Court appears more than aware of the

[95] For this change of perspective, see M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis' cit. 430.

[96] See L Pech and others 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit. 38 ff.

[97] See equally D Kochenov and P Bárd, 'The Last Soldier Standing?' cit. 262.

systemic implications of autocratic legalism for national legal systems. Where it acknowledges the risk thus posed, second, its interpretation of Union law may provide for standards to flexibly adjust interventions to successive amendments in national law. As the Court's constitutional response to the Polish judicial reforms illustrates, Union law equips judges in Luxemburg with strong arguments to jump to the aid of their national counterparts' independence, even in the light of repeated readjustments in national reforms.

Third, the Court may adjust the temperament of its response to autocratic legalism. In this regard, it may opt for one of two options. It may either counter the formalism of interpretative autocratic legalism by adopting a notably dynamic interpretation. This was the case in the context the Court's acknowledgment of a supranational safeguard of national courts' independence. Such a confrontational judicial response directly opposes the formalism habitually characterising autocratic legalist' counter-interpretations of law. It elucidates the specificities that follow from the autonomy of Union law and the Court's interpretation thereof. Nonetheless, such an approach may fail to dispel autocratic legalism's more strategic efforts, namely, to estrange the ECJ and national audiences.

Alternatively, as the preceding investigation suggests, the ECJ may occasionally acknowledge concerns of national audiences and try to accommodate these interests in its own authentic interpretations of Union law. Its jurisprudence concerning the Relocation Decisions may illustrate that approach. Whereas the Court rejected the excessive security rhetoric promoted by national governments' autocratic legalism, the Court nonetheless acknowledged that reasonable security concerns may be accommodated by virtue of exceptions in Union law. Provided refusal of relocation is justified by virtue of a case-by-case assessment, national authorities may, by virtue of Union law, act in accordance with the presumed preferences of national audiences.

ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

Edited by Matteo Bonelli, Monica Claes, Bruno De Witte *and* Karolina Podstawa

PEER REVIEWING THE RULE OF LAW? A NEW MECHANISM TO SAFEGUARD EU VALUES

THOMAS CONZELMANN*

ABSTRACT: The possible remedies that the EU can use against backsliding on the rule of law are limited: While art. 7 TEU has been widely conceived as ineffective, the recently introduced budget conditionality may become bogged down in court cases. Softer instruments like the Commission Rule of Law Report provide observations on rule of law developments, but are in themselves unable to address transgressions. Against this background, the Council has recently introduced a peer review mechanism that may exert peer and public pressure on transgressors. However, the agreed procedures show important deficits such as lacking transparency to the outside world, limited time devoted to the review, and the absence of clear country-specific recommendations that could become the focus of peer and public pressure. The new procedure thus needs reform to achieve results. A comparison with peer reviews among states in other international organizations show the potential that peer reviewing holds.

KEYWORDS: rule of law – peer review – compliance – European Union – article 7 – backsliding.

I. SITUATING THE TOPIC

These are dire times for European integration. Alongside numerous other crises and difficulties, the rule of law as one of the fundamental building blocks of European integration is in jeopardy, especially in Hungary and Poland. A particular aspect of this crisis is that the

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observance of fundamental values of the European Union is stylized in terms of an East-West conflict within the EU. Touting ideas of *illiberal democracy*, a group of states around Hungary and Poland is trying to establish an alternative discourse on the rule of law in the EU.[1] In line with this, art. 7 TEU and the recently established budget conditionality mechanism are portrayed as an attempt by the "old" EU members to impose a liberal *Western* ideology around the rule of law and to silence dissenting opinions. Such assaults on the legitimacy of the art. 7 TEU procedure, combined with its hitherto limited effectiveness,[2] have led the EU member states to search for alternative instruments to monitor and to address deficits in democracy, human rights, and the rule of law. One such instrument, alongside the other new procedures and mechanisms, discussed in the present Special Issue, is the recently introduced peer review on the rule of law conducted by the Council. The procedure enhances and complements the annual "Rule of Law Dialogue" that has existed since 2014 and the Commission's Rule of Law Report introduced in 2020. These instruments differ from art. 7 TEU and the proposed budget conditionality mechanism in that they choose a different, *soft* approach to the rule of law crisis, which builds on dialogue and the exertion of peer and public pressure instead of sanctions. In addition, all member states, and not only those with striking deficits, come under scrutiny of these two procedures. This may avert the criticism of bias and use of double standards. Moreover, as regards the new peer review, the Council is in the driving seat of the new peer reviewing procedure. The procedure might thus be less vulnerable to claims that *Brussels bureaucrats* are getting tough on transgressors.

Against this background, this *Article* discusses the potential of the new rule of law peer review to address rule of law deficits in the EU. The next part (section II) provides a theoretical discussion of compliance mechanisms and the specific contribution that peer reviews may make. Next, this *Article* reviews the existing instruments to address rule of law deficits in the EU, and discusses the potential of a peer review to address existing shortcomings (section III). Subsequently (section IV), the institutional design of the new peer review is discussed, building on previous research that analyses the authority and performance of some existing peer reviews in international organizations.[3] Section V concludes.

[1] R Csehi and E Zgut, '"We Won't let Brussels Dictate us": Eurosceptic Populism in Hungary and Poland' (2020) European Politics and Society 1; Z Kovács, 'PM Orbán: "When They Question the Rule of Law, They Step on Our Honor"' (1 October 2019) About Hungary Blog abouthungary.hu; Hungary Today, 'Hungary and Poland to Set Up Joint Institute for Comparative Law against "Suppression of Opinions by Liberal Ideology"' (31 July 2021) Hungary Today hungarytoday.hu.

[2] C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity Under Article 7 TEU' (2021) International Political Science Review 501; RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) Journal of European Public Policy 481.

[3] V Carraro, *A Double-Edged Sword: The Effects of Politicization on the Authority of the UN Universal Periodic Review and Treaty Bodies* (PhD thesis 2017) cris.maastrichtuniversity.nl; V Carraro, T Conzelmann and H Jongen, 'Fears of Peers? Explaining Peer and Public Shaming in Global Governance' (2019) Cooperation and Conflict 335; H Jongen, *Combating Corruption the Soft Way: The Authority of Peer Reviews in the Global Fight against Graft* (PhD thesis 2017) cris.maastrichtuniversity.nl.

This *Article* argues that the EU's rule of law peer review holds some limited potential for the preservation of the rule of law. Depending on its future institutional development, the peer review may create bigger political leverage than the Commission's Rule of Law Report. The peer review also holds potential in preventing the political blockades and the that cripple art. 7 TEU and the recently introduced budget conditionality mechanism. However, the agreed procedures of the review show important deficits such as lacking transparency, limited time devoted to the review, and the absence of clear country-specific recommendations. Another problem that transgresses such specific design features is that peer reviews build on the idea of rational and non-ideological exchange on best practices and the presumption of a shared value base. The current political climate of ideological debate about the values of rule of law is likely to undermine the social fabric from which peer reviews are gaining their strength.

II. Dealing with rule transgressions

II.1. Instrumentalist and normative approaches

The problem of how to promote compliance with international rules[4] has created a wealth of scholarly literature. Two principal approaches are juxtaposed, which von Stein usefully labels the "instrumentalist" and the normative approach.[5] The instrumentalist approach starts from the assumption that states are not principally committed to norm compliance. States will weigh the costs and benefits of specific courses of action, and are assumed to transgress rules if it is in their political or financial interest to do so. This does not mean that international rules will be broken all the time, but that there is a permanent danger of transgressions. Accordingly, the key task for the designers of international agreements is to increase the costs of rule violations, so that the "calculus of compliance"[6] changes. Such costs can come in the form of sanctions that an international organization may impose; or in the form of the damage to a state's reputation for being a trustworthy cooperation partner. Threatening sanctions and providing incentives are therefore considered key instruments to make states abide by the rules. Subsidiary design choices concern ways to increase the likelihood of detection of rule transgressions and procedures through which the severity of breaches and the corresponding sanctions can be determined.[7]

[4] Compliance is understood here as "the degree to which state behaviour conforms to what an international agreement prescribes or proscribes", see OR Young, *Compliance and Public Authority: A Theory with International Applications* (Johns Hopkins University Press 1979) 104.

[5] J von Stein, 'The Engines of Compliance' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 477. Also see RO Keohane, 'International Relations and International Law: Two Optics' (1997) HarvIntLJ 487.

[6] A Underdal, 'Explaining Compliance and Defection: Three Models' (1998) European Journal of International Relations 5, at 7.

[7] GW Downs, 'Enforcement and the Evolution of Cooperation' (1998) MichJIntlL 319.

Normative approaches diverge from this model in two ways. First, they assume that states and their societies are generally willing to comply with international rules. This may either be because "constantly recalculating the costs and benefits of compliance is onerous" and "following an established rule is typically more efficient and, therefore, the default option".[8] At the same time, state leaders and their societies have acceded to international agreements and organizations because they believed this to be in their interest. Therefore, they will also have a propensity to follow the behavioural expectations that come with being party to an agreement, and will see conforming to these rules as appropriate. Moreover, as states are members of an international agreement, they will become co-authors of the behavioural expectations that make up the international agreement or organization. A key argument in this respect is that membership in an international agreement is affecting and transforming the interests and identities of states. Compliance with the rules thus becomes part of a states' identity and will not be questioned even under adverse circumstances.[9]

Second, normative approaches rest on a different ontology of the law, seeing it not as a fixed external set of rules with which states are confronted, but as the product of a joint dialogical process through which rules are established, developed, interpreted, applied, and reinforced. These processes take place in "interpretive communities",[10] which are established in international organizations and international regimes. These communities are engaged in assessing and interpreting the behaviour of states and the justification for this behaviour in the light of shared norms and understandings. The product of this process is to constrain idiosyncratic and self-serving interpretations of the rules, to reinforce and sometimes develop the existing norms, and to promote habitual compliance. Such *regime dialogues* are an important element in the creation of legitimacy and the stabilization of international agreements.[11]

In this perspective, the use of sanctions against transgressors and the provision of incentives may still be relevant, but is not as crucial as in the instrumentalist account. As states have a general propensity to comply, rule violations are likely to indicate ambiguity of the rules, or a lacking capacity to implement them properly, rather than a wilful and calculated transgression.[12] Other authors in this tradition argue that sanctions run the

[8] J von Stein, 'The Engines of Compliance' cit. 486.

[9] AI Johnston, 'Treating International Institutions as Social Environments' (2001) International Studies Quarterly 487; HH Koh, 'Why Do Nations Obey International Law?' (1997) YaleLJ 2599.

[10] I Johnstone, 'The Power of Interpretive Communities' in M Barnett and R Duvall (eds), *Power in Global Governance* (Cambridge University Press 2005) 185.

[11] AI Johnston, 'Treating International Institutions as Social Environments' cit.; E Weisband, 'Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime' (2000) International Studies Quarterly 643; HH Koh, 'Why Do Nations Obey International Law?' cit.

[12] A Chayes and AH Chayes, 'On Compliance' (1993) International Organization 175; A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).

risk of creating alienation and division, thus undermining the sense of community which stabilizes international rules. While sanctions may be relevant to erect stop-signs for transgressors and to reassure the community of compliant states, they also come with costs and limited effectiveness.[13]

Normative approaches therefore suggest *softer* strategies; not as an alternative, but as a complement to sanctions. One element is the fortification of regime dialogues, through which obligations are clarified and reinforced, and rules can be developed in the light of new problems or changing circumstances. Regime dialogues can also be important in identifying needs for technical assistance. The need to explain and justify conduct to other participants in the dialogue can also provide incentives for compliance, if states want to look legitimate in the eyes of their peers, or want to belong to a certain reference group of reputable states.[14] This logic is enhanced if domestic publics impose social costs on actors that have been identified as non-compliant. Such costs occur if there is peer or public pressure and shaming by societal groups with reference to social norms;[15] if international organizations tie the delivery of aid or trade preferences to the observance of international standards;[16] or if investors avoid putting their capital into locations that are considered problematic in terms of financial transparency or human rights records.[17]

II.2. The potential of peer reviews

Peer reviews among states are instruments through which regime dialogues are organized. Through peer reviews, information on the behaviour or performance of regime members is periodically collected and evaluated by peer states, with a view towards reinforcing shared norms and triggering domestic policy reform.[18] A key element is the "soft tripartism" of peer reviews, involving the reviewed state, its peers (*i.e.*, representatives of other states),

[13] A Chayes and AH Chayes, 'On Compliance' cit.; A Chayes and AH Chayes, *The New Sovereignty* cit.

[14] T Risse and K Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in T Risse and others (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999) 1, 15.

[15] HR Friman, 'Introduction: Unpacking the Mobilization of Shame' in HR Friman (ed.), *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (Palgrave Macmillan 2015) 1; R Goodman and D Jinks, 'Social Mechanisms to Promote International Human Rights: Complementary or Contradictory?' in T Risse and others (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013) 103; EM Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) International Organization 689.

[16] EM Hafner-Burton, 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe' (2009) Perspectives on Politics 33; JH Lebovic and E Voeten, 'The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators' (2009) JPeaceRes 79.

[17] CM Barry, CK Clay and ME Flynn, 'Avoiding the Spotlight: Human Rights Shaming and Foreign Direct Investment' (2013) International Studies Quarterly 532; JC Sharman, 'The Bark *is* the Bite: International Organizations and Blacklisting' (2009) Review of International Political Economy 573.

[18] F Pagani, 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' (2002) African Security Review 15.

and the staff of the international organization hosting the peer review.[19] The Organization for Economic Cooperation and Development (OECD), the United Nations (UN), the World Trade Organization (WTO), the Council of Europe (CoE), and many other international organisations employ peer reviews among their members.[20] Within the EU, the European Semester and the several variants of the Open Method of Coordination are examples of peer reviews.[21] At the time of writing, discussions are underway to initiate a new global peer review for enhancing international financial accountability and transparency.[22]

Peer reviews may generate effects through two distinct mechanisms. First, as reviewed states explain and justify their policies during the reviews, "peer accountability"[23] is established. If a reviewed state is put into the spotlight for underperformance or for transgressing rules, this may trigger peer pressure on the reviewed state to heed the recommendations received.[24] A possible strength of peer reviews is that states may feel a greater obligation to comply with recommendations made by their peers, compared to a situation in which such recommendations come from an external expert body, or from the bureaucracy of an international organization.[25] If there is a sufficient degree of

[19] G Dimitropoulos, 'Compliance Through Collegiality: Peer Review in International Law' (2016) Loyola of Los Angeles International and Comparative Law Review 275, 292.

[20] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

[21] E Barcevičius, T Weishaupt and J Zeitlin (eds), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (Palgrave Macmillan 2014); A Crespy, 'The EU's Socioeconomic Governance 10 Years after the Crisis: Muddling through and the Revolt against Austerity' (2020) JComMarSt 143; S Deroose, D Hodson and J Kuhlmann, 'The Broad Economic Policy Guidelines: Before and After the Re-launch of the Lisbon Strategy' (2008) JComMarSt 827; J Zeitlin and B Vanhercke, 'Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond' (2018) Journal of European Public Policy 149.

[22] V Carraro and H Jongen, 'Peer Review in Financial Integrity Matters' (FACTI Panel Background Paper 8/2020).

[23] RW Grant and RO Keohane, 'Accountability and Abuses of Power in World Politics' (2005) AmPolSciRev 29.

[24] "[T]he process confronts the offending state with the stark choice between conforming to the rule as defined and applied in that particular case, or openly and explicitly flouting its obligation. The discomfort of such a position proves sufficient in most circumstances to get the transgressor to bring its behaviour in line with its obligations"; A Chayes, AH Chayes and RB Mitchell, 'Managing Compliance: A Comparative Perspective' in EB Weiss and HK Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998) 39, 62.

[25] See V Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?' (2017) Human Rights Quarterly 943-970; KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations: The Case of the Universal Periodic Review of Human Rights' (2018) British Journal of Political Science 513, 528. Examples of expert reviews are the Treaty Body monitoring procedures that exist for most UN human rights treaties, or the PISA reviews of national education policies conducted by the OECD.

transparency of the procedure, non-governmental organizations (NGOs), the media, and parliaments may amplify pressure on recalcitrant states.[26]

Second, the process of peer reviewing is important as it provides an organizational format to the "interpretive communities" discussed above.[27] This process is relevant on two levels. First, the "parameters of acceptable argumentation"[28] are established through this process of continuous deliberation and review, as well as a shared understanding of behavioural expectations and appropriate policies. This process serves to both prevent self-serving interpretations of the rules and reinforce shared understandings of the applicable rules. Second, the process also has an effect at the domestic level. Peer reviews involve officials from different departments of the domestic executive, through both the compilation of own country reports and the preparation for the review of other countries. The literature has identified this situation of preparation for the review session and the follow up to it as an important conduit for the questioning of domestic policies. This is especially so if there is the prospect of a subsequent session during the next review cycle in which responses of the reviewed state to the peer recommendations are expected.[29] It is not just the moment of review that matters, but also the run-up and the follow-up to it through which an "ongoing dialogic process" is established.[30] Critical assessments resulting from a peer review may thus act as an unsettling force for established policies and inject new knowledge into the domestic debate; a process that Sabel and Zeitlin call "democratic destabilization".[31]

In summary, pressure by the peers that their recommendations are heeded, the public pressure that may result from a critical assessment during a review, the ongoing dialogical processes by which rules are clarified and states are reassured about their validity, and the questioning of established domestic policies are the mechanisms through which peer reviews may create effects on domestic policy. Importantly, these effects all work without the imposition of formal sanctions, so that peer reviews can be considered an important example of the *normative* approach discussed above. However, the extent to which peer reviews are successful in utilizing these mechanisms to affect domestic policy is an empirical question. Important factors in this respect are the institutional design of the review procedure as well as the degree of value conflicts that exist in a concrete policy field.[32]

[26] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; F Pagani and U Wellen, 'The OECD Peer Review Mechanism: Concept and Function' in K Tanaka (ed.), *Shaping Policy Reform and Peer Review in Southeast Asia: Integrating Economies amid Diversity* (OECD 2008) 261; R Terman and E Voeten, 'The Relational Politics of Shame: Evidence from the Universal Periodic Review' (2018) The Review of International Organizations 1.

[27] I Johnstone, 'The Power of Interpretive Communities' cit.

[28] *Ibid*. 186.

[29] KM Milewicz and RE Goodin, 'Deliberative Capacity Building Through International Organizations' cit.

[30] *Ibid*. 519.

[31] CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) ELJ 271.

[32] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

Looking at the latter issue, the rule of law is arguably a difficult case for peer reviews. The current leaderships of Poland and especially Hungary have made it clear that they perfectly well understand the principles of the rule of law as pronounced by the EU, but that they prefer to follow an alternative model of *illiberal democracy* instead. In this sense, the two countries are putting themselves outside of the "interpretive community" discussed above. Some observers have therefore discussed soft approaches as meaningless paper tigers and have argued that tough sanctions are the only sensible measure against rule of law dissenter states.[33] While there is some plausibility to this argument, it nonetheless falls short in three respects: first, the existing EU toolbox, including the instruments working through financial and political sanctions, is likewise crippled by severe problems. This issue will be covered in section III, with brief reviews of the art. 7 TEU and the budget conditionality procedures. Second, the new peer review on the rule of law will not stand alone, but be used as a complement to existing procedures. It may thus augment the sanctioning procedures, but also the existing softer mechanisms (such as the Commission Rule of Law Report), which will likewise be discussed in section III. In that sense, the question is less whether the new peer review on its own will generate results, but how it will be embedded into the existing toolbox of the EU to address rule of law problems in its member states.[34] Third, as highlighted by the three Rule of Law Reports that the Commission has published in 2020, 2021, and 2022, the focus of the debate should not only be on Hungary and Poland, but also on the other member states, which likewise show deficits in their rule of law culture.[35] Because of these three reasons, soft measures, such as newly established peer review on the rule of law, should not be dismissed out of hand.

III. What is wrong with the current approaches?

Concerns over the rule of law in Hungary and Poland exist for more than a decade now. Already in January 2012, the Commission sent three Letters of Formal Notice (as a first step in a possible infringement procedure) to Hungary, which expressed concerns over the

[33] RD Kelemen, 'You Can't Fight Autocracy With Toothless Reports' (6 October 2020) EU Law Live eulawlive.com; KL Scheppele and L Pech, 'Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?' (9 March 2018) Verfassungsblog verfassungsblog.de.

[34] Also see the remarks on the complementarity of the various instruments made by M Bonelli Bonelli, M Claes, B De Witte and K Podstawa, 'Usual and Unusual Suspects in Protecting EU Values: An Introduction' (2022) European Papers www.europeanpapers.eu 641.

[35] Communication COM/2020/580 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 30 September 2020: 2020 Rule of Law Report on the rule of law situation in the European Union; Communication COM(2021) 700 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 July 2021: 2021 Rule of Law Report on the rule of law situation in the European Union; Communication COM(2022) 500 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13 July 2022: 2022 Rule of Law Report on the rule of law situation in the European Union.

independence of the country's central bank, the retirement age for judges and prosecutors, and the independence of Hungary's data protection supervisory authority.[36] The 2013 Tavares report by the EP critically reviewed the state of democracy and the rule of law in Hungary and called for the European Council to become active.[37] In 2017 and 2018, the EP and the Commission initiated art. 7 TEU procedures against Poland and Hungary, which have however not been brought to a formal vote in the Council yet. The Council, on its side, initiated an annual "Rule of Law Dialogue" in 2014, which turned out to be the nucleus of the peer reviewing procedure that is currently beginning to take shape. In 2019, the incoming von der Leyen Commission announced that fostering the observance of democracy and rule of law standards would be one of its priorities. This has led to the introduction of the so-called "Rule of Law Report" by the Commission, published for the first time in September 2020. Finally, the EP and the Commission tried to push a value-based conditionality mechanism in the discussions around the 2021-2027 MFF and the "Next Generation EU" budget. While there is no space within this *Article* to survey these instruments in detail, the chapters below each briefly review their main tenets and the successes and problems that the various mechanisms have run into. This provides the background against which the potential of the peer reviewing initiative will be discussed.

III.1. The Article 7 Procedure and the Rule of Law Framework

Art. 7 TEU gives the European Union the possibility to address violations of one of the fundamental values of the Union as laid down in art. 2 TEU. This is done through a multistage procedure, which had originally been established in the Treaties of Amsterdam and Nice, but had not been used until 2017.[38] Under the framework of art. 7(1) TEU, the Council can – on the initiative of the Commission, the EP, or its own – determine the "clear risk of a serious breach" of the EU's fundamental values in a member state. It can also

[36] For a detailed discussion of the use and effects of infringement procedures against Poland and Hungary, and the potential of infringement proceedings in addressing the current rule of law crisis, see P Bogdanowicz and M Schmidt, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) CMLRev 1061; KL Scheppele, DV Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3. Infringement proceedings are not discussed in the present *Article* because of its focus on the *political* mechanisms that the EU may use against transgressing states.

[37] Report 2012/2130(INI) of the Committee on Civil Liberties, Justice and Home Affairs of 24 June 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012).

[38] The short-lived measures adopted by the other 14 member states against Austria in 2000 because of the participation of the right-wing FPÖ in the federal government were adopted on a bilateral basis and outside of the EU procedures. The ensuing political disaster did however reduce the willingness of the EU to use the art. 7 TEU procedure; see KL Scheppele and L Pech, 'Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?' cit.; B Schlipphak and O Treib, 'Playing the Blame Game on Brussels: The Domestic Political Effects of EU Interventions Against Democratic Backsliding' (2017) Journal of European Public Policy 352.

address recommendations to the member state concerned, in both cases acting by a 4/5 majority of its members. Before doing so, the concerned member state must have been heard and the EP must have consented to the Council becoming active by a two-thirds majority of the votes cast, representing a majority of its members (art. 354 TFEU). Art. 7(2) TEU goes a step further than this. It allows the European Council, on the initiative of a third of the member states or the Commission, to declare a "serious and persistent breach" of the values mentioned in art. 2 TEU by a member state; thus going beyond the recognition of a mere *risk* for such breaches. To do so, the European Council decides by unanimity, excluding the member state concerned (art. 354 TFEU). The consent requirements for the EP are the same as in art. 7(1) TEU. Following such a decision, the Council may in a next step decide to suspend voting and other rights of the member state concerned, this time acting by qualified majority (art. 7(3) TEU).

The use of art. 7 TEU is preceded by a *structured exchange* between the Commission and the member state concerned, which aims to resolve problems before the formal procedure is triggered. This mechanism (the so-called "Rule of Law Framework") was only used once until now, in 2016 against Poland, but to no avail. After the consultations did not generate results, the Commission triggered an art. 7(1) TEU procedure against Poland over the country's judicial reforms in December 2017. This was followed by a similar art. 7(1) TEU initiative by the European Parliament against Hungary in September 2018, quoting violations of the freedom of opinion and assembly, threats to the independence of the judiciary, corruption, and a crackdown on civil society. Both initiatives have led to consultations with the Polish and Hungarian governments in the Council. However, in neither case was a formal decision taken to establish the existence of a *risk* or even a *breach* of EU values, in line with arts 7(1) and 7(2). Observers mention a number of hurdles that have prevented such decisions hitherto.[39] These hurdles pertain, first, to the consensual culture in the Council and the European Council, which makes it difficult and politically dangerous to ostracise other member states. This may fire back in decisions for which unanimity is required, for instance when adopting the budget or deciding on foreign and security policy matters. Second, the consensus minus one requirement of art. 7(2) TEU in conjunction with art. 354 TFEU has prevented the use of the instrument against either Hungary or Poland, as both states have pledged to veto decisions directed against the respective other member state in the European Council.[40] This is especially so as the Council can act by a qualified majority in determining sanctions under art. 7(3) TEU, which makes it important for these countries to prevent the European Council from passing the art. 7(2) TEU hurdle in the first place. Third, it turned out to be difficult to

[39] RD Kelemen, 'The European Union's Authoritarian Equilibrium' cit.; U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure' (2017) Journal of European Public Policy 337.

[40] C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity Under Article 7 TEU' cit.; U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU' cit.

achieve the required two-thirds majority in the EP in the Hungarian case, because of continuing resistance in the EPP to act against the Fidesz government.[41]

III.2. The budget conditionality mechanism

Frustrated with the lack of progress on the two ongoing art. 7 TEU procedures, a broad coalition of EP members, the Commission, and numerous member states have pushed to make the payment of EU funds conditional upon observance of human rights, democracy, and the rule of law. These discussions took up pace in 2018 with the Commission proposal for a "new mechanism to protect the Union's budget",[42] and reached a high in the fall of 2020, in the context of negotiations over the 2021-2027 MFF and the "Next Generation EU" budget to deal with the fallout of the Corona crisis. In November 2020, Council and Parliament reached an agreement according to which the EU can reduce or halt payments from the EU budget if breaches of rule of law principles in a member state could jeopardize the financial interests of the EU. This would also be possible if there is only a *risk* of damages to EU financial interests (thus adding a preventive element). On the demand of the EP, a list of situations that would constitute a breach of the rule of law was adopted, which contains explicit references to the independence of the judiciary, arbitrary or unlawful decisions by public authorities, or the availability and effectiveness of legal remedies.[43] Another positive aspect of the regulation is that the decision to impose financial sanctions can be made by qualified majority in the Council on a proposal by the Commission,[44] so that there are no similar veto possibilities as in the art. 7 TEU procedure.

While these are significant developments, the fact that rule of law breaches in a Member State have to be demonstrated to "affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way"[45] constitutes a potentially weak spot in court cases and in any

[41] This obstacle has been removed though by Fidesz' decision to leave both the EPP parliamentary group and the EPP party family in March 2021.

[42] Proposal for a Regulation Communication COM(2018) 324 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 May 2018 on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

[43] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, arts 3 and 4(2).

[44] *Ibid*. art. 6, especially art. 6(10) and (11). A decision of the Council is preceded by a complicated procedure in which the Commission has to establish evidence of a breach of the rule of law, also hearing the concerned member state (art. 6(1-9)).

[45] *Ibid*. art. 4(1). Case C-156/21 *Hungary vs European Parliament and Council of the European Union* ECLI:EU:C:2022:974, opinion of AG Campos Sánchez-Bordona, para. 149: "Financial conditionality is restricted to those breaches of the rule of law which have a sufficiently direct link to budgetary implementation and which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union"; and para. 167: "The sufficiently direct link ensures

case "reinforces the level of proof to be provided by the Commission when proposing measures".[46] Moreover, the regulation could only be adopted after the opposition by the Polish and the Hungarian governments had been addressed through a political compromise that the new mechanism would not be applied for the time being. In particular, it was agreed that a CJEU ruling on the new mechanism would have to be waited for, and that application guidelines would have to be developed before the Commission would act on them.[47] While the CJEU dismissed Poland's and Hungary's actions for annulment of Regulation 2020/2092 on 16 February 2022, it confirmed that funds could only be withheld if rule of law violations would directly impact or at least constitute a serious risk of impact on the sound financial management or the protection of the EU's financial interests. Thus, the problem remains that "instead of protecting the rights of citizens in the country in focus, the mission was redefined as protecting the money of taxpayers (especially in net contributors of the MFF). This [...] implied that if the EU money was not subject of abuse, the Union would have no issue with the breakdown of rule of law and the decline of democracy".[48] In summary, the effectiveness of the conditionality mechanism will be fettered by two factors: first, the need for the Commission to establish sufficient proof for clear causal effects of *specific* rule of law breaches on financial interests of the EU will likely lead to a cautious and time-consuming approach of the Commission; second and linked to this, the fact that not all rule of law breaches can be targeted by the conditionality regulation, but only those where the abovementioned link to the financial interests of the EU can credibly be established.

Looking at the failure of the two EU sanctioning instruments to deliver significant outcomes hitherto, there is a need to review the potential of further instruments that the EU has at its disposal.[49] Such instruments fall into the *normative* approach to compliance

that the conditionality mechanism will not apply to all serious breaches of the rule of law, but will be limited to serious breaches that are closely related to implementation of the budget".

[46] A Dimitrovs and H Droste, 'Conditionality Mechanism: What's in It?' (30 December 2020) Verfassungsblog verfassungsblog.de. For a critical review of the regulation, see I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) European Papers www.europeanpapers.eu 721.

[47] Conclusions of the European Council (EUCO 22/20) from General Secretariat of the Council to Delegations of 11 December 2020, para. 2(c). See the critical discussions by A Alemanno and M Chamon, 'To Save the Rule of Law You Must Apparently Break It' (11 December 2020) Verfassungsblog verfassungsblog.de; A Dimitrovs, 'Rule of Law-Conditionality as Interpreted by EU Leaders' (11 December 2020) EU Law Live eulawlive.com; N Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (2021) European Papers www.europeanpapers.eu 101; KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) Verfassungsblog verfassungsblog.de.

[48] L Andor, 'The Rule of Law Stalemate' (22 October 2020) The Progressive Post progressivepost.eu.

[49] This is a statement recognizing the political difficulties in using the existing sanctioning instruments. It is not a call for ending the political initiatives to make use of them. Moreover, there is clear academic and political interest to have an encompassing discussion on what the EU can do in the current rule of law crisis.

discussed in section II.1 above. Two of these instruments stand out, namely the Commission Rule of Law Report, and the Council's Rule of Law Dialogue.

III.3. The Commission rule of law report

The Rule of Law Report by the European Commission is a recent addition to the EU's toolbox in addressing rule of law concerns. It is based on two EP resolutions in 2015 and 2018 that called on the Commission to establish a comprehensive monitoring system for the rule of law that would target *all* member states, irrespective of the existence of any specific concerns over the rule of law.[50] The EP resolutions called for a system that would include an annual cycle of reporting and of recommendations to the member states. The Juncker Commission issued a communication in April 2019, which put up a number of issues for discussion, but refrained from making clear proposals.[51] This was followed by a communication in July 2019 which announced the will of the (outgoing) Juncker Commission to foster a "rule of law culture" and to step up the monitoring tools of the Commission.[52] A key proposal in this respect was the publication of an annual Rule of Law Report, which "would provide a synthesis of significant developments in the Member States and at EU level" and "could highlight best practices and identify recurrent problems".[53] This step was interpreted as an attempt to turn the spotlight away from Poland and Hungary as the only transgressors and to generate an EU-wide discussion on the issue instead.[54]

Heeding these earlier initiatives, the von der Leyen Commission issued the first Rule of Law Report in September 2020, and the second and the third in July 2021 and July 2022.[55] While – apart from Poland and Hungary – Bulgaria, Croatia, Romania, and Slovakia are described as facing specific issues in both the 2020 and the 2021 reports, the reports also describe problematic developments in Western member states, such as Austria, Germany, Italy, and Spain. The 2022 report additionally includes a set of country-specific recommendations for each member state.

[50] Resolution (2015/2254(INL)) of the European Parliament of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights; Resolution (2018/2886(RSP)) of the European Parliament of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights.

[51] Communication COM(2019) 163 final from the Commission to the European Parliament, the European Council and the Council of 3 April 2019 on Further strengthening the Rule of Law within the Union: State of play and possible next steps.

[52] Communication COM(2019) 343 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 July 2019 on Strengthening the rule of law within the Union A blueprint for action.

[53] *Ibid*. 11.

[54] Deutsche Welle, 'Jährlicher Grundwerte-Check für EU-Staaten' (17 July 2019) Deutsche Welle www.dw.com.

[55] Communication COM(2020) 580 final cit.; Communication COM(2021) 700 final cit.; Communication COM(2022) 500 final cit.

The report is remarkable in the breadth of sources that it builds on. It contains information provided by national contact points, interviews and consultations with stakeholders in all member states, virtual country visits, input from several European agencies and networks, and information assembled by other international organizations, specifically the CoE's Venice Commission and its GRECO (Group of States Against Corruption) committee. The report focuses on four areas: the quality of the justice system, the anticorruption framework, media freedom, and other institutional issues related to checks and balances. While media freedom (a key area of concern in many EU member states) is an addition to common understandings of the rule of law, the report is silent on broader issues related to the rule of law, such as the transparency and accountability of government conduct, or the protection of fundamental rights. Likewise, the report goes to great lengths in detailing national anticorruption frameworks, but is much less elaborate on whether these measures target key problems in the country. The report is also rather silent on government procurement and the use of EU funds.[56]

Another problem of the reports is that the chosen language is soft and does not go further than referring to "concerns" or sometimes "serious concerns", usually with reference to the views of third parties. This was criticized by the EP in a resolution on the 2020 report, in which it called the report "overly descriptive" and called "on the Commission to make future reports more analytical". Moreover, the EP considered "it necessary that future reports should contain country-specific recommendations on how to address the concerns identified or remedy breaches, including deadlines for implementation, where appropriate, and benchmarks to be followed up on" and called on the Commission "to include in the reports indications of the follow-up on the implementation of its recommendations and remedial action".[57]

While the Commission pledged to "carefully reflect" on these proposals,[58] the country-specific recommendations introduced with the 2022 report fall short of these proposals. While each country receives a number of recommendations, many of these recommendations keep generic ("take steps", "continue efforts"), and none of them sets a timeframe by when a certain benchmark or target has to be achieved. The recommendations are put into the context of the "preventive nature of the report" and are intended to "support Member States in their efforts [...], to encourage positive developments, and to help them identify where improvements or follow-up to recent changes or reforms may be needed".[59] While the Commission pledges to review the follow-up to its recommendations in future editions

[56] For a review of the 2020 report see A Mungiu-Pippidi, 'Unresolved Questions on the EU Rule of Law Report' (20 October 2020) Carnegie Europe Blog carnegieeurope.eu.

[57] Resolution (2021/2025(INI)) of the European Parliament of 24 June 2021 on the Commission's 2020 Rule of Law Report, consideration 5. Also see considerations 50 and 61.

[58] Communication COM(2021) 700 final cit.

[59] Communication COM(2022) 500 final cit. 2.

of the report, it also emphasises "consistency and synergies with other processes".[60] Specific references are made in this respect to financial support measures, the dialogues in the Council (section III.4 below) and the rule of law peer review, but also to the budget conditionality mechanism. Regarding the latter, it is argued that "the Commission may take into account the Rule of Law report [...] when identifying and assessing breaches of the principles of the rule of law that affect the financial interests of the EU".[61]

III.4. The Council's annual rule of law dialogue

The Council's Rule of Law Dialogue, as established in 2014, seeks to "promote a culture of respect for the rule of law" in the EU. From the beginning, it was determined that the dialogue should "be based on the principles of objectivity, non-discrimination and equal treatment of all Member States".[62] On this basis, three dialogues were held in 2014, 2015, and 2016. In its first evaluation in 2016 by the General Affairs Council, the dialogue received a mixed appraisal. While the member states agreed that the dialogue should be continued in principle, they called for it to be "more result-oriented and better structured", and stressed the need for a more systematic preparation and focused discussions.[63] The Council suggested a mix of interactive discussions on the situation in the member states as well as debates on specific topics. In the context of the present paper, it is notable that the 2016 Council conclusions called for a re-evaluation of the dialogue by "the end of 2019, when the Member States should be more ready to consider the possibility of turning the dialogue into an annual peer review exercise".[64] The 2019 evaluation of the dialogue reached about the same conclusions as in 2016. The member states again called "for the dialogue to be stronger, more result-oriented and better structured, [...], and for proper follow-up to be ensured".[65] Importantly, Poland and Hungary refused to endorse these conclusions.

Academic evaluations of the dialogue likewise paint a negative picture. While the existence of the dialogue as such is seen as a positive element, its "toothless" and "largely self-congratulatory nature" and the lack of a true dialogue are viewed critically.[66] As observed by Ravo, "governments were just invited (not obliged) to present on a particular

[60] *Ibid*. 4.

[61] European Commission, *2022 Rule of Law Report - Questions and Answers* ec.europa.eu.

[62] Conclusions 17014/14 of the European Council and the Member States meeting within the Council of 16 December 2014 on ensuring respect for the rule of law.

[63] Summary 14565/16 from Presidency to Delegations of 17 November 2016 on the evaluation of the Rule of Law Dialogue among all Member States within the Council.

[64] *Ibid*.

[65] Presidency conclusions 14173/19 from Presidency to Delegations of 19 November 2019 on evaluation of the annual Rule of Law Dialogue.

[66] KL Scheppele, 'EU Can Still Block Hungary's Veto on Polish Sanctions' (11 January 2016) Politico www.politico.eu.

aspect of the rule of law in their country. There were no questions, no reviews of a country's performance and no recommendations".[67] Pech and Kochenov describe the dialogue as "unhelpful if not counterproductive" and as merely offering a "façade of action in the absence of critical engagement with the crucial issues". As a possible way of improving the instrument, they identify the peer review proposal.[68]

IV. The EU rule of law peer review

Against the backdrop of the discussions above, the establishment of a peer review on the rule of law in the EU is the latest addition to the EU's toolbox in addressing rule of law deficits. Since November 2020, four reviews of individual member states were held in the General Affairs Council, in November 2020, April 2021, and November 2021, and April 2022. Given the recentness of the initiative and the fact that there are no first-hand accounts of the concrete functioning of the peer review, the assessment of the instrument has to focus on an appraisal of the agreed procedures. This will happen against two benchmarks: on the one hand, the extent to which the instrument of peer review can in principle react to the shortcomings of existing EU instruments, as identified in section III. On the other hand, the peer review will be assessed against factors that make peer reviews function well or less well in other international organizations.[69]

IV.1. History of the initiative

As discussed above, the introduction of a peer review to monitor the observance of rule of law is a proposal to give better structure and more power to the Council's Rule of Law Dialogue. The initiative gained pace in 2019, when the Belgian, Dutch, and German Foreign Ministers launched an initiative to introduce a periodic peer review on the rule of law. The objective was to initiate "a substantive exchange of views on the way the rule of law is implemented, monitored, guaranteed and enhanced within the respective legal and political systems of each of us Member States".[70] During the launch of the initiative, German Minister of State on Foreign Affairs, Michael Roth, also stated that "maybe our new mechanism can build bridges between East and West, North and South to overcome the stereotypes".

[67] L Ravo, 'EU Governments' Upcoming Rule of Law Peer Review: Better Get off on the Right Foot' (9 November 2020) Euractiv www.euractiv.com.

[68] L Pech and D Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (Working Paper June 2019) RECONNECT Policy Brief reconnect-europe.eu 4.

[69] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; V Carraro and H Jongen, '*Peer Review in Financial Integrity Matters* cit.

[70] D Reynders, M Roth and S Blok, 'Fundamental Values Check-Up: Let's Intensify Our Dialogue!' (28 November 2020) Federal Foreign Office www.auswaertiges-amt.de.

[71] On the same occasion, Poland made its support for a peer review dependent upon a "full guarantees of impartiality, objectivity, the role of EU institutions and states and relations with other procedures regarding fundamental rights". [72]

During the 2019 evaluation of the Rule of Law Dialogue mentioned above, there was broad support for the Belgian-Dutch-German proposal by 26 member states (except Hungary and Poland). The Presidency conclusions note the necessity of a "concrete elaboration of the procedure and modalities of a periodic peer review mechanism on the rule of law" and mention the planned use of the country-specific evaluations in the Commission's Rule of Law Report.[73] The availability of this new source of information thus became an important trigger for the new peer review. In the next step, the German Presidency announced to "launch a new peer review mechanism during its Presidency" a few days after the first Rule of Law Report was published on 30 September 2020.[74] Specifically, Germany proposed to introduce half-yearly "country-specific discussions" in parallel to the existing annual dialogue in the Council and emphasized that these discussions were to be "candid and critical".[75]

The first such exercise was conducted during the EU General Affairs Council of 17 November, comprising five EU member states selected by EU protocol (Belgium, Bulgaria, Czech Republic, Denmark and Estonia).[76] The next review round was held on 20 April 2021, covering Germany, Ireland, Greece, Spain and France, the third on 23 November 2021, discussing Croatia, Italy, Cyprus, Latvia, and Lithuania, and the fourth on 12 April 2022, covering Luxembourg, Hungary, Malta, The Netherlands, and Austria. The periodicity of the review, the discussion of evidence on individual countries, and the peer assessment of that information thus turned the previous Rule of Law Dialogue into a genuine peer review, a development that observers discussed as "a significant step forward".[77]

IV.2. Which institutional design for the initiative?

The institutional design of peer reviews can be usefully analysed according to the stages that a peer review typically goes through, namely *i)* the collection of information phase, *ii)*

[71] A Brzozowski, 'Belgium, Germany Make Joint Proposal for EU Rule of Law Monitoring Mechanism' (19 March 2019) Euractiv www.euractiv.com.

[72] *Ibid*.

[73] Presidency conclusions 14173/19 cit. points 15, 8, and 10. The Finnish presidency specifically mentions the establishment of a 'new mechanism for peer review' on the rule of law as one of the objectives of its presidency; see: Finland's Presidency of the Council of the European Union, *Strengthening the Rule of Law* eu2019.fi.

[74] Federal Foreign Office, *Germany: Working to Promote the Rule of Law in Europe* (2 October 2020) Federal Foreign Office www.auswaertiges-amt.de.

[75] *Ibid*.

[76] Germany did not participate because of its holding the presidency.

[77] L Ravo, 'EU Governments' Upcoming Rule of Law Peer Review' cit.

the evaluation and assessment phase, and *iii)* the follow-up and dissemination phase.[78] Another important aspect of the reviews is the scope of their assessment, *i.e*. the breadth of the topics covered. While the institutional evolution of the rule of law peer review is still in flux, a number of observations can be made, following the dimensions mentioned above.

a) Scope of review

The November 2019 Council conclusions announced a "comprehensive, genuine and interactive discussion broadly focused on the rule of law situation in the Member States and in the Union as a whole, taking into account both positive and negative trends". Further, the conclusions mentioned the planned use of the (country-specific) evaluations in the Commission's Rule of Law Report.[79] Building on this, the initial four rounds of the review followed the (limited) scope of the Commission report reviewed above. It thus covers the areas of: *i)* quality of the justice system, *ii)* anti-corruption framework, *iii)* media pluralism, and *iv)* other institutional issues related to checks and balances. While these are all important elements, the list is obviously limited and ignores the interdependence of the rule of law discussion with human rights and democratic standards. It is also much more circumscribed than the rule of law checklist issued by the CoE's Venice Commission.[80] This problem is unlikely to be addressed by the Council itself, but depends on the Commission's ambition in putting together its Rule of Law Report. As of now, there are no indications that the Commission intends to widen up the scope of its report.

b) Collection of evidence

The peer review is based on the information collected in the context of the Commission's Rule of Law Report. This report draws on a broad range of evidence collected by the Commission and the secretariats of other international organizations, most prominently the CoE's Venice Commission and the CoE's peer review in its Group of States against Corruption committee (GRECO). It also draws on assessments by the EU Fundamental Rights Agency, and a broad set of consultations of the EU with stakeholders at the national level,

[78] This differentiation of different phases of peer review diverges from a frequently cited distinction of phases in OECD publications F Pagani, 'Peer Review as a Tool for Co-operation and Change' cit. 20-21; U Wellen, 'The OECD Peer Review Mechanism' cit. 269–70. These authors distinguish the "preparatory phase", the "consultation phase" and the "assessment phase". For the purpose of the present study, the preparation and consultation phases as described by Pagani and Wellen are collapsed into the "collection of information" phase. The "assessment phase" discussed by Pagani and Wellen is relabelled "evaluation and assessment", in order to better grasp the complexity of this phase. Finally, I look at the "follow-up and dissemination" phase, which is not systematically covered by the OECD authors. Also see V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

[79] Presidency conclusions 14173/19 cit. points 8 and 10.

[80] UN Human Rights Regional Office for Europe, *The Case for a Human Rights Approach to the Rule of Law in the European Union* europe.ohchr.org. Similar criticism can be found in Resolution (2021/2025(INI)) cit. considerations 34-42.

including national human rights contact points, governmental actors and civil society sources. It is especially important in this respect that the government itself is consulted on the report and in the process of doing so becomes part of the ongoing dialogical process. The high (annual) frequency in which the Commission report is produced further enhances this effect.

Importantly, the way in which the collected information is evaluated is entirely in the hands of the Commission. This is defended by the Commission with reference to its role as "guardian of the treaty", but has also made it easier for Orbán and his likes to portray the information as the product of an unaccountable Brussels bureaucracy.[81] Orbán also tried to discredit the evidence collected from civil society players in the case of Hungary as stemming from sources funded by George Soros.[82] As discussed above, the evaluation and assessment of the situation by the Commission is rather cautious. In particular, there are no recommendations in the Rule of Law Report by the Commission which the Council could endorse and thus lend political weight to them.

c) Evaluation and assessment

The current rate of five countries per presidency period means that each member state is reviewed in the Council about every 2,5 to three years. This is less frequent than the reviews in the European Semester, but still in line with a number of well-functioning peer reviews such as the OECD's Economic and Development Review Committee (every 2 years). Other peer reviews show a much lower frequency.[83]

The review happens during one of the regular meetings of the General Affairs Council, using the non-public part of the meetings. This means that the review not only takes place behind closed doors; but also that only very limited time can be devoted to the review because of the many other issues on the agenda. A publicly available report of the third review cycle mentions that "around half an hour" was devoted to each of the five member states, comprising a short introduction by the Commission, and a presentation by each national delegation of "key developments and the particular aspects of its national rule of law framework". This was followed by "a round of comments in which other

[81] M Birnbaum and Q Ariès, 'E.U. Issues its First Rule-of-Law Report, Angering Leaders of Hungary and Poland' (30 September 2020) The Washington Post www.washingtonpost.com.

[82] V Orbán, 'Europe Must Not Succumb to the Soros network' (25 November 2020) www.miniszterelnok.hu. In this context, the (yet to materialize) plans by Poland and Hungary to set up their own "Rule of Law Institute" are notable. The stated aim of the institute is to ensure that their countries are not subjected to "double standards" and to provide "an alternative interpretation" of the situation. See S Walker and D Boffey, 'Hungary and Poland to Counter Critics with "Rule of Law Institute"' (28 October 2020) The Guardian www.theguardian.com. The blog About Hungary, *Rule of Law* abouthungary.hu gives an insight into how the Hungarian government seeks to discredit the rule of law principles and the corresponding EU instruments.

[83] For instance, the Environmental Performance Reviews of the OECD are only held every 10 years, while the peer reviews for medium-sized and smaller countries in the WTO Trade Policy Review Mechanism are held every 5 or 7 years, depending on size.

delegations shared their experiences and best practices in relation to the developments mentioned".[84] The very limited time devoted to the review is in contrast to other peer review exercises which usually take between half a day and a day per country, and sometimes (in the case of the WTO Trade Policy Review Mechanism) stretch out over two days. Even the UN Human Rights Council, which shows a very brief review time in comparison (3,5 hours per case), devotes much more time than the EU peer review.[85]

While no first-hand observations of the process are available, the limited time implies that no real discussion between the delegations is possible, let alone a joint assessment of the peers about the situation. The Council seems to abstain from making assessments on performance and does not seem to issue recommendations that could be followed up on during the next review cycle. Likewise, it seems that reviewed states are not pushed to make specific commitments to their peers, which the Council could return to in the next review of the respective country. The absence of these elements means that no peer pressure can be exerted. This is a key weakness of the new peer review.[86]

It remains to be seen which effects the introduction of country-specific recommendations in the Commission's 2022 Rule of Law Report will have on the discussion in the Council. The existence of such recommendations could provide greater focus to the discussions among member states. A focus on these topics could lend further political weight to the Commission report. It seems unlikely though that the GAC would formally adopt conclusions asking members states to heed specific recommendations from the Rule of Law Report. The fact that the most recent peer review in April 2022, which covered amongst others Hungary, "did not lead to the adoption of conclusions"[87] is notable in this respect.

d) Follow-up and dissemination

The way in which the rule of law peer review will be followed up on is unclear. There are two main reasons for scepticism: first, as observed above, there seem to be no recommendations by the Council to the countries under review that could be followed up on in

[84] European Council, *General Affairs Council*, 23 November 2021 consilium.europa.eu.

[85] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; T Conzelmann, 'The Politics of Peer Reviewing: Comparing the OECD and the EU' in T Blom and S Vanhoonacker (eds), *The Politics of Information: The Case of the European Union* (Palgrave Macmillan 2014) 49.

[86] Peer pressure has been discussed as a powerful element of peer reviews; see G Dimitropoulos, 'Compliance Through Collegiality' cit.; F Pagani, 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' cit. 16-17. As argued by Milewicz and Goodin in their review of the UN Universal Periodic Review (UPR), the dialogue during the review session is crucial: While "the Interactive Dialogue of the UPR itself may be only minimally deliberative – although that highly public moment of peer-to-peer accountability is arguably the key to its evoking commitments from states regarding their human rights performance. The prospect of being held to account in that way generates intense and ongoing deliberation before and afterwards that [...] seems to have made a positive difference to states" human rights performance. KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit. 519.

[87] European Council, *General Affairs Council* (12 April 2022) www.consilium.europa.eu.

terms of peer pressure in the Council and a review of implementation records during the next review meeting. The peer review thus lacks the character of a repeated exercise, which would arguably increase the "shadow of the future" and compel states to heeding behavioural expectations of their peers.[88] It thus lacks a crucial element through which states could be forced into an ongoing regime dialogue on the rule of law. Second, the lacking publicity of the procedure crucially inhibits the exertion of public pressure on transgressors.[89] No minutes or other material on the procedure and its outcomes are published by the Council. Many other peer reviews make material from the meetings available online, such as meeting minutes, summaries of the discussion, or (in the case of the UN Universal Periodic Review) even a live stream of the meetings. While keeping the doors closed may allow candid exchanges and sharing confidential information,[90] lacking publicity prevents political parties or civil society groups to pick up on review results and use them to exert public pressure on their governments.[91]

IV.3. Can the EU peer review address the problems of other approaches?

As the discussion above shows, the new rule of law peer review introduces some new elements to the EU's toolbox for addressing rule of law deficits, while at the same time suffering from some obvious problems. In terms of positive developments, the peer review clearly extends the Annual Rule of Law Dialogue in the Council. There is a true focus on the situation in a particular country instead of the less specific discussions in the dialogue. Building on the Rule of Law Report by the Commission, the member states are scrutinized against a fixed and relatively detailed (if however limited) catalogue of criteria. Each member state has to explain and justify its performance in these areas and is no longer in control of the topics under review, as was the case in the dialogue. Another positive aspect of the new peer review is that it covers all member states and is conducted on a regular basis. No claims can be made that the new instrument has been specifically designed to ostracise Hungary and Poland, even though the findings emerging from the Rule of Law Report (on which the peer review is based) may still be discredited as pro-Western and as biased.[92] As a regularly employed instrument, the peer review is less

[88] KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit. 527.

[89] Also see L Ravo, 'EU Governments' Upcoming Rule of Law Peer Review' cit.

[90] V Carraro and H Jongen, 'Leaving the Doors Open or Keeping them Closed? The Impact of Transparency on the Authority of Peer Reviews in International Organizations' (2018) Global Governance 615-635; JK Cowan and J Billaud, 'Between Learning and Schooling: The Politics of Human Rights Monitoring at the Universal Periodic Review' (2015) TWQ 1175.

[91] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU' cit.

[92] See for instance the blog published on the occasion of the second Rule of Law Report by Zoltan Kovacs, Hungarian Secretary of State for Public Diplomacy and Relations, in which the report is described as "a biased, politically motivated collection of blatant double standards"; Z Kovács, 'A European

extraordinary than the initiation of an art. 7 TEU procedure or the application of measures under the budget conditionality procedure. It may thus not be subject to the same public attention and politicization. A third welcome aspect is the relatively short review cycle. Countries will be reviewed every 2.5 to 3 years in the Council and annually by the Commission, which makes the rule of law situation a quasi-permanent point of attention for the EU and the member states. Provided that there is a political will, this allows a focused and specific dialogue with the country concerned. Such a focused dialogue can make an important contribution to the "rule of law culture" that the Commission and the Council aim at.

These positive aspects of the peer review have to be balanced against the problems reviewed above. The time allocated for the review of each country is very brief. A good part of the meeting seems to be spent on presentations by the Commission and the reviewed country, further limiting the time available for discussion and comments by the peers. The review also suffers from the absence of country-specific recommendations by the peers or the Council Secretariat, which prevents a more permanent review of shortcomings and the respective efforts of the country to remedy these problems. Given the little time available during the meetings of the General Affairs Council, the formulation of such recommendations during the meeting is impossible and could only work if the Council Secretariat prepared a list of recommendations that could be adopted during the meeting. Peer pressure can only work if the peers formulate clear behavioural expectations that need to be heeded by the time of the next review round. Finally, the lacking availability of documents from the review decreases the public visibility of the reviews and prevents a greater engagement of civil society and the broader public. Public pressure around the Rule of Law peer review is thus virtually non-existent.

The comparison with other international peer reviews shows that the instrument can be organized in a more ambitious format. As observed above, the time reserved for each review session is extremely short in comparison to other review exercises, which devote time between 3.5 hours (UN Universal Periodic Review) up to two days per reviewed country (WTO Trade Policy Review Mechanism). Presumably, the limited time given to the peer review in the General Affairs Council meetings is paralleled by a rather low priority that the General Affairs Council Secretariat is giving to the matter. Many peer reviews, especially in the OECD, but also in the CoE's GRECO end with a clear set of recommendations that the peers endorse and that reviewed member states commit to address by the time of the next review meeting. There are only some international peer reviews (such as the UNCAC Implementation Review Mechanism) which do not have recommendations, but this comes at the cost of a generally negative assessment of this review by

Commission Failure: Rule of Law Report a mere Regurgitation of our Political Opponents' Favorite Accusations' (21 July 2021) About Hungary abouthungary.hu.

participants.[93] Other peer reviews such as the UN Universal Periodic Review and the WTO Trade Policy Review Mechanism end by summing up a list of recommendations and questions by the member state, which has been shown to generate pressure on the reviewed member state.[94] Finally, and in contrast to the secretive nature of the EU rule of law peer review, most other peer reviews are providing a much richer documentation of the review and the documents discussed, ranging from searchable online databases of review documents and minutes of the meeting to the availability of webcasts of the review sessions for the UN Universal Periodic Review.[95] This aspect is especially important to safeguard both the ongoing dialogical nature of the review and to facilitate peer pressure. Therefore, while being a step forward, the new peer review in its current format leaves much to be desired. It is easy to mock it as another example of the EU's "new-instrument creation cycle", through which the Council, the Commission, and the EP are not only creating and using different instruments but are also pursuing different philosophies as to how the rule of law crisis of the EU can best be remedied.[96]

V. Ways ahead?

In the light of the highly visible debates on sanctioning rule of law transgressions in Hungary and Poland, less attention has been paid to the *softer* instruments of the EU in the current rule of law crisis. While instruments such as the new Council peer review and the Commission Rule of Law Report can be discredited as "toothless",[97] these instruments have the advantage of bringing all EU member states under scrutiny against the same standards, without the need to trigger specific procedures. Moreover, the wide consultation exercise that the Commission conducts for the Rule of Law Report gives domestic civil society, but also actors outside of the EU (such as the CoE's Venice Commission), a voice in the process. As preventive tools, the new peer review and the Rule of Law Report by the Commission hold the potential to generate an ongoing dialogue on the "Rule of Law Culture" in the EU. The biggest contribution of the peer review could be to increase the political weight of the Commission Rule of Law Report, by bringing member states

[93] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

[94] V Carraro, *A Double-Edged Sword* cit.; T Conzelmann, 'The Politics of Peer Reviewing' cit.; KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit.

[95] World Trade Organization, *Trade Policy Reviews* www.wto.org; United Nation Human rights Council, *Documentation by Country* www.ohchr.org for the UN Universal Periodic Review; Council of Europe, Group of States against Corruption, *Evaluations* www.coe.int for the CoE's GRECO; Organization for Economic Cooperation and Development, *Economic Surveys and Country Surveillance* www.oecd.org for the OECD Economic Surveys.

[96] L Pech and A Wójcik, '"A Bad Workman Always Blames His Tools": An Interview with Laurent Pech' (28 May 2018) Verfassungsblog verfassungsblog.de. Also see U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU' cit.

[97] RD Kelemen, 'You Can't Fight Autocracy with Toothless Reports' cit.

into a dialogue about how to address areas of concern or country-specific recommendations as identified in the report.

The power of peer reviewing is not only dependent on good institutional design, but also on specific societal pre-conditions that a peer review itself cannot generate. Such pre-conditions are the existence of a lively civil society, a free and critical press, openness to transnational exchange, and a public sphere in which the values that the peer review seeks to protect are not controversial. The crackdown on civil society and media freedom by the current Hungarian and Polish governments, but also their attempts to portray the rule of law concept as a Western ideology used to strip post-Communist countries of their hard-won freedoms, are important in this respect. These actions undermine the fabric of shared values, political transparency, transnational exchange and civil society engagement that can put pressure on recalcitrant governments and trigger domestic reforms.

Peer reviews and other soft instruments cannot revert the illiberal tendencies in backsliding member states. However, they do possess the benefit of at least not severing the "rallying-around-the-flag" effect that the art. 7 TEU interventions have triggered in Hungary and in Poland and that has strengthened, rather than weakened, the governments of these countries.[98] Possibilities to address this "intervention paradox" exist and should focus on involving civil society actors within the countries concerned as allies (in order to decrease possibilities to portray the rule of law discussion as an intervention driven by external actors), the targeting of actors responsible for violations (in order to avoid that a whole country is punished), and the application of monitoring procedures to all member states instead of ostracising a few.[99] Both the art. 7 TEU procedure and the financial conditionality proposal reviewed above do not possess these qualities. While satisfying calls mainly in the Western EU member states to get tough on these two countries, it is yet unclear whether the EU's sanctioning procedures can ever reach the desired effects.

This does not necessarily mean that the new peer review and the Rule of Law Report will do better to address the situation in Poland and Hungary. The new peer review however holds promise in countries in which the decay of shared values and political freedoms is not as advanced as in these two countries. Thinking of the member states singled out in the recent Commission Rule of Law Reports as carrying problems with respect to the rule of law (such as Bulgaria, Croatia, and Malta), the new peer review may be helpful as a preventive tool to signal concerns of the peers in other member states and to engender civil society support for necessary reforms. To achieve this, the new peer review would need to receive more discussion time in the Council, a clearer focus, including country-specific recommendations, better transparency to the outside world, and a proper follow-up procedure. Such a reformed procedure could not only lead to an

[98] B Schlipphak and O Treib, 'Playing the Blame Game on Brussels ' cit.

[99] B Schlipphak and O Treib, 'Legitimiert Eingreifen: Das Interventionsparadox der EU und wie man es vermeiden könnte' (2019) Aus Politik und Zeitgeschichte 26.

ongoing dialogue and a discursive fortification of rule of law standards, but also a broader public debate in the respective member state. Experiences with the Universal Periodic Review show that this peer reviewing scheme has booked some successes in achieving both objectives.[100]

[100] V Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review' cit.; F Cowell, 'Understanding the Legal Status of Universal Periodic Review Recommendations' (2018) Cambridge International Law Journal 164; KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit.

ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

Edited by Matteo Bonelli, Monica Claes, Bruno De Witte *and* Karolina Podstawa

BEYOND THE RULE OF LAW CONDITIONALITY: EXPLOITING THE EU SPENDING POWER TO FOSTER THE UNION'S VALUES

MARCO FISICARO*

ABSTRACT: In recent years, the EU budget has emerged as an attractive instrument to foster compliance with the fundamental values enshrined in art. 2 TEU. Especially following the exceptional increase in EU expenditure, the power of the purse seems to provide indeed more persuasive arguments compared with the existing EU rule-of-law toolbox. While most of the attention has focused exclusively on the rule-of-law conditionality regime ultimately introduced with Regulation (EU, Euratom) 2020/2092, this *Article* argues that the EU budget offers further, and arguably more promising, avenues to protect, promote and enforce the EU common values through financial means. Most notably, this *Article* explores the potential and challenges of the EU budget as a values-oriented policy instrument focusing on three elements of the new budgetary framework: *i)* the set of fundamental rights "enabling conditions" attached to the European Structural and Investment Funds, among which stands out an horizontal enabling condition related to the EU Charter of Fundamental Rights; *ii)* the "Justice, Rights and Values Fund", with special attention to the reforms concerning the financing of civil society organisations; *iii)* the "Recovery and Resilience Facility", which provides valuable instruments to police compliance with rule of law and fundamental rights standards thanks to its connection with the European Semester and the European Pillar of Social Rights.

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I. INTRODUCTION

The tough negotiations leading to the approval of the rule-of-law conditionality regime,[1] and the failure to swiftly enforce it, have captured the attention in the scholarly debate on the ongoing process of constitutional backsliding facing the European Union.[2] For a long time an "unusual suspect" in the rule-of-law battlefield, the EU budget has indeed emerged as an attractive instrument to foster compliance with the fundamental values enclosed in art. 2 TEU[3] and suspending the flow of funds to recalcitrant Member States is widely considered today the "dose of tough love needed".[4]

Without ignoring the legal and political value of Regulation 2020/2092,[5] it is however difficult to consider the new conditionality regime as a game changer in the ongoing crisis, even more so in light of the "double" compromise agreed in the second half of 2020.[6] The mechanism was indeed first watered down by designing a highly politicised[7] and rather cumbersome enforcement procedure,[8] and then *de facto* suspended at the end of the controversial European Council's meeting of December 2020.[9] Despite harsh criticism from the European Parliament, which has even sued the Commission before the Court of Justice,[10] the mechanism is unlikely to produce meaningful results in the short term.

[1] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[2] See, *inter alia*, the Editorials of some leading journals in the field: Editorial, 'Budget and Recovery Funds, Rule of Law, and an Unfortunate Standoff' (2020) ELR 755; Editorial, 'Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) European Papers www.europeanpapers.eu 1101; Editorial Comments, 'Compromising (on) the General Conditionality Mechanism and the Rule of Law' (2021) CMLRev 267.

[3] G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2019) Hague Journal on the Rule of Law 171; M Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2019) European Papers www.europeanpapers.eu 695.

[4] The expression is borrowed from A von Bogdandy and J Łacny, 'Suspension of EU Funds for Breaches of the Rule of Law: A Dose of Tough Love Needed?' (2020) SIEPS European Policy Analysis www.sieps.se.

[5] For a more optimistic account of the newly-established conditionality regime, see N Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (2021) European Papers www.europeanpapers.eu 101. For an analysis of the Regulation, see I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) European Papers www.europeanpapers.eu 721.

[6] For the whole story, see Editorial Comments, 'Compromising (on) the General Conditionality Mechanism and the Rule of Law' cit.; A Baraggia and M Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and its Constitutional Challenges' (2022) German Law Journal 131, 133-141.

[7] Art. 6 and Recital 26 of the Regulation 2020/2092 cit.

[8] *Ibid*. arts 4 and 6.

[9] European Council Conclusions EUCO 22/20 of 10-11 December 2020 paras 1–4.

[10] Case C-657/21 *European Parliament v European Commission* pending.

This *Article* argues that the new EU budget offers yet further, and arguably more promising, ways to defend and foster the EU common values through financial means, especially considering the exceptional increase in EU expenditure resulting from the agreement of the "Next Generation EU" package. Most notably, the *Article* explores the potential and challenges of the EU budget as a values-oriented policy instrument focusing on three elements of the new EU budgetary framework: *i)* the set of fundamental rights "enabling conditions" attached to the European Structural and Investment (ESI) Funds (section 2); *ii)* the Justice, Rights and Values Fund (section 3); and *iii)* the Recovery and Resilience Facility (section 4).

II. Protecting EU values through ESI funds: The new fundamental rights "enabling conditions"

The new Regulation laying down common provisions on the management of European Structural and Investment Funds (Common Provisions Regulation)[11] establishes a set of so-called "enabling conditions", the fulfilment of which is a necessary requirement for the Member States to obtain reimbursement of expenditure operations under ESI funds.[12]

In general terms, such instrument is intended to ensure that the allegedly critical pre-requisites for efficient and effective spending are in place before the disbursement of funds and remain operative throughout the entire financial period. However, one cannot but be struck by the extreme variety of the 20 enabling conditions set out in the new Common Provisions Regulation, which are rather heterogeneous as regards scope, content, and functions. As for the scope, the Regulation draws a distinction between "horizontal" and "thematic" enabling conditions – the former being applicable to all specific spending objectives, while the latter being relevant only for the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+) and the Cohesion Fund.[13] Turning to the content, the enabling conditions relate to various policy areas, ranging from public procurement market and state aid rules to gender equality and fundamental rights. Lastly, they serve a diverse range of functions: for instance, some enabling conditions require compliance with relevant EU law and policy in a particular field and thus perform an enforcement function, while others incentivise the implementation of administrative and structural reforms or the adoption of legislative and regulatory arrangements at national level.

[11] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

[12] Art. 15 and Annexes III and IV Regulation (EU) 2021/1060 cit.

[13] Art. 15(1) Regulation (EU) 2021/1060 cit.

For the purposes of this work, it is sufficient to focus on the following enabling conditions: *i)* the "horizontal" enabling conditions related to the effective application and implementation of the EU Charter of Fundamental Rights (CFR enabling condition) and of the UN Convention on the Rights of Persons with Disabilities;[14] *ii)* the set of "thematic" enabling conditions regarding the policy objective "A more social and inclusive Europe implementing the European Pillar of Social Rights", which make access to the ERDF and ESF+ conditional on a number of requirements concerning gender equality, social inclusion and poverty reduction, integration of Roma people, health and long-term care.[15] These enabling conditions are meant to reinforce the fundamental rights dimension of the Union's budget and to ensure a more values-based use of EU financial resources on the ground. An objective whose importance can hardly be overestimated, given the "visibility" of the Union in EU-financed projects and the recurrent concerns regarding the respect for fundamental rights in the management of ESI funds.[16]

These arrangements are not entirely new in the normative framework governing ESI funds. Indeed, the recourse to enabling conditions fits into the progressive expansion of spending conditionality in EU post-crisis internal governance[17] and, more specifically, takes up the legacy of the *ex ante* conditionalities in force over the last financial period.[18] In a rather similar way, the 2014-2020 *ex ante* conditionalities made in fact access to ESI funds dependent upon prior compliance with a set of conditions concerning, *inter alia*,

[14] Annex III Regulation (EU) 2021/1060 cit.

[15] See the enabling conditions n. 4.2, 4.4, 4.5 and 4.6 listed in Annex IV Regulation (EU) 2021/1060 cit.

[16] See, in particular, the contributions to the European Ombudsman's own-initiative inquiry OI/8/2014/AN on 'Respect of fundamental rights in the implementation of the EU cohesion policy', available at europa.eu. The inquiry was closed in 2015 with a set of policy recommendations addressed to the Commission: see European Ombudsman, Decision closing the own-initiative inquiry OI/8/2014/AN concerning the European Commission (11 May 2015).

[17] See, *inter alia*, V Vişă, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) CYELS 116; J Bachtler and C Mendez, 'Cohesion and the EU Budget: Is Conditionality Undermining Solidarity?' in R Coman, A Crespy and VA Schmidt (eds), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press 2020) 121.

[18] Regulation (EU) 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006, art. 19 and Annex XI; Regulation (EU) 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) 1698/2005, Annex V; Regulation (EU) 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) 2328/2003, (EC) 861/2006, (EC) No 1198/2006 and (EC) 791/2007 and Regulation (EU) 1255/2011 of the European Parliament and of the Council, Annex IV.

non-discrimination, gender equality, and disability.[19] Most notably, Member States needed to fulfil the applicable *ex ante* conditionalities before the disbursement of funds or, exceptionally, by 31 December 2016. Failure to fulfil the relevant conditionalities in time constituted ground for suspending interim payments by the Commission.[20]

Whether the *ex ante* conditionalities actually delivered on their promises is open to debate. The Commission considers the 2014-2020 experience with such policy tool an overwhelming success at many levels, including in terms of strengthening administrative capacity, fostering structural reforms, accelerating the implementation of the EU *acquis*, and improving the overall investment climate in the Member States.[21] In essence, as the Commission concludes, "had it not been for *ex ante* conditionalities, reforms and changes might not have happened or they might have happened at a much slower pace".[22] However, the rather triumphal assessment made by the Commission was met with scepticism by the Court of Auditors, which identified a number of shortcomings both in the design and in the actual implementation of *ex ante* conditionalities, depicting them as "innovative, but not yet effective instruments".[23] As regards the design, the Court of Auditors underlined that the *ex ante* conditionalities were often generic in nature and poorly targeted, and that there were no mechanisms designed to ensure continuous compliance by the Member States after the early-stage assessment and throughout the whole programming period. As for the implementation, the Court of Auditors detected *inter alia* an "overly positive and inconsistent self-assessment by the Member States"[24] and even cases of lack of compliance which were not followed by enforcement by the Commission.[25] Moreover, as noticed by Viorica Viță, the general *ex ante* conditionalities on anti-discrimination, gender and disability have hardly had a positive impact also from the perspective of equality mainstreaming due to the cumbersome applicability rules and assessment procedure, which resulted in greater room for manoeuvre for the Member States and the Commission and, ultimately, in poor compliance.[26]

[19] For the general *ex ante* conditionalities related to anti-discrimination, gender and disability see, in particular, Annex XI, Part II of the Regulation 1303/2013 cit.

[20] For the functioning of *ex ante* conditionalities, see art. 19 of the Regulation 1303/2013 cit.

[21] Commission, *My Region, My Europe, Our Future: Seventh Report on Economic, Social and Territorial Cohesion* ec.europa.eu (hereinafter "Seventh Cohesion Report"); Staff Working Document SWD(2017) 127 final from the Commission of 31 March 2017, 'The Value Added of Ex Ante Conditionalities in the European Structural and Investment Funds'.

[22] Staff Working Document SWD(2017) 127 cit. 19; Seventh Cohesion Report cit. 179.

[23] Court of Auditors, Special Report 15/2017, 'Ex-ante Conditionalities and Performance Reserve in Cohesion: Innovative but Not yet Effective Instruments'. See also, most recently, Court of Auditors, Special Report 24/2021, 'Performance-based Financing in Cohesion Policy: Worthy Ambitions, but Obstacles Remained in the 2014-2020 Period' paras 16–38.

[24] ECA Special Report 15/2017 cit. paras 38-49.

[25] *Ibid.* paras 60-62.

[26] V Viță, 'Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014–2020 Financial Framework' (2017) German Law Journal 993.

The current shape of the 2021-2027 enabling conditions seems to remedy, at least on paper, the most important flaws in the design of *ex ante* conditionalities emerged over the last financial period.

Firstly, all the enabling conditions immediately apply to the specific objectives listed in Annexes III and IV of the new Common Provisions Regulation, without being dependent upon reaching an "applicability threshold" as it was the case for the *ex ante* conditionalities.[27] In the previous regime, an *ex ante* conditionality was indeed "applicable" – in the meaning of art. 2(33) of the former Common Provisions Regulation – only when deemed to be "a concrete and precisely pre-defined critical factor, which is a *prerequisite for* and has a *direct and genuine link to*, and *direct impact on*, the effective and efficient achievement of a specific objective for an investment priority or a Union priority".[28] In addition, even when satisfying all these criteria, the application of an *ex ante* conditionality could be in any case excluded *in concreto* on the basis of the principle of proportionality referred to in art. 19(1) of the Regulation, meaning that the Member States were entitled not to fulfil those conditionalities which appeared to have a relatively small impact on the achievement of the specific spending objectives, considering also the level of support allocated.[29] In essence, the applicability of *ex ante* conditionalities was assessed on a case-by-case basis, depending on the conditions being strictly instrumental and proportionate to the pursuit of the relevant spending objectives. The assessment was first carried out by the Member States and then double-checked by the Commission, which was entrusted with the (not easy) task of evaluating the consistency and adequacy of the information provided.[30] Besides rendering the whole process rather cumbersome, the inclusion of such applicability threshold entailed in practice that certain *ex ante* conditionalities had a much more limited scope than initially expected.[31] For instance, despite being *in abstracto* applicable, the general *ex ante* conditionalities on anti-discrimination, gender equality and disability have found no application in the measures financed under the European Maritime and Fisheries Fund (EMFF) over the 2014-2020 period.[32] More generally, the applicability test provided the Member States with the formal opportunity to have a say on the application of *ex ante* conditionalities to them, with the paradoxical result that an

[27] See arts 19(1) and 2(33) Regulation 1303/2013 cit. For more on the 2014-2020 applicability threshold, see Commission, *Internal Guidance on Ex ante Conditionalities for the European Structural and Investment Funds - Part I* ec.europa.eu (hereinafter: ExAC Guidance).

[28] Art. 2(33) of the Regulation 1303/2013 cit. (emphasis added).

[29] *Ibid*. art. 19(1); ExAC Guidance I cit. 7.

[30] Art. 19(1) and (3) of the Regulation 1303/2013 cit.

[31] For a screening on the applicability of *ex ante* conditionalities based on the analysis of the Member States' programming documents, see M Whilborg and others, *The Implementation of the Provisions in Relation to the* Ex-Ante *Conditionalities during the Programming Phase of the European Structural and Investment (ESI) Funds – Final Report* (Study for the European Commission DG REGIO 2016) 24–40.

[32] On the point, see V Viță, 'Mainstreaming Equality in European Structural and Investment Funds' cit. 1007.

instrument designed to condition Member States' behaviours ended up being conditioned itself by the Member States' assessment.[33] The removal of the applicability test in the design of the 2021-2027 enabling conditions is thus meant to avoid that the Member States could "pick and choose" the applicable conditionalities and greatly eases the Commission's *ex post* assessment tasks.

Secondly, the Commission has taken up the Court of Auditors' suggestion to require the fulfilment of conditionalities throughout the entire financial period, instead of limiting the assessment only to the state of the art at the programming stage.[34] This is probably the most important innovation in the design of enabling conditions, since it mitigates the risks of cosmetic compliance and gives the Commission a more meaningful instrument to address eventual steps back by the Member States occurring after the assessment carried out at the very start of the programming period. In the previous regime, indeed, the assessment of *ex ante* conditionalities ended up being a one-off exercise and, as recently stressed by the Court of Auditors, it is at best "unclear whether the achievements reported in this process had been sustained throughout the entire 2014-2020 period".[35]

Turning to the content, the 2021-2027 fundamental rights enabling conditions largely match the corresponding *ex ante* conditionalities, with only some clarifications to be made on the enabling condition concerning gender equality.[36] By comparing the relevant pieces of legislation, it might be inferred that the scope of the new enabling condition is more limited than the corresponding *ex ante* conditionality since the former is "thematic" and applies only to the ERDF and ESF+, while the latter was "general" and thus covered all ESI funds. However, as anticipated, one should consider that in practice the gender equality *ex ante* conditionality has found no application in some ESI funds in 2014-2020, particularly regarding the EMFF, due to the onerous applicability test envisaged in the previous financial period.[37] Most importantly, as lastly confirmed by the Commission, the new CFR enabling condition "includes gender equality as one of its key principles and applies to all the investments under this regulation [i.e., the Common Provisions Regulation]".[38] The "residual" role of the CFR enabling condition, which largely absorbs fundamental rights issues not covered by specific conditionalities, is also relevant with regard to the former *ex ante* conditionality on anti-discrimination, which is not present among the new enabling conditions but is definitely a cornerstone of the Charter.

[33] Such paradox is highlighted in V Viţă, *Ex Ante Fundamental Rights Conditionalities – A Novel Fundamental Rights Tool in the European Structural and Investment Funds Architecture: Locating in the Broader EU Fundamental Rights Conditionality Landscape* (European University Institute 2014) 83.

[34] Art. 15(6) of the Regulation 2021/1060. Cf. ECA Special Report 15/2017 cit. para. 111, recommendation 1(d).

[35] ECA Special Report 24/2021 cit. para. 26.

[36] See the enabling condition n. 4.2 included in Annex IV Regulation 2021/1060 cit.

[37] V Viţă, 'Mainstreaming Equality in European Structural and Investment Funds' cit. 1007.

[38] Communication COM(2020) 152 from the Commission of 5 March 2020, 'A Union of Equality: Gender Equality Strategy 2020-2025' 16.

That said with regard to the design and content of the fundamental rights enabling conditions, it is worth focusing now on the CFR enabling condition, which represents a distinctive novelty of the new package of conditionalities covering the machinery of ESI funds in 2021-2027.

This is not to say that the Charter played no role in the Union's budget before. The funding instruments of EU home affairs policy in 2014-2020[39] contained indeed some conditionality arrangements related to the Charter.[40] In addition, over the last financial period the Charter has acquired increasing significance also in the overall administration of ESI funds. In particular, it has gained "indirect" – though admittedly limited[41] – relevance as a benchmark for assessing the fulfilment of the fundamental rights *ex ante* conditionalities at the start of the 2014-2020 programming period. Moreover, prompted by the European Ombudsman's inquiry on the respect for fundamental rights in EU cohesion policy,[42] the Commission issued a specific "Guidance" aimed at strengthening compliance with the Charter in the implementation of ESI funds.[43] The document usefully describes how the Charter becomes relevant in the different phases of implementation of ESI funds at national level and contains also a "Fundamental Rights Checklist" with a view to "help Member States screen ESIF implementing measures against the Charter".[44]

Built upon previous practice, the CFR enabling condition is therefore meant to expand the role of, and add teeth to, the Charter in the normative framework governing ESI funds. Being a "horizontal" enabling condition of the new Common Provisions Regulation, it applies to all ESI funds operating in 2021-2027. Therefore, its scope has been significantly extended compared to the previous financial period, where it was confined only to

[39] Art. 3(5) of the Regulation (EU) 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA; art. 3(4) of the Regulation (EU) 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision 574/2007/EC; arts 3(1) and 19(2) of the Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions 573/2007/EC and 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

[40] Suffice it to read the mentioned provisions of the fund-specific regulations with the general financial corrections clause of art. 47 of the Regulation (EU) 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management.

[41] The EU Charter is barely mentioned as a benchmark in the Commission's guidelines for the assessment on the fulfilment of *ex ante* conditionalities: see Commission, *Guidance on Ex ante Conditionalities for the European Structural and Investment Funds – Part II* ec.europa.eu. The only exception is a reference to art. 21 of the Charter in the part concerning the general *ex ante* conditionality on non-discrimination (p. 341).

[42] European Ombudsman Decision on the case OI/8/2014/AN cit. para. 48(i).

[43] Commission, *Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds* europa.eu.

[44] *Ibid*. 1.

home affairs policy funds. In addition, the possibility to check compliance with the Charter throughout the entire programming cycle offers the Commission a more persuasive instrument to ensure respect for the Charter in all phases of implementation of ESI funds at national level. Besides, the CFR enabling condition may offer a new unexpected opportunity to revive the role of the Charter in the rule of law crisis, which has long been advocated by scholars.[45] In the "revolutionary" Court of Justice's case-law on rule of law backsliding[46] the Charter has indeed played a rather limited role so far. This holds particularly true if one considers the block of cases on judicial independence, where the Charter has been mostly[47] eclipsed by the prominent "reinvention" of art. 19(1) TEU,[48] while some counter-examples are offered by the few rule-of-law infringement proceedings not related to judicial independence[49] and the relevant European Arrest Warrant's case-law.[50] The 2021-2027 EU budget might have added a new dimension to the classic deployments of the Charter, making it also a shield against the use of EU financial resources in utter disrespect of fundamental rights. The potential relevance of such a new instrument is

[45] A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 187; J Morijn and D Kochenov, 'Strengthening the Charter's Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing' (2021) EPL 759.

[46] For an overview of the Court's relevant case-law see L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case' (SIEPS 2021:3) SIEPS Report.

[47] The most notable exception is the Court's judgement in joined cases C-585/18, C-624/18, C-625/18 *AK and Others v Sąd Najwyższy (Indépendance de la chambre disciplinaire de la Cour suprême)* ECLI:EU:C:2019:982.

[48] For a recent account on the relation between art. 19 TEU and art. 47 of the Charter, see K Lenaerts, 'The Role of the EU Charter in the Member States' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 23–25. For a critique of the Court's approach on the matter, see N Lazzerini, 'Inapplicabile, ma comunque rilevante? La Carta dei diritti fondamentali nella giurisprudenza recente della Corte di giustizia sull'indipendenza dei giudici nazionali' in *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci* (Cacucci Editore 2019) 171. On the "indirect" effects of the Charter in art. 19-based cases, see A Rasi, 'Effetti indiretti della Carta dei diritti fondamentali? In margine alla sentenza Commissione c. Polonia (Indépendance de la Cour suprême)' (2019) European Papers www.europeanpapers.eu 615.

[49] Case C-78/18 *Commission v Hungary (Transparence associative)* ECLI:EU:C:2020:476; case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792. On the use of the Charter in the former case and, more generally, in rule-of-law infringement proceedings, see M Bonelli, 'European Commission v Hungary (Transparency of Associations) (C-78/18): The "NGOs Case": On How to Use the EU Charter of Fundamental Rights in Infringement Actions' (2021) ELR 258.

[50] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the System of Justice)* ECLI:EU:C:2018:586; joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033. It is however worth reminding that the suitability of using the Charter in the EAW case-law is questioned by scholars: see, most recently, J Morijn and D Kochenov, 'Strengthening the Charter's Role in the Fight for the Rule of Law in the EU' cit. 772–774.

best exemplified by the recent discriminatory practices occurred in some Polish cities which declared themselves "LGBTIQ-free zones"[51] and, at the same time, applied for funding under the "Town Twinning" programme. In the case at hand, the Commission rejected the relative funding applications at the outset,[52] while it is unclear whether it would have been possible to suspend payments at a later stage under the regime in force at that time. Against this background, as recently confirmed by the Commission, the new CFR enabling condition provides a more stable basis for the adoption of these kind of measures throughout the 2021-2027 period and, as already said, it applies to all operations financed by ESI funds and is enforceable at every stage of implementation.[53]

There are however some challenges ahead for the Commission to make effective use of the new enabling conditions, and especially of the one concerning the Charter.

Firstly, while the new Common Provisions Regulation seems to address effectively the main problems in design emerged over the last financial period, it is up to the Commission to fully exploit the potential of these conditionality mechanisms at the enforcement stage. The experience with spending conditionality so far suggests that the Commission essentially relies on voluntary compliance by the Member States, leaving the exercise of its enforcement powers as a very last resort. In practice, in 2014-2020 the Commission has suspended payments for failure to fulfil the *ex ante* conditionalities only in two cases and well after the expiry of the (allegedly) final deadline of 31 December 2016,[54] although there are reported cases of temporary "self-suspensions" by the Member States on selected investment priorities.[55] Since it is implausible to expect loyal cooperation by Member States blatantly disrespecting the EU basic values, the Commission will definitely need to make use of its enforcement powers to avoid that the new tools remain on paper. Despite taken under different funding instruments,[56] the decision to reject grants to Polish cities and regions declaring themselves "LGBTIQ-free zones" is a promising sign in this respect and appears

[51] The matter is also the subject of an infringement procedure launched by the Commission on 15 July 2021: INFR(2021)2077.

[52] The decision was announced by Commissioner Helena Dalli on Twitter on 28 July 2020 twitter.com and later confirmed, despite more cautiously, in a written response to the Parliamentary question E-0044332020 on "Refusal to grant EU funds to cities in Poland which have established so-called LGBT-free zones" (19 October 2020).

[53] Communication COM(2020) 698 final of 12 November 2020 from the Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' 20–21. See also the written answer given by Commissioner Ferreira to Parliamentary question E-003512/2021 on "So-called LGBT-free zones in Poland violate the principle of non-discrimination in EU cohesion policy" (21 October 2021).

[54] The Commission suspended payments against Spain (2018, then lifted in 2019) and Italy (2019): see ECA Special Report 24/2021 cit. paras 33–34.

[55] ECA Special Report 15/2017 cit. paras 61–62.

[56] As said above, the Commission rejected funding applications under the "Town Twinning" programme in 2020. More recently, in September 2021, the Commission threatened to refuse the disbursement of resources under "REACT-EU": see A Wlodarczak-Semczuk and others, 'EU Warns Polish Regions They Could Lose Funding over "LGBT-Free" Zones' (6 September 2021) Reuters www.reuters.com.

to have produced some results in the specific case.[57] Importantly, as anticipated above, the Commission has already confirmed that the new CFR enabling condition might cover this kind of situation[58] and that it is ready to enforce it, if necessary.[59]

Secondly, the CFR enabling condition is formulated in fairly broad terms, as it "only" requires effective application and implementation of the Charter. This element could impact on the effective deployment of the new tool, especially considering its "attractive power" for all fundamental rights issues emerging in ESI funds' implementation. The Commission usually develops guidelines concerning the application of conditionality[60] and this might be the case also for the new enabling conditions. Alternatively, the Commission could explore the possibility of updating the above-mentioned 2016 Guidance as to include a new section on the CFR enabling condition, with a view to guide Member States in ensuring compliance with the Charter when implementing ESI funds.

Finally, somehow backed by the Court of Justice,[61] the Commission has adopted a rather strict interpretation of the Charter's scope of application against national measures financed by ESI funds,[62] while the potential of the "obligation to promote" the rights and principles enshrined in the Charter has remained untapped to date.[63] A greater emphasis on the "positive" dimension of the Charter would definitely make the CFR enabling condition a more significant tool to advance the discourse of fundamental rights in the framework of ESI funds.

[57] A Charlish and A Wlodarczak-Semczuk, 'Three Polish Regions Repeal "LGBT-Free" Declarations' (27 September 2021) Reuters www.reuters.com.

[58] Communication COM(2020) 698 cit. 20–21.

[59] S Fleming and H Foy, 'Poland and Hungary Face Threat to EU Regional Aid over Human Rights Concerns' (22 September 2021) Financial Times www.ft.com.

[60] For instance, this was the case for the 2014-2020 macro-economic conditionalities and the *ex ante* conditionalities.

[61] See, in particular, para. 42 of the Court's judgement in case C-117/14 *Grima Janet Nisttahuz Poclava v Jose María Ariza Toledano* ECLI:EU:C:2015:60, where the Court held that "the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Art. 51(1) of the Charter".

[62] In the Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds, cit. paras 2(2)(2) and 3, the Commission seems to follow the Court's approach when identifying the scope of application of the EU Charter in the implementation of ESI funds. As emerges from the Guidance, the fact that a national measure is financed by EU funds is not *per se* a triggering factor for the application of the Charter, being necessary to show that the national measure is intended to implement an obligation stemming from EU law.

[63] On the point, see V Viţă and K Podstawa, 'When the EU Funds Meet the Charter of Fundamental Rights: On the Applicability of the Charter of Fundamental Rights to EU Funds Implemented at the National Level' (Global Campus Working Paper 2017).

III. Decentralising the "politics of values": The potential of the Justice, Rights and Values Fund

More attention should be paid on the potential of the newly established "Justice, Rights and Values Fund" (JRVF), comprising the "Citizens, Equality, Rights and Values" programme (CERV)[64] and the "Justice" programme.[65] The relative regulations were adopted almost unanimously in April 2021, with only Hungary and Poland (unsurprisingly) voting against in the Council.[66]

The JRVF is part of the "Cohesion, resilience and values" heading of the 2021-2027 Multiannual Financial Framework (MFF)[67] and will be implemented under *direct* or *indirect* management.[68] Hence, JRVF financial resources will not be channelled through governmental bodies of the Member States (*shared* management) and will be managed by the Commission either directly or indirectly[69] – an element of crucial importance in light of the objectives and features of the new instrument, as will be detailed below.

The CERV programme has four different strands reflecting distinct policy objectives: *i)* the *Union values* strand, which upholds the protection and promotion of EU values with a particular focus on the empowerment of civil society organisations; *ii)* the *Equality, rights and gender equality* strand, aiming at promoting non-discrimination and equality, including gender equality, and the mainstreaming thereof; *iii)* the *Citizens' engagement and participation* strand, which is designed to promote exchanges between citizens of different countries and to raise awareness of their common European history; *iv)* the *Daphne* strand, that is intended to prevent and combat violence and especially gender-based violence, in line with the Istanbul Convention.[70] The Justice programme, instead, focuses essentially on supporting judicial cooperation and training, as well as on facilitating effective and non-discriminatory access to justice and effective remedy, with a view to "contributing to the further development of a European area of justice based on the rule of law".[71]

[64] Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014.

[65] Regulation (EU) 2021/693 of the European Parliament and of the Council of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) No 1382/2013.

[66] The relative voting results are available at www.consilium.europa.eu (CERV programme) and www.consilium.europa.eu (Justice programme).

[67] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

[68] Art. 9(1) of the Regulation (EU)2021/692 cit.; art. 7(1) of the Regulation (EU)2021/693 cit.

[69] The different methods of budget implementation are laid down in arts 62 and 63 of the Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

[70] Arts 2-6 of the Regulation 2021/692 cit.

[71] Art. 3 of the Regulation 2021/693 cit.

To be accurate, the JRVF is not an entirely new heading in the EU budget, deriving partly from the repackaging of previous programmes. Most notably, the CERV programme incorporates the "Rights, Equality and Citizenship"[72] and the "Europe for citizens"[73] programmes operating in 2014-2020, while the Justice programme replaces the homonymous programme in force over the last financial period.[74] However, while the initial Commission's proposals were essentially in line with the 2014-2020 predecessors both in financial size and substantive arrangements, some fundamental ameliorative amendments have been adopted at the final stages of the institutional negotiations.

To start, the JRVF financial size was almost doubled compared to the Commission's proposals. In particular, the CERV financial envelope of 641 million euro was increased by an additional allocation of 800 million euro (in 2018 prices) financed through revenue from competition fines.[75] By adding the Justice programme's allocation of 305 million euro,[76] the overall funding available under the JRVF reaches the total amount of around 1,8 billion euro in current prices, which represents a considerable increase if compared with the initial proposal of 946 million euro.

Moreover, thanks to the decisive impulse of the European Parliament,[77] the *Union values* strand was added alongside the other specific objectives of the CERV[78] and was allocated almost half of the overall CERV financial envelope, becoming the first heading of the programme in financial terms.[79] As anticipated, the *Union values* strand is primarily aimed at providing financial support to civil society organisations which are active at local, regional, national and transnational level in protecting and promoting the EU founding values.[80] The strategic role of civil society organisations in fostering EU values on the ground is also supported by the earmarking provision set out in art. 7(5) of the Regulation, according to which at least 50% of amounts devoted to the *Union values* and *Equality, rights and gender equality* strands shall be allocated to civil society organisations, of which at least 40% to the local and regional ones.[81]

[72] Regulation (EU)1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020.

[73] Council Regulation (EU)390/2014 of 14 April 2014 establishing the "Europe for Citizens" programme for the period 2014 to 2020.

[74] Regulation (EU)1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020.

[75] Art. 7(2) of the Regulation 2021/692 cit.; art. 5(1) and Annex II of the Regulation 2020/2093 cit.

[76] Art. 5(1) of the Regulation 2021/693 cit.

[77] European Parliament resolution P8_TA(2019)0407 of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Rights and Values programme, art. 2(a).

[78] Art. 2(2)(a) of the Regulation 2021/692 cit.

[79] *Ibid*. art. 7(3)(a) and (4)(a).

[80] *Ibid*. art. 3.

[81] *Ibid*. art. 7(5).

The creation of such an instrument, which was long advocated by civil society organisations[82] and then found fertile ground in EU institutional circles,[83] is of critical importance. The shrinking of funding is indeed one of the most pressing challenges facing civil society organisations over recent years, as highlighted *inter alia* by the EU Agency for Fundamental Rights.[84] As is known, the problem is even more evident in Member States experiencing democratic backsliding and especially in Hungary,[85] where the chances of gaining external funding have been drastically curtailed[86] while governmental funding has become ever more politicised over the last decade.[87] At the end of his mission in Hungary, the UN Special Rapporteur on the Situation of Human Rights Defenders expressed concern for the lack of access by Hungarian civil society organisations to independent funding, noting also that the EU's practice of channelling its financial resources through governmental agencies could even exacerbate the issue, as "the discontinuation of funding can be used as a tool to silence dissent or encourage self-censorship".[88] For this reason, already in 2017 the Special Rapporteur urged "the European Union [to] review its policy on funding civil society organizations exclusively through the State budget and explore alternative sources and means of funding for independent civil society, with a view to ensuring free and non-politicized access to funding, including small grants, for all civil society organizations".[89]

[82] Among the various initiatives, it suffices to remind that in December 2017 more than 70 civil society organisations from different EU countries called for the establishment of the so-called 'European Values Instrument' (EVI): see 'Towards a Value-Driven European Policy: European CSOs Call for The Instrument to Support European Values in Europe' (2017) www.europuls.ro.

[83] See, *inter alia*, Opinion of the European Economic and Social Committee of 19 October 2017 on 'Financing of civil society organisations by the EU' para. 6(8); Resolution P8_TA(2018)0184 of the European Parliament of 19 April 2018 on the need to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at local and national level.

[84] EU Agency for Fundamental Rights, *Challenges Facing Civil Society Organisations Working on Human Rights in the EU* fra.europa.eu 29-37. Most recently, EU Agency for Fundamental Rights, *Protecting Civic Space in the EU* fra.europa.eu 39-45.

[85] CoE Commissioner for Human Rights, 'Report on Hungary Following Her Visit to the Country in February 2019' (21 May 2019) CommDH(2019)13 paras 45–86. See, most recently, Staff Working Document SWD(2021) 714 final from the Commission of 20 July 2021, '2021 Rule of Law Report – Country Chapter on the rule of law situation in Hungary' 25–27.

[86] In February 2021, the Commission sent a letter of formal notice under art. 260(2) TFEU to Hungary for failing to comply with the so-called 'Lex NGO' judgement (*Commission v Hungary (Transparence associative)* cit.). In April 2021, a new law repealing the "Lex NGO" law was adopted, but it is at least questionable whether it has brought substantial improvements: L Gall, 'Hungary's Scrapping of NGO Law Insufficient to Protect Civil Society' (23 April 2021) Human Rights Watch www.hrw.org.

[87] Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Hungary (2017) A/HRC/34/52/Add.2.

[88] *Ibid*. paras 102–103.

[89] *Ibid*. paras 113.

Under this lens, one cannot but appreciate the choice of administering CERV resources under direct or indirect management, as it allows to provide civil society organisations with access to funding without further involvement of national governmental authorities. Yet, it remains to be seen whether the new funding instrument will adequately address the difficulties facing civil society organisations, and especially smaller grassroots organisations, in accessing EU funding. As emerged in the 2021 FRA Report "Protecting Civic Space in the EU", the high level of bureaucracy and the provision of strict eligibility criteria, including in terms of co-financing requirements,[90] are still significant hurdles to cope with.[91]

On a different level, the Regulation witnesses an increasing awareness of the particular challenges facing civil society organisations committed in areas – such as gender equality, gender-based violence, sexual and reproductive health, and LGBTIQ rights – which have become the target of conservative agendas in backsliding Member States. To give a few examples, the Fundamental Rights Agency stressed how "organisations involved in litigation and advocacy in the fields of domestic violence, women's rights and gender equality did not receive any direct government funding other than the 1% contributions from personal income tax" in Hungary.[92] At the end of her visit in Poland, the CoE Commissioner for Human Rights noticed with concern that "the abrupt and/or unexplained interruption of access to central government funding which affected several well established and reputable women's rights organisations has led these to limit the scope of their activities, close offices, increase reliance on volunteer or pro bono work, and increase the average waiting time for victims to obtain counselling or therapeutic support".[93] Hence, it is no coincidence that Recital 12 of the CERV regulation emphasises the importance of granting funding to civil society organisations working in these fields, stating in a crystal-clear manner that "all those activities seek to promote key values of the Union and *ought* therefore *to be supported* throughout the Union, *without exception*".[94]

Lastly, it is worth emphasising how the decision to grant direct financing to civil society organisations working in challenging contexts may signal a growing acknowledgment of the often overlooked "societal dimension" of rule of law and democratic backsliding in the EU, which demands greater attention on bottom-up forms of engagement and promotion of the rule of law rather than on top-down monitoring and enforcement by EU

[90] Actually, the CERV co-financing rate is set pretty low – *i.e.*, no more than 10 per cent of total eligible costs (see Commission Implementing Decision C(2021) 2583 of 19 April 2021, 12) – but may still represent an obstacle especially for smaller civil society organisations.

[91] EU Agency for Fundamental Rights, 'Protecting Civic Space in the EU' cit. 42.

[92] EU Agency for Fundamental Rights, 'Challenges Facing Civil Society Organisations Working on Human Rights in the EU' cit. 30.

[93] CoE Commissioner for Human Rights, 'Report on Poland Following Her Visit to the Country in March 2019' (28 June 2019) CommDH(2019)17 para. 125.

[94] Recital 12 of the Regulation 2021/692 cit. (emphasis added).

institutions, however important it may be.[95] The CERV programme may in fact contribute to shaping a more proactive role for the EU institutions, especially for the Commission, in empowering civil society and enabling domestic *contre-pouvoirs* to act as a bulwark against democratic decline. In addition, it may pave the way for a more direct "channel of dialogue" between the EU institutions and civil society, unmediated by national authorities, and supports a greater decentralisation of the politics of values, which is crucial to stimulate genuinely democratic changes at domestic level.

IV. The Recovery and Resilience Facility: Shaping Europe's recovery in line with EU values

Finally, also considering its exceptional volume[96] and the delicate moment facing European economies in times of pandemic, the Recovery and Resilience Facility (RRF) may prove an extremely powerful instrument to stimulate compliance with, and support the advancement of, the Union's values through financial incentives – and the Commission is already testing its potential, as will be said below.

As is known, in order to be eligible for financial support under the RRF, Member States are required to submit a "Recovery and resilience plan" (RRP)[97] detailing the set of measures to be financed under the mechanism, which are then subject to assessment by the Commission and finally approved by the Council by means of an implementing decision.[98] Payments of financial contributions and loans are conditional upon the previous fulfilment of the milestones and targets set out in the Council's implementing decision.[99] Hence, although the RRF and other NGEU-related instruments mark at least a temporary departure from the controversial vocabulary of "strict conditionality" in vogue during the Eurozone crisis,[100] RRF financial resources are anything but "*blank cheques*" and can only be used to support the implementation of measures which are consistent with the policy objectives set by the Union.

[95] On the "societal dimension" of democratic backsliding, see P Blokker, 'The Democracy and Rule of Law Crises in the European Union and Its Member States' (RECONNECT Deliverable 2021). See also the Special Issue edited by A Buyse and others, 'Rule of Law from Below' (2021) Utrecht Law Review 1.

[96] The RRF is allocated the overall amount of 672,5 billion euro, covering almost 90 per cent of the whole NGEU's financial envelope of 750 billion euro: see art. 2(2)(a)(ii) and (c) of the Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

[97] National RRPs and related documents are available at ec.europa.eu.

[98] Arts 18-20 of the Regulation (EU)2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

[99] *Ibid*. art. 24.

[100] P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) LIEI 337 and 350–352.

For our purposes, two main elements need to be considered: *i)* the embedment of the RRF in the European Semester cycle; *ii)* the link between the RRF and the European Pillar of Social Rights (EPSR), with special regard to the gender equality dimension.

As regards the first element, suffice it to remind here that since 2013 the European Semester has increasingly included considerations over issues related to the principles of the rule of law,[101] so that it is frequently presented as part of the EU rule-of-law toolbox.[102] According to the Commission, the combination of the European Semester and the EU Justice Scoreboard constitutes indeed a "good framework to develop country-knowledge relating to rule of law".[103] In fact, topics such as the organisation of national judiciaries and judicial independence,[104] the functioning of public administration systems and anti-corruption frameworks,[105] as well as media freedom and the independence of academic and research fora,[106] have become ever more present among the lines of the Country-Specific Recommendations (CSRs) issued annually by the Council, contributing to shape a growing rule-of-law dimension of the European Semester.

That said, the overall rate of implementation of CSRs has remained very low over the years[107] and the picture does not change if one looks at the rule-of-law related ones. For instance, the 2020 Country Report on Hungary indicates that "no progress" was made to reinforce the anti-corruption framework, strengthen judicial independence, and improve prosecutorial efforts and access to public information, as to meet the 2019 CSRs.[108] The low level of compliance by the Member States is one of the elements prompting the Commission to enhance the link between the EU budget and the European Semester, as to develop a framework of sanctions and incentives to stimulate CSRs' implementation. As examples of this tendency, one may refer to the CSRs-related macroeconomic conditionality included in the 2014-2020 Common Provisions Regulation,[109] as well as to the Structural Reform

[101] The 2013 Annual Growth Survey first referred to the improvement of the quality, independence and efficiency of national judicial systems as a growth factor: Communication COM(2012) 750 final from the Commission of 28 November 2012, 'Annual Growth Survey 2013'.

[102] L Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (RECONNECT Working Paper 7/2020) 26–28.

[103] Communication COM(2019) 163 final from the Commission of 3 April 2019, 'Further strengthening the Rule of Law within the Union: State of play and possible next steps' 9.

[104] See, in particular, the CSRs addressed to Hungary (2019), Malta (2019-2020), Poland (2020), and Slovakia (2019-2020). The 2019 CSRs are available in OJ C-301 of 5 September 2019, while the 2020 CSRs are included in OJ C-282 of 26 August 2020.

[105] CSRs Hungary (2019), Malta (2019), and Slovakia (2019).

[106] CSRs Hungary (2019); Commission Staff Working Document SWD(2020) 516 final of 26 February 2020, 'Country Report Hungary 2020'.

[107] Court of Auditors Special Report 16/2020, 'The European Semester – Country Specific Recommendations address important issues but need better implementation'.

[108] Commission SWD(2020) 516 cit. 17.

[109] Art. 23(1)(a) of the Regulation 1303/2013 cit.

Support Programme.[110] In line with the recommendations of the Court of Auditors,[111] the architecture of the emerging EU budgetary framework for the coming years further confirms this trend, and the RRF is undoubtedly the most important instrument in this regard.

The RRF is indeed fully ingrained in the European Semester cycle. The effective contribution to address the challenges identified in the context of the European Semester, and especially in the CSRs issued in 2019 and 2020, represents a key element in the design of the national RRPs[112] and will be subject to specific assessment by the Commission.[113] As further detailed in the relevant Guidance, "unless the Commission has assessed the progress with these recommendations as 'substantial progress' or 'full implementation', all country-specific recommendations are considered to be relevant".[114] Most importantly, the Guidance stresses that "reforms linked to [...] the *effectiveness of justice systems*, and in a broader sense *respect of the Rule of Law* are essential elements of the Member States' overall recovery strategy".[115]

Under this lens, it is hardly necessary to explain why early commentators have celebrated the RRF's embedment in the European Semester, crystallised in the political agreement reached at the end of the European Council's marathon-meeting of July 2020,[116] as a potentially big step forward for the rule of law, even "Christmas in July".[117] For instance, according to the very wording of the Regulation and related documents, Hungary should describe how the national RRP contributes to address effectively longstanding issues such as the controversial reshaping of the justice system, the country's high exposure to corruption, the increasingly polarised media environment, or the legislation undermining the independence of academic and research bodies. Along the same lines, to access RRF funding Polish authorities should take effective action to restore judicial independence and to guarantee the efficiency and quality of the justice system, as required by the 2020 CSRs. In other words, the Regulation provides a legal basis – albeit, admittedly, a rather subtle one – for linking RRF spending to rule-of-law compliance, at least in so far as national challenges to the rule of law are reflected in the relevant CSRs.

[110] Regulation 2017/825 of the European Parliament and of the Council of 17 May 2017 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020 and amending Regulations 1303/2013 and 1305/2013.

[111] ECA Special Report 16/2020 cit. paras 41-44 and 63 (Recommendation 3).

[112] Arts 17(3) and 18(4)(b) of the Regulation (EU) 2021/241 cit.

[113] *Ibid*. art. 19(2) and (3)(b).

[114] Commission Staff Working Document SWD(2021) 12 final of 21 January 2021, 'Guidance to Member States - Recovery and Resilience Plans, Part I' 8.

[115] *Ibid*. 9 (emphasis added).

[116] European Council Conclusions of 17-21 July 2020, EUCO 10/20 para. A19.

[117] J Morijn, 'Op-Ed: "The July 2020 Special European Council, the EU Budget(s) and the Rule of Law: Reading the European Council Conclusions in Their Legal and Policy Context"' (23 July 2020) EU Law Live eulawlive.com.

At the time of writing, the Commission is already exploiting the RRF's firepower against the two countries. While most Member States have already received the first tranche of payments,[118] Hungary and Poland are still waiting for the Commission's approval of the RRPs submitted in May 2021 and, as time goes by, it has become apparent that the delay primarily relates to rule of law concerns.[119] Most notably, it appears that the approval of the Hungarian RRP has been halted mainly due to fears over the reliability of the anti-corruption framework, while judicial independence and the questioning of the primacy of EU law are the key issues at stake for Poland.[120] At the moment, it is not clear what the next steps will be, especially following the much-controversial ruling of the Polish Constitutional Tribunal of 7 October 2021.[121] In any case, the eventual approval of the plans is likely to come with strict milestones and targets attached, so that the Commission could retain leverage over the two countries should the agreed reforms not be implemented.[122] Be that as it may, the Commission's delay in giving the green light to the plans can already be considered the most serious, if not the first real, financial sanction ever proposed to counter democratic backsliding in Hungary and Poland.[123]

Beyond the link with the European Semester, the second element to be briefly outlined here is the connection between the RRF and the European Pillar of Social Rights, with special regard to gender equality – which is listed among the EPSR principles and whose relevance is emphasised in the Regulation and related documents.

According to art. 18 of the Regulation, the national RRPs should indeed detail how the proposed measures would contribute to the implementation of the European Pillar of Social Rights, as well as to gender equality and equal opportunities for all and the mainstreaming of those objectives.[124] On this last point, as further specified in the Commission's Guidance, Member States are thus not only required to explain "how the reforms and investments supported by the plan will be instrumental in overcoming the equality challenges identified", but also to "demonstrate that the objectives of gender equality and equal opportunities for all are mainstreamed into the plan, i.e. that the plan promotes the integration of gender equality and equal opportunities for all across the six pillars [of the RRF]".[125]

[118] By the end of December 2021, the Commission had already disbursed pre-financing payments to 18 Member States: see ec.europa.eu.

[119] Euronews, 'Brussels Admits Link between COVID Cash Delays and EU Values Respect' (10 September 2021) Euronews www.euronews.com.

[120] *Ibid.* See also the answers of Commissioner Dombrovskis at the press conference of the informal meeting of economy and finance ministers of 6 September 2021, available at video.consilium.europa.eu.

[121] Constitutional Tribunal of Poland judgment of 7 October 2021 n. K3/21.

[122] Euractiv, 'EU Mulls Approving Hungary, Poland Recovery Plans, with Conditions' (1 October 2021) www.euractiv.com.

[123] See also T Nguyen, 'How Much Money is a Lot of Money?' (17 September 2021) Verfassungsblog verfassungsblog.de.

[124] Art. 18(4)(c) and (o) of the Regulation (EU) 2021/241 cit.

[125] Commission SWD(2021) 12 cit. 11.

The *liaison* with the European Pillar of Social Rights and the focus on equality mainstreaming enriches the values-based dimension of the RRF by promising closer attention on civil and social rights, which are hardly considered within the European Semester. This takes on further relevance in a moment when the pandemic has exacerbated existing inequalities and the path towards the green and digital transition may have non-negligible social costs in the short-term. Yet, the promise of greater consideration of gender equality and, more generally, equality mainstreaming needs to be thoroughly scrutinised over coming years. In a recent report on gender mainstreaming in the EU budget, the Court of Auditors has indeed evidenced a significant mismatch between the longstanding commitments at high level and the relatively poor record when it comes to budgetary implementation.[126] Echoing the findings of the report, the European Parliament has recently advocated for real and meaningful gender budgeting, calling the Commission "to systematically collect, analyse and report on existing sex-disaggregated data for the implementation of the RRF".[127]

This is definitely one of the most difficult, and yet pressing, challenges facing the Commission. In the same resolution of 10 June 2021, the European Parliament has shown to be "deeply concerned that most recovery and resilience plans fall short of significantly contributing to and mainstreaming these objectives and fail to include explicit and concrete measures to address the issue of gender inequality".[128] In addition, it is hardly necessary to remind that gender equality and the protection of sexual and reproductive rights and the rights of LGBTIQ persons are not a priority for illiberal forces governing in backsliding Member States,[129] and this is already affecting the EU's approach on the matter. Suffice it to mention the case of the European Council's declaration issued at the end of the Porto Social Summit,[130] where any reference to gender equality was avoided following pressures from Hungary and Poland.[131] The attempt by these countries to shape the Union's agenda from within is further confirmed by a set of unilateral statements attached to various budgetary instruments, including the Common Provisions Regulation[132] and the Justice programme,[133]

[126] Court of Auditors, Special Report 10/2021, 'Gender mainstreaming in the EU budget: Time to turn words into action'.

[127] Resolution P9_TA(2021)0288 of the European Parliament of 10 June 2021 on the views of Parliament on the ongoing assessment by the Commission and the Council of the national recovery and resilience plans para. 26. Cf. also Resolution P9_TA(2021)0276 of the European Parliament of 9 June 2021 on the gender dimension in Cohesion Policy para. 24.

[128] Resolution P9_TA(2021)0288 of the European Parliament cit. para. 26.

[129] S Mancini and N Palazzo, 'The Body of the Nation: Illiberalism and Gender' in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021) 403.

[130] European Council Press release, 'The Porto Declaration' (8 May 2021).

[131] G Baczynska, 'Poland, Hungary Block "Gender Equality" from EU Social Summit' (8 May 2021) Reuters www.reuters.com.

[132] Interinstitutional File 2018/0196(COD), Doc. 8851/21 ADD 1 REV 1 of 25 May 2021.

[133] Interinstitutional File 2018/0208(COD), Doc. CM 2773/21 of 19 April 2021.

where Hungary and Poland held to specify that they will interpret "gender equality" merely as equality between women and men. Actually, the use of "gender equality" by the EU institutions is anchored to the man-woman dichotomy as well,[134] but the unilateral statements mentioned above are only the latest expression of the anti-LGBTIQ rhetoric in vogue in illiberal countries and call for greater attention on the part of the Commission in the assessment of the relative RRPs. Drawing clear "red lines" is of the utmost importance here,[135] as to avoid that EU financial resources would finance discriminatory practices.

The RRF undoubtedly offers the Commission and the Council a great opportunity for advancing compliance with the CSRs and contributing to implement the European Pillar of Social Rights, including the principles of gender equality and equal opportunities. To this end, as lastly evidenced by the European Parliament,[136] it is crucial to scrupulously assess RRPs at the beginning – setting out clear milestones and targets as regards rule-of-law related CSRs, the European Pillar of Social Rights, and equality mainstreaming – and to rigorously monitor the implementation of national plans in the coming years, as to avoid deviations not in line with the EU basic values. The risk is that, also due to time pressures, the design and actual implementation of RRPs downgrade the ambitions of the mechanism, transforming the RRF template in a futile "box-ticking" exercise.[137] Moreover, further challenges may derive from the pitfalls of the RRF governance structure: the required approval of RRPs by the Council and the possible activation of the emergency brake before the European Council may indeed pave the way for undue politicisation in the scrutiny of national plans.[138] In this light, albeit probably coherent with the features of the NGEU legal architecture,[139] the failure to envisage a more meaningful role for the European Parliament beyond the "right of information"[140] is regrettable not only in terms of democratic legitimacy,[141] but also in that it greatly reduces the Parliament's bargaining

[134] *E.g.*, the very first lines of the Commission's Gender Equality Strategy for 2020-2025 confirm that "gender equality" is intended as equality between men and women: Communication COM(2020) 152 cit.

[135] A von Bogdandy and others, 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines' (2018) CMLRev 983; most recently, A von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) CMLRev 705 and 732–734.

[136] Resolution P9_TA(2021)0288 of the European Parliament cit. para. 39.

[137] On the point see J Pisani-Ferry, 'European Union Recovery Funds: Strings Attached, but Not Tied up in Knots' (2020) Bruegel www.bruegel.org 5.

[138] See F Corti and J Núñez Ferrer, 'Steering and Monitoring the Recovery and Resilience Plans: Reading between the Lines' (CEPS 2-2021) 13–14.

[139] B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 635, 677.

[140] Cf. Resolution P9_TA(2021)0257 of the European Parliament of 20 May 2021 on the right of information of the Parliament regarding the ongoing assessment of the national recovery and resilience plans.

[141] The problems of "democratic stagnation" were already clear at the very beginning: F Costamagna and M Goldmann, 'Constitutional Innovation, Democratic Stagnation? The EU Recovery Plan' (30 May 2020) Verfassungsblog verfassungsblog.de.

power when acting as a "watchdog" on the respect for EU values in the implementation of the largest stimulus package ever adopted by the European Union.

V. Conclusions

According to Daniel Kelemen, EU funding is one of the three pillars underpinning the "authoritarian equilibrium" where the EU has become trapped.[142] Notwithstanding the EU's alleged commitment to liberal democratic values, its financial resources have ended up supporting the consolidation of hybrid autocratic rule in the very map of Europe, the author argues.[143]

This *Article* showed that the new EU budgetary framework offers valuable instruments to reverse this tendency. Even leaving aside the much-debated rule of law conditionality regime introduced at the end of 2020, the EU institutions – and especially the Commission – have now several tools at their disposal to protect, promote and enforce the Union's values through financial means.

First of all, there are more effective instruments to *protect* the EU common values in the management of EU financial resources by national authorities. Most notably, the new fundamental rights enabling conditions are definitely better crafted than the analogue *ex ante* conditionalities in force during the 2014-2020 financial period, being immediately applicable to all measures financed under ESI funds and enforceable at every stage of implementation. Among them, the "horizontal" enabling condition related to the EU Charter is a particularly worthy addition as it provides the Commission with a versatile tool to manage virtually all fundamental rights issues emerging in the implementation of ESI funds at national level. It is regrettable, however, that similar mechanisms have not been envisaged for the management of the RRF, where the protection of fundamental rights is ensured only indirectly, and to a limited extent, through the connection with the European Pillar of Social Rights.

Secondly, the EU budget appears to be better equipped also from the perspective of the *promotion* of the Union's values. This holds particularly true following the creation of the Justice, Rights and Values Fund, which has been double-sized in financial terms compared with initial proposals and is mostly devoted to the financing of civil society organisations. Specifically, the *Union values* strand of the CERV programme may prove of critical importance by providing much-needed financial support to civil society organisations working in backsliding Member States and by stimulating greater decentralisation and bottom-up engagement in the "politics of values". This initiative usefully complements the top-down political and judicial actions in defence of the EU values and reveals an increasing acknowledgment of the "societal dimension" of democratic backsliding occurring in some EU Member States. On a different level, *i.e.* in the relations between the

[142] RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) Journal of European Public Policy 481.

[143] *Ibid*. 490-491.

Union and the Member States, the potential of the Union's budget as a tool to promote the EU common values is also reinforced by the other instruments discussed in this *Article.* Most notably, the RRF conditionality toolbox may help the Commission steer the use of financial resources towards addressing rule-of-law structural issues in the Member States and towards the implementation of the European Pillar of Social Rights, including in terms of gender equality. In addition, the CFR enabling condition might be usefully exploited to give substance to the obligation to promote the rights and principles enclosed in the Charter, as required by the less-known part of art. 51(1) of the Charter.

Thirdly, the EU budget is an ever more powerful instrument to *enforce* compliance with the EU common values, especially in light of the exceptional increase in EU public expenditure resulting from the agreement of the NGEU package. As seen above, albeit of course intended also to preserve the integrity of EU spending, the Commission's decision to delay the approval of the Hungarian and Polish RRPs seems to be primarily a way to enforce respect for the principles of the rule of law against recalcitrant Member States. Considering also the huge volume of financial resources at stake, the Commission wields enormous leverage by controlling access to the RRF, much more than that exerted even as a result of the highest penalty payment ever imposed by the Court of Justice in a single case.[144] As explained, the Commission's approach finds a justification in the text of the Regulation which, by embedding the RRF in the European Semester's machinery, provides a legal basis for linking RRF spending to the implementation of relevant country-specific recommendations, including those concerning rule-of-law structural issues. However, one may wonder whether this prolonged use of the RRF as a rule-of-law tool *in lieu* of an instrument – *i.e*. the conditionality regime laid down in Regulation 2020/2092 – which was (at least also) created for that purpose but is to date controversially halted by the Commission, is actually reasonable. It is also worth considering, in this respect, that the Commission's choice is not without "costs" for the Union, to the extent that the use of the RRF as an instrument to "buy" compliance with rule-of-law principles may entail the sacrifice of the important EU policy objectives pursued through this funding scheme – *e.g*. mitigating the economic and social impact of the pandemic crisis or supporting the green transition.[145]

To conclude, the financial tools discussed above, each with its own specific aim and features, all contribute to shape the Union's budget as a more values-oriented policy instrument for the coming years. This is certainly positive, especially in a moment when the EU budget is entering an era of increasing centrality in the trajectories of European integration. It is now up to the Commission – as the guardian of the Treaties as well as the main institution in charge for the implementation of the budget and the management of EU funds – to make effective use of the growing financial means at its disposal.

[144] I refer to the Order of the Vice-President of the Court in the case C-204/21R *Commission v Poland* ECLI:EU:C:2021:878, which imposed a daily penalty payment of 1 million euro as an interim measure in the context of the pending infringement procedure concerning the disciplinary regime for judges in Poland.

[145] The general and specific objectives of the RRF are listed in art. 4 of the Regulation 2021/241 cit.

ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

Edited by Matteo Bonelli, Monica Claes, Bruno De Witte *and* Karolina Podstawa

THE RISE AND FALL OF RULE OF LAW CONDITIONALITY

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ABSTRACT: During the last decade, a deterioration of the respect for the EU's common values occurred. On the EU level, various procedures and instruments have been created and applied to cope with the crisis. The latest instrument, Regulation 2020/2092, was designed to establish a rule of law conditionality mechanism but has turned out as a budget conditionality mechanism. This *Article* examines the evolution and nature of the conditionality mechanism in said Regulation and shows why rule of law conditionality can currently rather be located in the financial instruments breathing life into the EU Green Deal than in the so-called rule of law conditionality Regulation.

KEYWORDS: rule of law – conditionality – EU Green Deal – financial assistance – enforcement – funds.

I. INTRODUCTION

Since the 2010 financial and sovereign debt crisis, a phenomenon called rule of law and democratic backsliding[1] has become increasingly salient in the Member States (MS) of the EU. A deterioration of the EU's common values in art. 2 TEU could be observed especially in some of the newer Member States: after some time, the EU institutions launched several initiatives to address the emerging crisis: the European Commission (Commission)

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[1] On the term, see KL Scheppele and L Pech, 'What is Rule of Law Backsliding?' (2 March 2018) VerfassungsBlog www.verfassungsblog.de.

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triggered an art. 7 TEU procedure concerning Poland,[2] the European Parliament did so regarding Hungary;[3] besides, cases against Poland[4] and Hungary[5] were brought before the Court of Justice of the European Union (CJEU). In 2020, the Commission highlighted "prevention and promotion" and "response" as the two main limbs of tackling the rule of law crisis. The latter category consists of four instruments: *(i)* the Rule of Law Framework (dialogue),[6] *(ii)* the art. 7 TEU procedure (political sanctions), *(iii)* infringements pursuant to art. 258 TFEU (judicial determination and enforcement), and, most recently, *(iv)* "a proposed regime of conditionality to protect the EU budget" (administrative enforcement). Moreover, the instruments that breathe life into the European Green Deal, REACT-EU,[7] the Recovery and Resilience Facility,[8] and the envisaged Just Transition Fund[9] and InvestEU,[10] contain links to the "horizontal financial rules" of the newly established regime of conditionality in Regulation 2020/2092 (hereinafter: the Regulation).[11]

This *Article* aims at analysing the new rule of law conditionality regime from various angles. Section II explains the road to rule of law conditionality. Section III analyses the critical aspects of the Regulation such as its legal basis, scope of application and relationship with other procedures. That section also shows why the Regulation has been transformed to an instrument of budget conditionality and focuses on the Court of Justice's findings in two actions for annulment brought against the Regulation.[12] Then, section IV

[2] Communication COM(2019) 163 final from the Commission of 3 April 2019 on Further strengthening the Rule of Law within the Union, 3-6.

[3] European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland* www.europa.eu.

[4] Most importantly, case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

[5] Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687; case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792; case C-78/18 *Commission v Hungary (Transparency of associations)* ECLI:EU:C:2020:476.

[6] Communication COM(2014) 158 final from the Commission to the European Parliament and the Council of 11 March 2014 on A new EU Framework to strengthen the Rule of Law.

[7] Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU), recitals 7, 23, art. 92(b).

[8] Recital 71 of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

[9] Recital 9 of Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund.

[10] Recital 65 of Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017.

[11] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[12] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97; case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

shifts the focus to some of the instruments breathing life into the European Green Deal, where rule of law conditionality has been applied by the Commission even without applying the Regulation in the stricter sense. Thereby, the *Article* puts the recent application of rule of law conditionality in the broader context of EU budget conditionality.

II. The road to rule of law conditionality

After (potential) threats to the rule of law have been brought to the surface, the Commission has developed a toolkit for containing the deteriorating respect for the rule of law (as one of the common values of Art. 2 TEU) by some Member States.[13] In the area of "prevention & promotion", one of the two main limbs of tackling the rule of law crisis,[14] the Commission mentions the following instruments: European Rule of Law Mechanism, EU Justice Scoreboard, European Semester; Cooperation and Verification Mechanism, support for civil society, networks and projects, and structural reforms. The other limb "response" consists of four instruments: *(i)* the Rule of Law Framework (dialogue), *(ii)* the art. 7 TEU procedure (political sanctions), *(iii)* infringements pursuant to art. 258 TFEU (judicial determination and enforcement), and, most recently, *(iv)* a regime of conditionality to protect the EU budget (administrative enforcement). In the end of 2021, the Regulation has been adopted, but a closer look on the underlying conditionality mechanism reveals that there is not much left of the initial idea of a conditionality mechanism based on the compliance with the rule of law.

Following the blueprint of the International Monetary Fund's (IMF)[15] and the World Bank's[16] policies, the EU has applied conditionality since the 1980s. Human rights clauses have been inserted to international agreements in the form of *ex-ante* or *ex-post* (ie conditionality is applied before or after the disbursement of funds) and positive or negative (ie granting a (non-)pecuniary benefit, withdrawing resources or imposing a sanction) conditionality.[17] In the 1990s, the EU's accession policy has been made conditional on the

[13] Starting with Communication COM(2014) 158 final cit., followed by Communication COM(2019) 163 final cit.

[14] European Commission, *The EU's Rule of Law Toolbox – Factsheet* www.ec.europa.eu.

[15] International Monetary Fund, Guidelines on Conditionality, Decision of the Executive Board No 6056-(79/38) of 2 March 1979; International Monetary Fund, Guidelines on Conditionality, Decision of the Executive Board No 12864-(02/102) of 25 September 2002, as amended by Decision No 13814-(06/98) (November 2006).

[16] World Bank Group, *Development Policy Lending* web.worldbank.org.

[17] Among the first, L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 60 ff.; E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 98 ff. For further references see AC Prickartz and I Staudinger, 'Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union's International Trade Agreements' (2019) Europe and the World: A Law Review 1, 5 ff.

compliance with the Copenhagen Criteria.[18] In the aftermath of the 2008/9 financial crisis, macroeconomic conditionality, a term that has recently also been used by Advocate General Campos Sánchez-Bordona,[19] has been applied *vis-à-vis* EU MS when granting financial assistance under international law (European Stability Mechanism)[20] and EU law (Two-pack).[21] Conditionality has also been introduced to the EU's budgetary policy in the form of *ex-ante* conditionalities as requirements for the disbursement of resources under the regime of the European Structural and Investment Funds.[22] In 2021, budget conditionality in the Common Provisions Regulation has been expanded and deepened.[23] The Commission proposed a conditionality mechanism linking compliance with the rule of law to the disbursement of all EU funds,[24] which resulted in the adoption of the Regulation. This so-called general regime of conditionality for the protection of the Union budget is the latest legislative product of countering a deterioration of the respect for the common values of the EU enlisted in art. 2 TEU. In 2018, the Commission adopted a proposal on the Protection of the

[18] The accession criteria were first mentioned in the European Council Presidency Conclusions of 21-22 June 1993 www.consilium.europa.eu para. 7.A.iii. See, among others, D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Field of Democracy and the Rule of Law* (Wolters Kluwer 2008).

[19] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2021:974, opinion of AG Campos Sánchez-Bordona, paras 105, 107, 113, 114.

[20] Arts. 13(3) and 16 of the Treaty Establishing the European Stability Mechanism [2012] and Regulation (EC) 332/2002 of the Council of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. For example, V Borger, 'The ESM and the European Court's Predicament in Pringle' (2013) German Law Journal 113, 123 ff.

[21] Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. See M Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"' (2014) Heidelberg Journal of International Law 61, 76 ff.

[22] Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006. See R Bieber and F Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) CMLRev 1057, 1076 ff. See also V Vita, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) CYELS 116, 122 ff; M Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2020) European Papers www.europeanpapers.eu 695, 704.

[23] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

[24] G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2018) Hague Journal on the Rule of Law 171,182 ff; A von Bogdandy and J Łacny, 'Suspension of EU Funds for Breaching The Rule of Law – a Dose of Tough Love Needed?' (SIEPS 7-2020).

Union Budget against Generalised Deficiencies as regards the Rule of Law.[25] In December 2020, "rule of law" conditionality has been introduced to the EU's budgetary policy with Regulation 2020/2092 and entered into force on 1 January 2021.[26] As a result of lengthy discussions and threats to block the adoption of the Multiannual Financial Framework (MFF) and the own resources decision,[27] the Regulation was adopted with the caveat that the enforcement will be delayed until after the Court of Justice's decision on a potential action for annulment and the Commission's adoption of guidelines on the application of the Regulation.[28] Voices in the literature have characterised the Conclusions of the European Council on the Commission's enforcement *moratorium* illegal.[29]

On 11 March 2021, Hungary brought said action for annulment before the Court of Justice and sought to either annul the entire Regulation or arts 4(1), 4(2)(h), 5(2) 5(3) penultimate sentence, 5(3) final sentence, and 6(3) and (8) thereof.[30] Poland followed suit.[31] The European Parliament announced in June 2021 to bring an action for failure to act against the European Commission under art. 265 TFEU, which has eventually been brought to the Court in October 2021, accusing the Commission of inaction as it had decided to await the Court of Justice's findings in the annulment actions, before implementing the Regulation.[32]

III. How the rule of law conditionality regulation became an instrument of budget conditionality

In 2020, the proposal of a rule of law conditionality regulation has been created under the headline of adding a new instrument to European Commission's rule of law toolbox. With the Regulation, conditionality has eventually been introduced to the implementation

[25] Proposal COM(2018) 324 final from the Commission of 2 May 2018 for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. On the draft and the subsequent developments, see also I Staudinger, 'Der Konditionalitätsmechanismus als Instrument zum Schutz des Rechtsstaatsprinzips: COM(2018) 324 final' in M Kopetzki and others, (eds), *Autoritä-res vs Liberales Europa* (Jan Sramek 2019) 183, 195 ff; M Fisicaro, 'Rule of Law Conditionality in EU Funds' cit.; I Staudinger 'Reflections on the General Regime of Conditionality for the Protection of the Union Budget' in Stefan Mayr and Andreas Orator (eds), *Populism, Popular Sovereignty and Public Reason Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook* (Peter Lang 2021) 223, 228 ff.

[26] Art. 10 Regulation 2020/2092 cit.

[27] The entire process was described in detail in *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras 77-95. See also, A Baraggia and M Bonelli, 'Linking Money to Values: the New Rule of Law Conditionality Regulation and its Constitutional Challenges' (2022) German Law Journal 131, 141 ff.

[28] European Council Conclusions of 11 December 2020, EUCO22/20 para. I.2.c.

[29] On the illegality, see KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) Verfassungsblog verfassungsblog.de.

[30] *Hungary v European Parliament and Council* cit.

[31] *Poland v European Parliament and Council* cit.

[32] European Committee of Legal Affairs Meeting of 14 October 2021 JURI_PV(2021)1014_1 *Minutes*, 5.

of the EU budget on a general level. However, after the adoption of the Regulation and the Court of Justice's findings in the relevant cases, said classification has to be reconsidered. That conclusion can already be derived from the text of Regulations, since art. 1 of the Regulation defines the subject matter as follows: "This Regulation establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States". After the Court of Justice's findings, it became clear that the sufficiently direct link between the rule of law violation in question and the sound implementation of the Union budget transformed the rule of law conditionality mechanism to an instrument of budgetary conditionality. The following section will address said finding together with those aspects of the Regulation that have been perceived most criticisable: the legal basis and the relationship of a conditionality mechanism to existing procedures under the Treaties.

III.1. The conditionality mechanism in Regulation 2020/2092

As mentioned, the Regulation establishes a conditionality mechanism protecting the Union budget. The Regulation consists of ten arts, accompanied by 29 recitals. Art. 2(1)(a) of the Regulation defines the terms "rule of law" as referring to the "Union value in art. 2 TEU (…) [which] shall be understood having regard to the other Union values and principles enshrined in art. 2 TEU".[33] The values of the Union have been derived by the Court of Justice from the constitutional traditions of the Member States. Thus, also the definition includes enlisting a series of principles. In the identical Recital (3) of the Regulation, these principles have been equipped with references to the case law of the Court of Justice: "[…]principles of legality[34] implying a transparent, accountable democratic and pluralistic law-making process; legal certainty;[35] prohibition of arbitrariness of the executive powers;[36] effective judicial protection, including access to justice, by independent and impartial courts;[37] and separation of powers".[38]

Surprisingly, the footnote on the independence of the judiciary does not refer to the Polish CJEU cases.[39]

[33] Art. 2(1)(a) Regulation 2020/2092 cit.

[34] Case C-496/99 P *Commission v CAS Succhi di Frutta* ECLI:EU:C:2004:236 para. 63.

[35] Joined cases C-212/80 to C-217/80 *Meridionale Industria Salumi and Others* ECLI:EU:C:1981:270 para. 10.

[36] Joined cases C-46/87 and C-227/88 *Hoechst v Commission* ECLI:EU:C:1989:337 para. 19.

[37] Case C-64/16 *Associação Sindical dos Juízes Portugueses (ASJP)* ECLI:EU:C:2018:117. paras. 31, 40-1; case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 63-7.

[38] Case C-477/16 PPU *Kovalkovas* ECLI:EU:C:2016:861 para. 36; case C-452/16 PPU *Poltorak* ECLI:EU:C:2016:858 para. 35; case C-279/09 *DEB* ECLI:EU:C:2010:811 para. 58.

[39] Especially, *Commission v Poland (Independence of Ordinary Courts)* cit.; *Commission v Poland (Independence of the Supreme Court)* cit.

Art. 4(1) of the Regulation specifies the conditions for the adoption of measures, i.e., "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way".[40] Niels Kirst described this link to the Union budget as the "Regulation's big caveat".[41] Others have criticised that the conditionality mechanism has been "watered down".[42]

Art. 3 of the Regulation stipulates three alternatives, which are indicative of breaches of the principles of the rule of law: "a) endangering the independence of the judiciary; b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities (…) c) limiting the availability and effectiveness of legal remedies (…)".[43] Hence, this definition refers to some of the recent shortfalls as regards the respect for the rule of law. Again, an explicit reference to the Polish-centred CJEU case law is missing. Art. 4(2) of the Regulation contains an exhaustive list of potential breaches that are linked to the implementation of the EU budget.[44]

Art. 5(1) of the Regulation enlists the measures for the protection of the Union budget, which can entail a suspension or reduction of existing commitments or the prohibition of new commitment. Measures vary depending on whether the Commission implements the Union budget in direct or indirect management pursuant to points a) and c) of art. 62(1) of the Financial Regulation,[45] or the where the Commission implements the Union budget under shared management with Member States pursuant to point b) of art. 62(1) of the Financial Regulation.[46] According to art. 5(2) of the Regulation, the obligations of the Member States' government entities shall not be affected by the adopted measures. A similar provision can be found in the Common Provisions Regulation.[47] According to Art. 5(3) of the Regulation: "The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, insofar as possible, target the Union actions affected by the breaches".[48]

[40] Art. 4(1) Regulation 2020/2092 cit.

[41] N Kirst, 'Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (European Forum Insight of 22 April 2021) www.europeanpapers.eu 101, 105.

[42] S Platon, 'Bringing a Knife to a Gunfight. The European Parliament, the Rule of Law Conditionality, and the Action for Failure to Act' (11 June 2021) Verfassungsblog verfassungsblog.de.

[43] Art. 3 Regulation 2020/2092 cit.

[44] On the importance of this limitation see *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras 154-161.

[45] Art. 5(1)(a) Regulation 2020/2092 cit.

[46] *Ibid*. art. 5(1)(b).

[47] Art.103 Regulation (EU) 2021/1060 cit.

[48] Art. 5(3) Regulation 2020/2092 cit.

III.2. Art. 322(1) TFEU as the correct legal basis

Since the Regulation has been based on art. 322(1)(a) TFEU, it has been disputed (e.g., by Hungary and Poland) that this is the correct legal basis for a rule of law conditionality mechanism. Under art. 322(1)(a) TFEU, the Parliament and the Council can adopt regulations on "the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts". The most prominent example is the Financial Regulation,[49] which governs the financial rules applicable to the general budget of the Union. Further requirements on these Regulations can be found in the neighbouring provisions of art. 322 TFEU, which refer to the Financial Regulation.[50] The principle of sound financial management (arts 310(5) and 317(1) TFEU) has been referred to in the Regulation.[51] Sound financial management is defined in the Financial Regulation as the "implementation of the budget in accordance with the principles of economy, efficiency and effectiveness".[52] Therefore, making the disbursement of EU funds conditional on the compliance with the rule of law would contribute to an economic, efficient and effective implementation of the EU budget.

According to the case law of the CJEU, the predominant component of an act of EU secondary legislation defines the correct legal basis.[53] Thus, it follows that if the protection of the Union budget (instead of the protection of the rule of law) can be characterized as the predominant component of the Regulation, art. 322(1)(1) TFEU is the correct legal basis. AG Sánchez-Bordona noted that recital 14 of the Regulation was somewhat misleading in that regard, as it stated that "the mechanism provided for in this Regulation complements these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union".[54] He added that that nature of the Regulation has changed during the legislative process, since the "Commission's original proposal focused less on the financial conditionality of the proposed mechanism and more on protecting the rule of law" whereas the "final text of Regulation 2020/2092 became an instrument of financial conditionality under which safeguarding the rule of law operates as a horizontal

[49] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

[50] M Niedobitek, 'AEUV Art. 322 [Haushaltsvorschriften; Verfügbarmachung der Eigenmittel]' in R Streinz, *EUV/AEUV* (CH Beck 2018) para. 2; arts 310(2) and (3), 315(1) and (2). 316(1) and (2), and 317(1) and (3) TFEU.

[51] Recitals (7) and (8), Regulation 2020/2092 cit.

[52] Art. 2(59) Regulation (EU, Euratom) 2018/1046 cit. Those principles were further defined in art. 33(1) Regulation (EU, Euratom) 2018/1046 cit.

[53] Case C-137/12 *Commission v Council* ECLI:EU:2013:675 paras 52 ff and the case law cited.

[54] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 134.

condition that must be respected by Member States in implementing the budget".[55] Hence, "it is necessary to carry out a detailed analysis of the content of Regulation 2020/2092 in order to determine whether the 'final legislative product' is genuinely a financial conditionality mechanism, like others in EU law. If it is, art. 322(1)(a) TFEU would provide an appropriate legal basis, because the regulation would be a rule concerning budgetary implementation".[56]

The Court of Justice thoroughly examined art. 322(1) TFEU as the Regulation's legal basis and put it in the context of its neighbouring provisions (arts 310 and 315 to 317 TFEU).[57] The cornerstone of the CJEU's argument, why the rule of law can be protected via budgetary conditionality is the Regulation's reference to the principle of sound financial management (art. 317 TFEU):

> "Member States can only ensure sound financial management if public authorities act in accordance with the law, if breaches of the law are effectively pursued and if arbitrary or unlawful decisions of public authorities can be subject to effective judicial review, and that the independence and impartiality of the judiciary and investigation and public prosecution services are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union".[58]

III.3. Sufficiently direct link

Back in 2018, rule of law conditionality has been presented as a mechanism that complements the existing instruments and processes to promote the rule of law, which was also reflected in Recital (14) of the Regulation. Such emphasis on the rule of law (instead of the Union budget) has led to severe criticism regarding the compatibility of the mechanism with EU law. Eventually, the CJEU could only avert this criticism by emphasising the necessity of a sufficiently direct link between the rule of law violation and the alleged rule of law violation, which entailed narrowing down the scope of application of the Regulation to budget-related rule of law violations.

Hungary argued that the Regulation envisaged a three-phase procedure: "a) a breach of the rule of law; b) a serious and sufficiently direct risk to the sound financial management of the Union budget or to the protection of the financial interests of the Union; and c) the need to take proportionate measures to tackle it".[59] The term "(serious) breach" is also used in the art. 7 TEU procedure. In that sense, a sufficiently serious breach means that a Member State, through acts or omissions of its organs or subordinated units,

[55] *Ibid*. para. 135.
[56] *Ibid*. para. 136.
[57] *Hungary v Parliament and Council* cit. paras 98 ff; *Poland v Parliament and Council* cit. paras 112 ff.
[58] *Hungary v Parliament and Council* cit. para. 116; *Poland v Parliament and Council* cit. para. 130.
[59] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 148.

deviates from the content of the values in art. 2 TEU.[60] Such breach must be serious and persistent,[61] in other words it must exhibit a certain intensity and systemic density.[62]

The Parliament and the Council argued that there is only a two-stage procedure, where the stages a) and b) are one step. The AG claims that the latter opinion is the correct one. This seems to be artificial: a sufficiently direct link to the sound financial management *of* a certain rule of law violation cannot be determined without having identified said violation *beforehand*. The AG then applied the means of interpretation to support his finding. In essence, one can agree with the AG's opinion that the Regulation is an instrument of financial conditionality, *because* it focuses on the existence of a sufficiently direct link between the violation of the rule of law and the implementation of the EU budget.[63] Most importantly, art. 2(a) of the Regulation defines the rule of law "for the purpose of this Regulation"[64] and art. 4(1) in conjunction with arts 3 and 4(2) of the Regulation limit the scope of application of the conditionality mechanism to those violations of the rule of law that have an impact on the sound financial management of the Union budget.

Likewise, the CJEU clarified that the "objective of the contested Regulation is to protect the Union budget from adverse effects on that budget stemming in a sufficiently direct manner from breaches of the rule of law in a Member State, and not to impose penalties, per se, on such breaches".[65] Consequently, the conditionality mechanism can no longer be shelved in the rule of law section but has to be moved to the budget section of the European Commission's enforcement library.

III.4. Alleged infringement of art. 7 TEU, circumvention of art. 258 TFEU, and destabilising the institutional balance

Violations of the common values of art. 2 TEU are subject to the art. 7 TEU procedure[66] other infringements of the Treaties (except those of the obligation of unsound budgetary

[60] F Schorkopf, 'Art. 7 EVU [Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat]' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2020) para 30, referring to case C-112/00 *Schmidberger* ECLI:EU:C:2003:333 para. 42, where the term, sufficiently serious "breach" is defined.

[61] PV van Vormizeele, 'Art. 7 EUV [Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat]' in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015) para. 10.

[62] M Ruffert, 'Art. 7. EUV [Aussetzung von Rechten]' in C Calliess and M Ruffert (eds), *EUV/AEUV* (CH Beck 2016) 179, referring *inter alia* to A von Bogdandy and M Ioannidis, 'Das systemische Defizit. Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens' (2014) Heidelberg Journal of International Law 283, 304 ff. See also, A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) CMLRev 59, 76 ff.

[63] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras. 157 ff.

[64] *Ibid*. paras. 151.

[65] *Hungary v Parliament and Council* cit. para. 119; *Poland v Parliament and Council* cit. para. 137.

[66] On the procedure see, e.g. W Sadurski, 'Adding a Bite to a Bark: The Story of Article 7, E.U. Enlargement and Jörg Haider' (2010) Columbia Journal of European Law 385; L Besselink, 'The Bite, the Bark and the Howl. Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), *The Enforcement of*

policies (art. 126(10) TFEU)) are subject to infringement actions (art. 258 TFEU).[67] Thus, a major point of criticism of the Regulation has been the alleged overlap with both these procedures.

Art. 6 of Regulation (EU) 2020/2221 details the procedure for adopting appropriate measures. First, the Commission shall send a written notification to the Member State concerned.[68] Before or after that, the Commission can request additional information from said Member State.[69] The time-limit for the Member State's submission is to be specified by the Commission but shall be between one and three months after the written notification.[70] Second, the Commission "shall assess the information received by the Member State within an indicative time limit of one month from the receipt of any information from the Member State concerned or of its observations, or, when no information or observations are received, from the expiry of the time limit set in accordance with paragraph 5, and in any event within a reasonable time frame".[71] If the Commission decides to adopt a proposal for the Council, it shall give the Member State concerned another month to submit a statement.[72] For assessing the proportionality of measures, the Commission shall take into account relevant information pursuant to art. 6(3) of the Regulation.[73] Then, the Commission "shall submit a proposal for an implementing decision on the appropriate measures to the Council", after the reception of additional information.[74] Third and last, the Council shall adopt the proposed implementing decisions after one month – two months under exceptional circumstances – of receiving the proposal.[75] To ensure a timely decision, the Commission can decide to summon the Council under art. 237 TFEU. The Council can amend the Commission's proposal acting by qualified majority.[76] The European Parliament shall be informed of the notification under art. 6(1) of the Regulation and it may be invited to a structured dialogue on its findings.[77]

The procedure under art. 6 of the Regulation is reminiscent of both the infringement procedure under art. 258 TFEU and the art. 7 TEU procedure. At the end of all three

EU Law and Values. Ensuring Member States' Compliance (Oxford University Press 2017) 128, 128 ff; C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity under Article 7 TEU' (2020) International Political Science Review 501.

[67] On the proposal of systemic infringement actions see, KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105.

[68] Art. 6(1) Regulation 2020/2092 cit.

[69] *Ibid*. art. 6(4).

[70] *Ibid*. art. 6(5).

[71] *Ibid*. art. 6(6).

[72] *Ibid*. art. 6(7).

[73] *Ibid*. art. 6(8).

[74] *Ibid*. art. 6(9).

[75] *Ibid*. art. 6(10).

[76] *Ibid*.

[77] Art. 6(2) Regulation 2020/2092 cit.

procedures, there is a "sanctioning" decision. In two cases this leads to a fine (art. 260 TFEU) or a suspension or reduction of funds (the Regulation), in one case to the suspension of voting rights (art. 7 TEU). The Court of Justice is the dominant actor only in the case of art. 258 TFEU and art. 260 TFEU. In the other two cases, the power lies with the Council or even the European Council (sanctioning mechanism under art. 7 TEU). The Commission's task in all three cases is characterised by informal conflict resolution, culminating in a referral to another EU institution. The Commission has a large margin of discretion to start the procedure.

According to the AG, art. 7 TEU is not the only procedure available to achieve compliance with the rule of law.[78] The AG mentioned two other examples (independence of judges and the European arrest warrant) where an assessment of a violation of the rule of law as a common value of art. 2 TEU is carried out.[79] Hence the art. 7 TEU procedure is non-exclusive. Then, the AG compared the compliance of existing financial conditionality mechanisms with the new conditionality mechanism of the Regulation.[80] In its case law, the Court of Justice has dealt with the compliance with EU law regarding a similar procedure, the conformity clearance procedure.[81] Accordingly, such procedure of financial corrections is compatible with EU, if its independent from the infringement proceedings, governed by a different set of procedural rules and has different objectives.[82] In the entire Regulation, there is only one reference to infringement proceedings: Recital (14) mentions it as another one of the "instruments and processes that promote the rule of law and its application".[83] Apart from that, there are no visible links to the infringement proceedings, which is why only the third criterion of different objectives must be analysed in detail. In infringement proceedings the Court of Justice determines if a Member States violates EU law obligations and assesses whether the effects of said violation are persisting.[84] The objective of the regime of conditionality is the protection of the Union budget. If one believes the logic of the Commission, the protection of the rule of law is only a

[78] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 209.

[79] *Ibid*. paras 210 ff.

[80] *Ibid*. paras 217 ff.

[81] Commission Delegated Regulation (EU) No 640/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance.

[82] Joined cases 15 and 16/76 *France v Commission* ECLI:EU:C:1979:29 para. 26; case C-325/94 P *An Taisce and WWF UK* ECLI:EU:C:1996:293 para. 25; case C-247/98 *Greece v Commission* ECLI:EU:C:2001:4 para. 13.

[83] Recital (14) Regulation (EU) 2020/2092 cit.

[84] U Karpenstein, 'Art. 258 [Vetragsverletzungsverfahren]' in Eberhard Grabitz, Meinhard Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2021) para 1; N Wunderlich, 'Artikel 258 (ex-Artikel 226 EGV) [Vertragsverletzungsverfahren]' in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* cit. para. 2. U Ehricke, 'Art. 258 [Anrufung des Gerichtshofs durch die Kommission]' in R Streinz, *EUV/AEUV* cit. para. 2. See also case C-362/90 *Commission v Italy* ECLI:EU:C:1992:158 paras. 10 ff.; case C-276/99 *Germany v Commission* ECLI:EU:C:2001:576 paras. 24 ff.

means to achieve this end. This logic was questioned by the parties to the dispute.[85] In the proposal, the rule of law was mentioned both in the beginning and the end in the Commission's proposal.[86] Without the detour of a connection to the sound financial management (art. 317 TFEU), the difference of objectives would have been harder to believe. Nonetheless, a serious breach of the rule of law seems to be eligible to threaten the Union budget. Again, while some of the findings of the AG are imprecise,[87] in essence once can agree with the finding that the conditionality mechanism in the Regulation is different from the art. 7 TEU procedure and from the infringement proceedings.

Another aspect addressed by the AG was the institutional balance between the Commission and the Council since the Regulation has conferred implementing powers on the Council.[88] As a result of a new decision-making process in the Regulation, where the Commission and the Council play major roles instead of the European Council (art. 7 TEU) and the Court of Justice (art. 258 TFEU), the institutional balance might have been affected. New enforcement powers for the Commission in secondary EU legislation potentially threaten the institutional balance. In the initial proposal,[89] the Council implementing decision would have been adopted by Reverse Qualified Majority Voting (RQMV).[90] While the automatism of RQMV might have been welcome, it would, however, not have been compatible with the Treaties. Since art. 322(1)(a) TFEU has not specified any deviating decision-making rules, the default case of majority voting in art. 16(3) TEU must apply.[91] The AG examined art. 291(2) TFEU which specifies that "where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases (…) on the Council". After a comparison with other conditionality mechanisms in the Common Provisions

[85] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 134.

[86] Recitals (1) and (2) COM(2018) 324 final cit.

[87] E.g., in *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 224, the AG argues that the threshold of art. 7 TEU is "[…] higher than that in Regulation 2020/2092, since it requires the existence of a serious and persistent breach of any of the values in Article 2 (not just that of the rule of law)". The fact that a violation of other values can also trigger the application of an art. 7 TEU procedure does broaden the scope of application, but it has, however, no impact on the characterisation of the threshold as regards what types of rule of law violations can trigger a procedure. In *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 225, the AG argues that "Article 7 TEU does not require a sufficiently direct link with a specific area of EU law, which is required by [the] Regulation. in that it requires a connection between the breach of the rule of law and implementation of the Union budget. The application of Regulation 2020/2092 is therefore far more limited than that of Article 7 TEU". Hence, the scope of the art. 7 TEU procedure is broader than the one of the Regulation.

[88] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras. 252 ff.

[89] Art. 5(7) Commission COM(2018) 324 final cit.

[90] Termed as RQMV also by G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' cit. 184.

[91] For the financial crisis, see in particular R Palmstorfer, 'The Reverse Majority Voting under the "Six Pack": A Bad Turn for the Union?' (2014) ELJ 186, 194 ff. See also, A Kumin, '"Reverse Majority Voting" – Auf dem Weg zur Herrschaft der Exekutive über die Legislative?' (2013) Zeitschrift für Öffentliches Recht 441, 449 ff.

Regulation 2021-2027[92] and the Recovery and Resilience Facility,[93] the AG concludes that also the mechanism in the Regulation "reflects one of those 'duly justified specific cases' in which implementing powers may be conferred on the Council".[94]

The Court of Justice merely focused on the potential overlap with the art. 7 TEU procedure and did neither dwell on potential the circumvention of art. 258 TFEU nor on the institutional balance. It emphasised that "numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in art. 2 TEU committed in a Member States".[95] Furthermore, *Openbaar Ministerie (Indépendence de l'autorité d'émission)*[96] did not establish the exclusive nature of art. 7 TEU, "but merely determined the situations in which systemic and generalised deficiencies so far as concerns the independence of the judiciary of the Member State which has issued a European arrest warrant may justify the non-execution of a warrant".[97]

Then, the CJEU clarified that there must not be any procedure established by secondary legislation, that has *(i)* the same subject matter, *(ii)* pursues the same objective and *(iii)* allowing the adoption of identical measures.[98] By referring to its existing case-law,[99] the Court of Justice claimed that procedures with different aims and subject matters from art. 7 TEU are compatible with the Treaties.[100] As regards the Regulation, the Court argued that while art. 7 TEU covers violations of all the values enlisted in art. 2 TEU, the Regulation only addresses violations of the rule of law, being one values thereof.[101] Art. 7 TEU allows the Council to "penalise serious and persistent breaches of the values contained in art. 2 TEU, in particular with a view to the Member State concerned to put an end to those breaches.[102] By contrast, the purpose of the conditionality mechanism is "the protection of the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise through the Union budget, breaches of the principles of the rule of law.[103] The measures adopted under art. 7 TEU "relate to any

[92] Arts. 19(6), (7), (8), (11) and (13) Regulation (EU) 2021/1060 cit.

[93] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, arts 10(3) and 20.

[94] *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 256.

[95] *Hungary v Parliament and Council* cit. para. 159; *Poland v Parliament and Council* cit. para. 195.

[96] Case C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendence de l'autorité d'émission)* ECLI:EU:C:2020:1033.

[97] *Poland v Parliament and Council* cit. para. 204.

[98] *Hungary v Parliament and Council* cit. para. 167; *Poland v Parliament and Council* cit. para. 206.

[99] *France v Commission* cit. para. 26; *An Taisce and WWF UK* cit. para. 25; *Greece v Commission* cit. para. 13.

[100] *Hungary v Parliament and Council* cit. para. 168; *Poland v Parliament and Council* cit. para. 207.

[101] *Hungary v Parliament and Council* cit. para. 173; *Poland v Parliament and Council* cit. para. 212.

[102] *Hungary v Parliament and Council* cit. para. 170; *Poland v Parliament and Council* cit. para. 209.

[103] *Hungary v Parliament and Council* cit. para. 171; *Poland v Parliament and Council* cit. para. 210.

right deriving from the application of the Treaties to the Member State in question", whereas the measures adopted under the Regulation "are all budgetary in nature".[104] Thus, according to the Court, budgetary rights and obligations are not to be mistaken as rights and obligations under the Treaties. The Court's view that the conditionality mechanism does not aim at putting an end to rule of law violations, pushes the Regulation even further in the budget conditionality corner. In turn, other budgetary instruments contain elements of rule of law conditionality.

IV. Other traces of rule of law conditionality

The year 2020 was characterised by a cumbersome process[105] on the adoption of the 2021 to 2027 Multiannual Financial Framework (MFF).[106] The MFF was accompanied by the Regulation 2020/2092 and the EUR 750 billion Recovery Instrument,[107] providing for the financial resources for the financial instruments of the European Green Deal. As mentioned, the Regulation has been transformed from a rule of law conditionality mechanism to a budgetary conditionality mechanism. Yet, rule of law conditionality has been applied in the context of the European Green Deal.

IV.1. References to Regulation 2020/2092

Several instruments breathing life into the European Green Deal (the Recovery and Resilience Facility,[108] REACT-EU,[109] the Just Transition Fund,[110] InvestEU[111] and the public sector loan facility)[112] contain links to the "horizontal financial rules" of the newly established regime of conditionality in the Regulation. In this case, the reference can be found both in a recital and in the text of the Regulation: "The Facility shall be implemented by the Commission in direct management in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council".[113] In all other cases, the

[104] *Hungary v Parliament and Council* cit. para. 177; *Poland v Parliament and Council* cit. para. 216.

[105] See e.g. B de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLREv 635, 638 ff.

[106] Regulation (EU, Euratom) 2020/2093 of the Council of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

[107] Regulation (EU) 2020/2094 of the Council of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

[108] Recital (71), art. 8 Regulation (EU) 2021/241 cit.

[109] Recital (7) Regulation (EU) 2020/2221 cit.

[110] Recital (9) Regulation (EU) 2021/1056 cit.

[111] Recital (65) Regulation (EU) 2021/523 cit.

[112] Recital (9) Regulation (EU) 2021/1229 of the European Parliament and of the Council of 14 July 2021 on the public sector loan facility under the Just Transition Mechanism.

[113] Art. 8 Regulation (EU) 2021/241 cit.

reference can merely be found in the recitals. First, the recitals state that the "[h]orizontal financial rules adopted by the European Parliament and the Council on the basis of Article 322 [TFEU] [...] apply to this Regulation". [114] Second, they specify these rules by mentioning the Financial Regulation 2018/1046[115] and emphasising the general regime of conditionality for the protection of the Union budget, without explicitly referring to Regulation 2020/2092.

IV.2. Applying rule of law conditionality under the Recovery and Resilience Facility

As mentioned in recital 7 of the Regulation 2020/2092 the general regime of conditionality applies to all sorts of EU funds, also the Recovery and Resilience Facility (RRF).[116] However, the Commission has refrained from applying the Regulation before the Court of Justice has reached a verdict in cases brought by Hungary and Poland. Until then, rule of law conditionality under the headline of a 'generalised regime of conditionality for the Union budget' has been put to a deep slumber and, if one takes the AG's Opinion seriously: the underlying mechanism is a financial conditionality mechanism rather than a rule of law conditionality mechanism.

However, provisions of the RRF also contain conditionality clauses in arts 10 and 20.[117] The conditionality in art. 10 of the RRF relates to non-compliance with recommendations in the course of an excessive imbalance procedure under the Six-Pack- Regulation (EU) No 1176/2011,[118] assistance in case of balance of payment problems under Regulation (EC) No 332/2002,[119] and non-compliance with macro-economic adjustment programmes under Two-Pack-Regulation (EU) No 472/2013.[120] Art. 20 of the RRF governs the procedure. Therefore, the budget conditionality under the RRF refers to the macroeconomic conditionality that has been created after the financial and sovereign debt crisis.

Nonetheless, the Commission has used the RRF as a tool of rule of law enforcement even without a specific legal basis in the RFF. Funds of the RRF are disbursed only after the MS prepare their respective recovery and resilience plans.[121] These plans must be submitted to the Commission and must cover a series of aspects.[122] The Commission

[114] Recital (7) Regulation (EU) 2020/2221 cit.

[115] Regulation (EU, Euratom) 2018/1046 cit.

[116] Recital 71 Regulation (EU) 2021/241 cit.

[117] Arts. 10(3) and 20. Regulation (EU) 2021/241 cit.

[118] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

[119] Regulation (EC) No 332/2002 cit.

[120] Regulation (EU) No 472/2013 cit.

[121] Art. 17 Regulation (EU) 2021/241 cit.

[122] *Ibid*. art. 18.

then carries out an assessment of the plans[123] and makes a proposal for an implementing decision to the Council.[124] In the cases of Poland and Hungary the Commission has delayed issuing its opinion the Poland's national recovery and resilience plan. In October 2021, the Economy Commissioner Gentiloni explained to the Parliament that the "reasons for the delay are being related to the rule of law and attacks on the judiciary, primacy of EU law, public procurement, corruption and unequal treatment of minorities".[125] Since the RRF does not contain specific rules on compliance with the rule of law, the questions arises whether this is already an application of the Regulation without following the procedure in art. 6 of the Regulation.

V. Conclusions

Rule of law conditionality has had a rather rough start in the EU. First, the content of the Regulation 2020/2092 had been watered-down from a rule of law-centred mechanism where the Commission's proposal would be adopted by RQMV to a mere budgetary conditionality mechanism, where the decision-making power remains within the Council. Second, the Commission made a political compromise not to apply the Regulation until the Court of Justice has decided on its compliance with the Treaties, which has triggered the Parliament to bring an action for failure to act. Finally, the AG has argued that the underlying conditionality mechanism is a financial conditionality mechanism rather than a rule of law conditionality mechanism, in order to make the Regulation compatible with the Treaties (art. 322(1)(a) TFEU functioned as its legal basis): only those rule of law violations that are sufficiently and directly linked to the sound financial management of the Union are being covered. The CJEU confirmed that only procedures established by secondary legislation, that do not concern *(i)* the same subject matter, *(ii)* pursue the same objective and *(iii)* allowing the adoption of identical measures as art. 7 TEU are compatible with the Treaties.[126]

Despite accepting the political compromise, to not enforce the Regulation, the Commission has found another opportunity to "apply" rule of law conditionality: it has delayed its opinions on Hungary's and Poland's national recovery and resilience plans. Since the Regulation is also applicable to the RRF, and the RRF does not contain specific rules on withholding the funds in case of rule of law violations, it is questionable whether the Commission is applying the Regulation's budgetary conditionality mechanism, nonetheless. Or, the Commission added a rule of law rationale to the RFF, and thereby created a new sort of rule of law conditionality. Nonetheless, after the Court's findings in the cases brought by Hungary and Poland the Commission now has to enforce the Regulation, also in order to avert the European Parliament's action for failure to act.

[123] *Ibid*. art 19.

[124] *Ibid*. art 20.

[125] Extracts of the debate can be found here: European Parliament, *Hungary and Poland Plans should be Approved Only if Concerns are Addressed* www.europarl.europa.eu.

[126] *Hungary v Parliament and Council* cit. para. 167; *Poland v Parliament and Council* cit. para. 206.

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

INTRODUCTION TO THE *SPECIAL SECTION*: DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES

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ABSTRACT: This *Article* introduces the *Special Section* on "Differentiated Governance in a Europe in Crisis", outlining the focus of the *Special Section* and summarising the contents of its various contributions. The *Article* defines the notion of differentiated governance and highlights its manifestation both within and outside the EU, and underlines how recent crises affecting the EU have increased differentiated governance.

KEYWORDS: Brexit – crises – differentiated governance – European Union – future of Europe – integration.

I. INTRODUCTION

The governance of the European Union has been significantly altered by the multiple crises – of the euro, migration, rule of law, Brexit, and Covid-19 – that it has endured over the last decade. This has often led to increased differentiation in which the authority of

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structures of governance varies across different regions and territories within and around the EU. In many cases this differentiation has taken forms that do not conform to the standard definition of "differentiated integration", which is generally focused on the variation in the applicability of EU rules across EU Member States, or the variation in their participation in common EU policies. For example, Schimmelfennig and Winzen define differentiation as a situation arising "when the legally valid rules of the EU, codified in EU treaties and EU legislation, exempt or exclude individual member states explicitly from specific rights or obligations of membership".[1] Other scholars use different terms to refer to this phenomenon, such as (merely) "differentiation"[2] or "variation".[3] In this *Special Section* we use "differentiated governance" as an alternative term that could apply more broadly to the forms of differentiation that have emerged post-crises.[4] What this term emphasizes is the extent to which there is differentiation not only in the application of rules but in the authority of new structures of governance – institutions, procedures, mechanisms, agencies – within and outside the EU, some of which are outside the EU's legal framework.

The term governance is frequently used in the international relations literature to denote forms of rule or order which may lack a hierarchical state structure; hence global governance is "governance without government".[5] This notion also applies to the EU which is not a "government" in the traditional sense (*i.e.* a State), but possesses many of its attributes.[6] A couple of decades ago there was a "governance turn"[7] in EU studies which shifted the focus from European *integration* – grand theories explaining the historical development of the EU polity – to a *governance* approach which took the EU polity as a given but sought to study its structure and functions. A good example of the latter approach is the literature

[1] F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press 2020) 3-4.

[2] JE Fossum, 'Europe's Triangular Challenge: Differentiation, Dominance and Democracy' (18 December 2019) EU3D Research Papers 1.

[3] EH Ballin and others, *European Variations as a Key to Cooperation* (Springer 2020) 1.

[4] Several scholars have studied differentiation and governance together. See *e.g.*, S Fabbrini, 'Alternative Governance Models: "Hard Core" in a Differentiated Europe' (2019) Comparative European Politics 278–293; S Lavenex and I Križić, 'Conceptualising Differentiated Integration: Governance, Effectiveness and Legitimacy' (EU IDEA Working Papers 29 November 2019) 1; T Nguyen, 'Differentiated Integration and Accountability in the European Union – An Analytical Framework' (24 November 2020) EU IDEA Research Papers 1; M Pilati and F De Angelis, 'Differentiated Integration in the EMU: Impact on Policy Effectiveness and Political Unity' (30 June 2020) EU IDEA Policy Papers 1.

[5] J Rosenau and E Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge University Press 1992).

[6] See *e.g.* F Fabbrini and others (eds), *What Form of Government for the EU and the Eurozone?* (Hart 2015) 1.

[7] B Kohler-Koch and B Rittberger, 'Review Article: The 'Governance Turn' in EU Studies' (2006) JComMarSt 27.

on multi-level governance.[8] Recent scholarship on governmentality in the EU takes this line of inquiry even further.[9]

A similar point could be made regarding the difference between differentiated integration and differentiated governance: the former may refer to the historical development of a multi-speed EU, in which certain Member States integrate further and faster,[10] whereas the latter would refer to the system of differentiated governance as it exists at present. Moreover, integration may imply a one-way or teleological process, making it less suitable to denote instances in which the process is at a standstill or going backwards – towards disintegration.[11] This notion of differentiated governance is thus intended to be deliberately broad, so as to capture myriad forms of differentiation that have emerged post-crisis that do not conform to the common, narrow definition of differentiation as deviation from the uniform application of EU rules.

II. Differentiated governance within the EU

The EU is a system of differentiated governance whose effects are to be found both internally and externally. Internal differentiation has started at the time of the Maastricht Treaty, mostly as a result of requests by Denmark and the UK to secure opt-outs from several new common policies. With enlargement and the increasing heterogeneity of the EU, differentiation has further increased. The rise of Eurosceptic parties questioning transnational solidarity[12] has further fueled the trend of variation in member states' involvement in EU law and governance. While austerity measures during the economic crisis fueled populism on the left in some old Member States, in new Member States Eurosceptic populism is nativist and right-leaning in its ideological orientation.

The most well-known instances of internal differentiation are the Eurozone and Schengen (discussed in greater detail below), in which only 19 and 22 Member States participate, respectively. It can also take the form of legislation that does not apply uniformly across all EU-27 Member States. For example, legislation may be passed by enhanced cooperation, as foreseen by art. 20 TEU and arts 326-334 TFEU. To date there have been four legislative measures passed in this manner by a subset of EU Member States, which are:

[8] G Marks and others, 'European Integration from the 1980s: State-centric v. Multi-level Governance' (1996) JComMarSt 341.

[9] See *e.g.*, J Lawrence, 'Of Politics and Pluralism: Governmentality and the EU Legal Order' in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 243.

[10] F Schimmelfennig and T Winzen, 'Grand Theories, Differentiated Integration' (2019) Journal of European Public Policy 1172.

[11] Editorial, 'Disintegration Through Law' (2016) European Papers www.europeanpapers.eu 3. See also H Vollaard, *European Disintegration: A Search for Explanations* (Palgrave 2018) 1.

[12] See H Krunke, H Petersen and I Manners (eds), *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020).

The Law Applicable to Divorce and Legal Separation (17 of EU-27),[13] European Patent with Unitary Effect ("Unitary Patent") (25 of EU-27),[14] Property Regimes Rules for International Couples (18 of EU-27),[15] and the European Public Prosecutor's Office (EPPO) (22 of EU-27);[16] in addition, a group of 11 Member States moved in 2013 to use enhanced cooperation to create a Financial Transactions Tax, but the final legislation has not been adopted so far.[17] A similar example, specifically permitted by arts 42(6) and 46 TEU, is Permanent Structured Cooperation in Defence (PESCO), in which 25 Member States participate.

But differentiation does not just take the form of the non-uniform application of rules; it also takes the form of structures of governance – institutions, mechanisms, procedures, agencies – whose authority is differentially applied. And there has been a proliferation of these structures of differentiated governance in the wake of the EU's multiple crises. Differentiated governance has been a hallmark of Economic and Monetary Union (EMU) from the beginning, in that a sub-group of EU Member States were subject to the direct governance of one institution, the European Central Bank, which set the monetary policy for the Eurozone, in a way that did not apply to the non-Eurozone States. But in response to the eurocrisis a number of other governance institutions were created.[18] These include three new "mechanisms"– the European Stability Mechanism, the Single Supervisory Mechanism, and the Single Resolution Mechanism – as well as the Euro Summit and the Interparliamentary Conference on Stability, Economic Coordination and Governance, the latter two mandated by arts 12 and 13 of the Treaty on Stability, Coordination and Governance (TSCG).[19] In addition, Eurozone States were subject to far more extensive governance procedures of economic coordination and surveillance in the form of the European Semester. Moreover, differentiated governance is not confined to the field of EMU. For example, Denmark ceased to be a full member of Europol, the EU's Agency for Police Cooperation, in 2017 following a

[13] Regulation (EU) 1259/2010 of the Council of 20 December 2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[14] Regulation (EU) 1257/2012 of the European Parliament and of the Council of 17 December 2012 on implementing enhanced cooperation in the area of the creation of unitary patent protection.

[15] See Regulation (EU) 2016/1103 of the Council of 24 June 2016 on implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[16] See Regulation (EU) 2017/1939 of the Council of 12 October 2017 on implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO").

[17] See Decision 2013/52/EU of the Council of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax.

[18] See F Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016) 1.

[19] I Cooper, 'The Politicization of Interparliamentary Relations in the EU: Constructing and Contesting the "Article 13 Conference" on Economic Governance' (2016) Comparative European Politics 196.

national referendum – although it remains in close cooperation with the agency.[20] And five EU Member States remain outside the EPPO.

In addition to these semi-permanent structures of differentiated governance, there are also procedures and mechanisms that may apply to particular Member States on a temporary basis, in particular when a Member State is in difficulty or is subject to tutelage or correction by the EU institutions. While all Member States have always been subject to the authority of the European Court of Justice (ECJ), which can enforce compliance with EU rules, there are other extra-judicial, technocratic governance procedures whose numbers have increased in response to recent crises. The Excessive Deficit Procedure has been in place since the launch of the single currency to enforce the Stability and Growth Pact, with mixed success. But at the height of the euro-crisis new, more intrusive structures were put in place for the economic governance of Member States which needed a financial bailout – most notably the *troika* (the Commission, ECB and IMF).[21] A parallel may be drawn between these technocratic procedures and some of the elements in the rule of law toolkit, such as the Cooperation and Verification Mechanism (which applies to Romania and Bulgaria) and the art. 7 TEU Procedure (which has to date been triggered only for Poland and Hungary).[22]

This raises a broader debate about whether differentiation should even be allowed with respect to the founding values enshrined in art. 2 TEU, especially the rule of law, given that it could lead to the downfall of the EU as a legal order based on shared values.[23] However, while the European Arrest Warrant, with a strong emphasis on mutual cooperation, is the top example of integration, the Area of Freedom, Security and Justice shows multiple points of fragmentation, if not outright disintegration. Another possible example of differentiated governance in this field is Protocol No. 30 attached to the Treaties concerning the applicability of the Charter of Fundamental Rights in Poland and the UK, and later Czechia as well; on closer examination this was not "opt-out" of the Charter but rather a clarification that it did not alter the *status quo ante*, and so was called a "non-opt-out opt-out".[24]

III. Brexit and differentiated governance outside the EU

External differentiation is the phenomenon in which there is variation in the extent to which EU rules and governance structures exert authority on States and territories outside the

[20] S Morgan, 'Europol: Denmark Closes Front Door, Opens Back Door' (2 May 2017) Euractiv www.euractiv.com.

[21] See S Baroncelli, 'Le specificità dell'unione economica e monetaria europea' (2009) Diritto dell'Economia 35.

[22] See R Uitz, 'The Perils of Defending the Rule of Law through Dialogue' (2019) EuConst 1.

[23] See Editorial, 'Sovereign Within the Union? The Polish Constitutional Tribunal and the Struggle for European Values' (2021) European Papers www.europeanpapers.eu 1117. See also D Kelemen and others, 'National Courts Cannot Override CJEU Judgments: A joint Statement from Academics in Defense of the EU Legal Orger' (31 May 2020) The Irish Times www.irishtimes.com.

[24] C Barnard, 'The EU Charter of Fundamental Rights: Happy 10th Birthday?' (2011) EUSA Review 5.

EU. The EU has quite different kinds of relationships with its nearest neighbors, including association countries and partners, such as Turkey with which the EU has a partial customs union.[25] The case of Brexit helps to illustrate this point. Throughout the negotiations over the EU-UK relationship, one major point of contention was over the question of "governance", i.e. what structures would be put in place to oversee the agreement? As it turns out there is differentiation even within the very complex structures governing the new relationship, as they are divided into three distinct layers: The Trade and Cooperation Agreement (TCA),[26] which governs the new trading relationship, has separate governance structures from those of the Withdrawal Agreement (WA),[27] which set the terms of the withdrawal, but which also features separate governance arrangements for the Ireland/Northern Ireland Protocol.[28] The authority of EU law is different in each of these three layers, as is apparent in the varying role of the ECJ which is excluded from the TCA, has a transitional role in the WA, and has a continuing role in overseeing the Protocol.

The reference to Northern Ireland highlights another aspect of differentiated governance, that the authority of the EU can vary not only across States but also across other territories. Northern Ireland is a territory that is part of the UK, therefore formally outside the EU, but that remains closely linked to the EU, within the single market for goods and *de facto* within the customs union. It is no coincidence that there are three protocols to the WA, because this is exactly the number of cases in which a UK territory abuts an EU territory – not just Northern Ireland but also Gibraltar, which is now likely to join the Schengen agreement on passport-free travel, and also the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, which use the euro as a currency and are integrated into the EU customs union.

More generally, the distinction between the Member States of the EU and close neighbours that are EU non-members is most striking in the fact that many non-member States are not only subject to EU rules but to some extent subject to EU governance structures. Yet this external governance is also differentiated insofar as the authority of the EU varies not only across states and territories but by policy area. A good indicator of this is the variation in neighboring States' relations with the most important economic institutions of the EU – the Single Market, the Customs Union and the euro currency. A number of neighbouring States are implicated in each of these EU institutions, but in each case the States in question are different. The Single Market comprises all the EU-27 plus

[25] J E Fossum and others, 'The EU's Non-Members: Key Principles, Underlying Logics and Types of Affiliation' (2020) EU3D Report 1.

[26] See F Fabbrini (ed.), *The Law & Politics of Brexit: Volume III. The Framework of New EU-UK Relations* (Oxford University Press 2021) 1.

[27] F Fabbrini (ed.), *The Law & Politics of Brexit: Volume II. The Withdrawal Agreement* (Oxford University Press 2020) 1.

[28] F Fabbrini (ed.), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022) 1.

seven non-EU States that are partially integrated within it, which are: Iceland, Liechtenstein and Norway, by virtue of the European Economic Area (EEA); Switzerland, through numerous bilateral agreements; and Georgia, Moldova, and Ukraine, each of which has an Association Agreement with a Deep and Comprehensive Free Trade Area (DCFTA) with the EU.[29] The Customs Union comprises the EU-27 plus four neighbouring States which have a customs agreement with the EU – Turkey and three microstates (Andorra, Monaco and San Marino). Finally, in addition to the nineteen Eurozone States within the EU, six States outside the EU use the euro as their currency – four microstates (Andorra, Monaco, San Marino and Vatican City) which do so by agreement with the EU, and two States which do so on a unilateral basis, Kosovo and Montenegro.

External differentiation is also a feature of the EU's cooperation with neighbouring countries on migration policy. The four EFTA States (Iceland, Liechtenstein, Norway, and Switzerland) are part of the Schengen area of passport-free travel (even while five EU Member States are outside of it) and are also participants in the Dublin Regulation on asylum. Ireland, one of the EU's non-Schengen States, has its own bilateral arrangement for passport-free travel with a non-EU State, the Ireland-UK Common Travel Area.

IV. Structure of this *Special Section*

This *Special Section* brings together contributions which were produced in the framework of the Jean Monnet Network BRIDGE (Brexit Research and Interchange on Differentiated Governance in Europe), which were originally presented by academics of the BRIDGE Network at a Conference hosted online at Dublin City University (DCU) in October 2021. The BRIDGE Network – a multi-year EU-funded project led by DCU Brexit Institute and involving also Central European University, the Free University of Bolzano/Bozen, and the University of Copenhagen – was designed to explore the impact that Europe's recent crises had on EU governance. This *Special Section* offers an overview of the outcome of this transnational research dialogue, with *Articles* examining differentiated governance in economic and banking affairs after the euro-crisis, in the area of freedom, security and justice after the migration crisis and rule of law crisis, and in the space of interstate cooperation after Brexit.

The *Article* by Stefania Baroncelli focuses on differentiated governance in Europe's Economic and Monetary Union.[30] As Baroncelli points out, differentiated governance was an original feature of EMU even prior to the crisis, given the fact that some Member States did not join the single currency. After the crisis hit, however, the EU passed legislative measures, most notably the "six-pack" and the "two-pack", which significantly increased

[29] L Pedreschi and J Scott, 'External Differentiated Integration: Legal Feasibility and Constitutional Acceptability' (EUI Working Paper RSCAS 54-2020) 24.

[30] S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) European Papers www.europeanpapers.eu 867.

surveillance and coordination for the Eurozone, widening the difference between governance of Eurozone and non-Eurozone States. Moreover, new governance structures were created outside the EU legal framework, with the ESM and the TSCG. The TSCG imposed different rules for Eurozone and non-Eurozone States, while permitting non-Eurozone Sates to adhere to some parts of the treaty on a voluntary basis. Most significantly, the TSCG authorized the creation of two new economic governance institutions, namely the Euro Summit (meeting of heads of State and government of the Eurozone States) and the Interparliamentary Conference on Stability, Economic Coordination and Governance. As Baroncelli underlines, nevertheless, in response to the recent Covid-19 pandemic, the Recovery Fund "Next Generation EU" – arguably the most important development in EU fiscal policy in many years – was established for all EU Member States, which could suggest a new phase in EMU governance.

The *Article* by Christy Ann Petit focuses on differentiated governance in Europe's Banking Union, exploring one of the most sprawling areas of post-euro-crisis EU development.[31] Petit shows that even within a single policy area, significant territorial and institutional differentiation may arise. In the beginning, membership of the Banking Union was identical to membership of the Eurozone; while it was permissible in theory for non-Eurozone States to join, none initially did so. This changed, however, in 2020, when two non-Eurozone States, Bulgaria and Croatia, joined the Banking Union; both did so just a few months after joining the Exchange Rate Mechanism II (ERM II), the Eurozone "waiting room" where prospective members shadow ECB's monetary policy and maintain a stable exchange rate, and may be permitted to join the single currency after two years. (The only other State in ERM II is Denmark, which has an opt-out from joining the Eurozone.) This pairing of Banking Union and ERM II membership for Bulgaria and Croatia arguably creates a new category of States, that are outside the single currency but are nonetheless very closely aligned with the Eurozone governance regime. This policy area also features differentiated governance insofar as the institutions of the Banking Union are partly within and partly outside the EU legal framework: The Single Supervision Mechanism is firmly embedded in EU institutions but the Single Resolution Mechanism is partly outside them, and the Single Resolution Fund is established by an international treaty approved by all EU Member States but one, Sweden.

The *Article* by Janine Silga details the extent of differentiated governance in the field of migration policy.[32] There is both internal and external differentiation in this area, as illustrated by the Schengen area of passport free travel that includes most but not all EU Member States (22 of EU-27) and some non-EU member states. As Silga underlines, differentiated governance in the area of migration results institutionally from a number of

[31] CA Petit, 'Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting-ins' (2022) European Papers www.europeanpapers.eu 889.

[32] J Silga, 'Differentiation in the EU Migration Policy: "The Fractured" Values of the EU' (2022) European Papers www.europeanpapers.eu 909.

opt-outs and derogations, enshrined in the Treaties and allowing Denmark, Ireland and the UK (while it was still a Member State) opt-outs from the EU's Common European Asylum System (CEAS). However, in contrast to the euro-crisis, the problem of migration has not led to the proliferation of new structures of governance within the EU. Nevertheless, as Silga argues, cases of *de facto* differentiation have recently emerged in this area in the form of non-compliance with CEAS rules, notably by Visegrad countries opposing the relocation of EU asylum seekers. Indeed, the European Commission proposal for a New Pact on Migration and Asylum seems to accept this state of affairs as it would introduce a system of "flexible contributions" which would in effect allow Member States to refuse to take in asylum seekers. As Silga persuasively claims, though, there is a danger that "normative differentiation" could split the EU as a community founded on a shared set of common values – which also raises the spectre of the EU's growing rule of law crisis.

The *Article* by Renata Uitz addresses differentiation in the context of the rule of law crisis.[33] The rule of law crisis – a process of democratic and human rights backsliding at play in a number of EU Member States – has also led to the creation or activation of differentiated governance mechanisms that subject certain Member States to more intensive scrutiny regarding the rule of law, but the effectiveness of these has been questionable. Some of these are part of the so-called rule of law "toolkit". The art. 7 TEU procedure, intended to sanction Member States in breach of the EU's fundamental values, including the rule of law, has been triggered for the two worst offenders, Poland and Hungary, but thus far the results have been inconclusive. The Commission relies on infringement action in select cases, without aiming to address systemic violations. And while the ECJ is developing increasingly robust jurisprudence to protect the rule of law, the resistance of the Member States has turned into full fledged attacks against the primacy of EU law and the authority of the ECJ. As a possible source of leverage, most recently, a new mechanism to introduce Rule of Law conditionality into the EU budget and the Covid-19 Recovery Fund was introduced in late 2020, but it is unclear how this will be triggered or how effective it will be. In the meantime, offending member states continue to benefit from differentiated governance. The EPPO – whose mission is to prosecute crimes against the EU budget – was created via enhanced cooperation by 22 Member States, without the participation of Denmark, Ireland and Sweden, as well as Poland and Hungary – two serial rule of law offenders.

The *Article* by Ian Cooper and Federico Fabbrini addresses one more form of differentiated governance that deserves our attention, the increasing importance of regional groups of Member States within the EU.[34] Through a thorough mapping exercise, Cooper and Fabbrini reveal that there are currently thirteen bottom-up regional groups (BURGs)

[33] R Uitz, 'The Rule of Law in the EU: Crisis, Differentiation, Conditionality' (2022) European Papers www.europeanpapers.eu 929.

[34] I Cooper and F Fabbrini, 'Regional Groups in the European Union: Mapping am Unexplored Form of Differentiation' (2022) European Papers www.europeanpapers.eu 951.

within the EU which touch all regions of the EU and all EU-27 Member States. The rise of such regional groups predates the recent decade of EU crises, but some of them have certainly been brought to the fore by crisis. In particular, the establishment of the so-called "New Hanseatic League" of Northern and Western EU Member States constituted a response to Brexit and the desire to influence EU economic policy after the withdrawal of an integration-skeptic Member State. Similarly, efforts to address the migration crisis was the propellent for resistance to the CEAS by the Visegrad Group. Cooper and Fabbrini identify the features that distinguish regional groups of Member States, classify them by their features and discuss their roles.

The *Special Section* is finally concluded by a post-face by Jean-Claude Piris, former Director General of the Council Legal Service, and a leading intellectual voice on EU law and integration.[35] Piris' *Article* completes the *Special Section* with broader reflections on the EU's multiple crises and its options for the future. As Piris claims, the essential problem is that the aims given to the EU by its Member States in the EU Treaties cannot be achieved by the EU with the means it was given, which are ill-adapted to the number of its members. In his view, the problem can be dated back to the "original sin" of the Nice Treaty, in which the then-15 Member States, despite their legal commitment to do so, did not adequately reform the EU's governance to prepare for the accession of ten new Member States in 2004. In particular, they did not reform the Council's decision-making procedures, which require common agreement or unanimity on all major decisions, effectively giving each Member State a frequent right of individual veto. Piris therefore recommends amending the EU Treaties to vastly cut back the number of decisions and areas subject to common agreement or unanimity in favour of the introduction of a collective veto of three to five States representing 10 to 15 per cent of the EU population and different thresholds of qualified majority voting. As such, Piris' *Article* suggests that while differentiation is not key to resolving the EU's core problems, different forms of differentiation should be introduced to permit flexibility within the EU's system of governance.

This provides a cautionary tale, which should be borne in mind after Brexit, also in the ongoing debate on the future of Europe, particularly within the framework of the Conference on the Future of Europe.[36] This *Special Section* hopes to enrich that debate.

[35] JC Piris, 'The European Union in Crisis: What Should the Member States Do?' (2022) European Papers www.europeanpapers.eu 971.

[36] See also F Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (Oxford University Press 2020) 1.

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

DIFFERENTIATED GOVERNANCE IN EUROPEAN ECONOMIC AND MONETARY UNION: FROM MAASTRICHT TO NEXT GENERATION EU

STEFANIA BARONCELLI*

ABSTRACT: The *Article* argues that differentiated governance within the Economic and Monetary Union has been reduced in recent times, thanks to the adoption of positive intervention programmes such as the Next Generation EU and SURE which apply to all the MS. It also explains that differentiated governance is not the preferable solution because it emphasises the differences between MS, whereas they need to be put on an equal footing if we want to reform EMU and the EU. The *Article* looks at the three phases in which different types of governance were legally established as a reaction to the crises that occurred over time, highlighting the various legal solutions and the consequences for the institutional fragmentation among the MS. Furthermore, it illustrates the pros and cons of some institutional solutions bearing in mind both the need for a more efficient and reactive union in the face of difficulties and a clearer allocation of responsibilities while ensuring greater legitimacy. Although the assessment of the new policy instruments is positive in terms of reducing fragmentation among States, a reform to make EU governance more responsive and efficient and based on homogeneous constitutional principles is necessary.

KEYWORDS: differentiation – multi-speed Europe – European Union governance – Economic and Monetary Union – Next Generation EU – Recovery and Resilience Fund.

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I. Introduction

This *Article* argues that differentiation in governance within the Economic and Monetary Union (EMU) has been reduced in recent times, thanks to the adoption of positive intervention programmes such as the Next Generation EU (NGEU) and the Support to mitigate Unemployment Risks in an Emergency (SURE), intended to revive the Member States (MS)' economies in the direction of a greener, more digital, more resilient and more inclusive society. It also explains that differentiated governance is not the preferable solution in view of EMU and EU reform, because it emphasises the differences between MS and their weaknesses, whereas they need to be on an equal footing in order to achieve a shared and resilient agreement. The *Article* focuses on the three phases in which different types of governance were legally established as a reaction to the crises that occurred over time, highlighting the various legal solutions and the consequences for the institutional fragmentation among the MS.

This *Article* is structured as follows. Section II outlines the rationale for a multi-speed Europe, based on the rules of the Treaties that distinguish States into two categories - with or without a derogation - and legitimise the opt-out of the UK and Denmark. The section emphasises that differentiation led to the need for differentiated European Central Bank (ECB) bodies to represent the euro area countries and the EU as a whole. Section III analyses how differentiation in Member State governance has grown as a consequence of the financial and economic crisis. The types of governance are then distinguished according to whether they apply to *a)* eurozone States only, *b)* eurozone States but also EU MS (so called "hybrid models"), and *c)* intergovernmental treaties that apply to all EU States. Section IV follows, dedicated to the Recovery Plan, where it is highlighted how EU programmes have regained a value for all MS, thanks to a logic of positive intervention built on the legal basis of cohesion funds. Section V takes up the themes of the previous three sections and links them, highlighting the consequences of differentiation for the resilience of the European governance and for the legitimacy of the EU. Section VI illustrates the pros and cons of some institutional solutions bearing in mind both the need for a more efficient and reactive union in the face of difficulties and a clearer allocation of responsibilities while ensuring greater legitimacy. Finally, in the conclusions, the *Article* evaluates positively the approach of the new European intervention instruments such as SURE and NGEU for their ability to reduce the gap between the vanguard and the laggard countries. At the same time, it considers a reform of the Treaties and greater flexibility to be unavoidable, starting with an evaluation of the shared principles of constitutional homogeneity.

II. The path of differentiation in the Maastricht Treaty

During the negotiations leading to the Treaty of Maastricht, some rules were established that would influence the setting up of the "common currency". The currency would not

be common to all the States of the EU, but only to those that would submit to its specific discipline. EMU in fact adhered to a strict anti-inflationary criterion to guarantee lasting stability of the value of the currency and thus a "balanced economic growth and price stability" (art. 3 TEU). The objective of currency stability meant setting limits on the debt of each Member State in the percentages, compared to Gross Domestic Product (GDP), of 3 per cent for annual deficit and 60 per cent for total debt. This meant that only the States who fulfilled the convergence criteria would be allowed to participate. Furthermore, the MS agreed to allow for opt-outs for those States that would not wish to participate to the EMU, even if entitled. The decision arose from the United Kingdom's unwillingness to give up its historic currency, the pound. The UK was granted an "opting-out" clause. First granted to the UK, it was also extended to Denmark. In the absence of a formal derogation, it was also de facto granted to Sweden, which joined the EU in 1995 after the Treaty of Maastricht was signed.

Denmark is, after Brexit, the only State with a legal opt-out from EMU. This differentiation is contained in the Edinburgh Agreement concluded following the two constitutional referendums held in Denmark for accession to the Maastricht Treaty (1992) and for participation in the single currency (2000).[1] Given the opt-out, Denmark has to rely on the willingness of EU Member States to conclude intergovernmental agreements. This was the case for the 1997 Stability and Growth Pact, the Fiscal Compact and the Banking Union. On this basis, a parallel system has been established that is very similar in content to the EU regulatory packages.

The Treaty of Maastricht ended up covering two distinct categories of member countries, *1)* those admitted to the euro, referred to as "countries without a derogation" (euro area MS), and *2)* those continuing to use their own currency, referred to as "countries with a derogation". The euro area countries were subject to stricter coordination rules and sanctions. The derogation was, however, intended to be provisional, with a view to all EU countries joining the euro area in the future. In fact, it was foreseen that every two years or at the request of the Member State with a derogation, an assessment of the fulfilment of the criteria set out in the Maastricht Treaty for access to EMU would be carried out.[2]

The presence of opt-outs and of States with a derogation has some implications for the institutional set-up of the ECB. The Maastricht Treaty assigns the management of monetary policy to the European System of Central Banks (ESCB), which includes the ECB

[1] According to the Danish Constitution, whenever a portion of sovereignty is transferred to a supranational institution, a 5/6 majority in parliament is required. Failing that (as is often the case), the Constitution requires a referendum. The opt-out from EMU was necessary to obtain popular consent for the ratification of the Maastricht Treaty. See H Krunke and S Klinge, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' (2018) European Papers www.europeanpapers.eu 157.

[2] The Commission and the ECB report to the Council in accordance with the procedure laid down in art. 140 TFEU. For the provisional nature of the derogation see also art. 141(1) TFEU, according to which "if and as long as there are Member States with a derogation".

and National Central Banks (NCBs) of the 27 EU MS.[3] However, until all EU countries have adopted the euro, the ESCB remains a non-operational concept.[4] That is why since 1998, the term Eurosystem has been used to refer to the acts adopted by the ECB and the NCBs that have adopted the euro. Only the ECB and the NCBs of the countries whose currency is the euro are part of the Eurosystem (art. 282 TFEU). The Eurosystem conducts the single monetary policy of the Union. As of 1st January 2022, the euro area comprises 19 countries.[5] Eight MS have not yet joined EMU. This is the case for Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Poland, Romania, and Sweden.

The NCBs of the States outside of the euro area do not participate in full within the ECB. They do not nominate the President and vice-President of the ECB and the other members of the Executive Council.[6] In addition, their central banks' governors are not members of the Governing Council of the ECB. However, considering that some functions of the ECB pertain also to non-euro area States, a third organ was created by the Treaty of Maastricht, the General Council, which includes the President and vice-President of the Executive Council and the governors of all the NCBs of the MS of the EU.[7]

A parallel development to that which took place in the monetary area also occurred in economic governance. Here, too, there was a need for a more restricted body than Economic and Financial Affairs Council (ECOFIN) in which only the finance ministers of the MS that had adopted the euro would participate. This is the reason why the Eurogroup was created in 1997 as an informal body to allow eurozone finance ministers to meet without those of the non-eurozone States. Following the entry into circulation of the euro, the Eurogroup strengthened its role. Firstly, it decided to nominate a permanent president for a two-year period. Secondly, it established a strong link with the Euro Summit, the informal body created in 2008 that brings together the heads of state and government of the eurozone States. Finally, the role of the Eurogroup was formally recognized in the Lisbon Treaty by Protocol 14. This Protocol establishes that the Eurogroup meets once a month, before the meetings of the ECOFIN. The Protocol increased the term of office of the President of the Eurogroup to two and a half years. It also contains rules on the composition of the body: in addition to the finance ministers of the eurozone countries, the European Commission and the ECB also take part in the meetings.

From the point of view of the objectives, however, the EMU designed in Maastricht was a well-integrated system within the EU institutional system and the EU Treaties, as can be seen in Figure 1 on the governance of EMU under the Maastricht Treaty.

[3] Both art. 282 TFEU and art. 1 of the Statute of the ESCB and of the ECB (the "Statute") refer to the ESCB, which includes the ECB and all NCBs of EU countries.

[4] JV Louis, 'Article I-30, La Banque Centrale Européenne' in L Burgorgue-Larsen, A Levade and F Picod (eds), *Traité Établissant une Constitution pour l'Europe* (Bruylant 2007) 401, 405.

[5] Euro area members: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain.

[6] Art. 139 (2)(h) TFEU.

[7] Art. 141 TFEU and art. 44 of the Statute.

	EU Legal Framework	Intergovernmental Space
Euro area 11	Euro System Eurogroup Euro summit	
EU 15	EUROFIN ESCB	

TABLE 1. The original governance of EMU (Maastricht).

It can be concluded that the differentiation introduced by the new single currency manifested itself above all with regard to monetary policy, with the ECB establishing itself at the centre of the Eurosystem. However, the status of State with a derogation was considered as provisional, as the principle was "one EMU" as a goal. It was expected that all the EU Member States would have joined the monetary union, which was deemed irreversible. Not only were there no specific provisions in the Treaty on the possibility of states withdrawing from monetary union, but the choice to introduce a new currency implied a definitive choice, which could only be terminated in the case (not provided for in the Maastricht Treaty) of leaving the European Union. Furthermore, the degree of differentiation allowed was limited as is visible from the evidence that that the body with the legal competence to manage economic policy coordination was the ECOFIN and not the Eurogroup, which has only an informal role.

III. The post-Maastricht path: the widening of differentiation

At the beginning of the 2000s, it became clear that the MS could not enforce the Stability and Growth Pact, and the EU did not have the sufficient legal basis and political instruments to impose it on the States. This situation worsened in the wake of the economic and financial crisis and the sovereign debt crisis that followed, as the euro area countries were most exposed to the risk of contagion and bankruptcy due to speculation on the markets, which hit the most indebted euro area countries, betting on their failure. A *de facto* differentiation began to emerge clearly, dividing the euro area MS into economically weak States (or debtor States) and economically strong States (creditor States), based on the state of their public debt. The debtor States – mainly in southern Europe, but also including Ireland – were the target of speculative attacks, and the creditor States, which included Germany and the Netherlands, feared that this situation would lead to a transfer of funds between States, and thus ultimately weaken the control of their national budgets, undermining the principle of parliamentary control.

When, at the end of 2009 and the beginning of 2010, the Greek crisis emerged with the possibility of a full-blown default, the EU found itself without the means to react. The Maastricht model was designed for a system without major shocks. In fact, there is no article in the Treaties that would give the EU the power to intervene in the event of crisis

affecting certain EMU Member States in particular. The only clause that could be used, art. 122 TFEU, which provides for EU financial assistance to States that are in difficulty or are seriously threatened by serious events such as natural disasters or exceptional circumstances, if certain conditions are met, was not used for fear that the principle of no bail-out would be questioned by southern European countries. The crisis, in fact, was spreading seriously, affecting above all the southern and peripheral countries with budget deficits, in particular Spain, Portugal, Ireland, Cyprus and Italy. In order to reduce the fragmentation among Member States, the ECB had to intervene by adopting a number of unconventional monetary programmes. However, these interventions were opposed by the German Constitutional Court, which challenged these programmes before the EU Court of Justice (*Gauweiler* and *Weiss* judgments).[8] The division between North and South (or peripheral countries) within the euro area was now a reality.

Given the difficulty of revising the Treaties, the EU first enacted a series of secondary legislation, and then entered into a number of agreements outside the EU system, to provide urgent financial assistance to MS. Some of these targeted only euro area MS while others applied to a variable number of EU MS, fostering institutional and geographical fragmentation among EU MS. These include the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), better known as the Fiscal Compact, the European Stability Mechanism (ESM), the Two-Pack, and the Six-Pack. The sub-sections below distinguish such measures on the basis of the type of differentiation allowed. The expansion of differentiation measures is illustrated by Figure 2 on the EMU governance during the economic and financial crisis.

	EU Legal Framework	Intergovernmental Space
Euro area 17	Euro System Eurogroup Euro summit Two-Pack	
	Six-Pack	
	SSM,SRM	Fiscal Compact
EU 28	EUROFIN ESCB	

TABLE 2. EMU governance after the economic and financial crisis.

[8] The German Constitutional Court considered that the purchase of MS' securities by the ECB affected the economic policies of the Eurozone States, triggering a mutualisation of the MS' debts, which is prohibited by the treaties. See S Baroncelli, 'Monetary Policy and Judicial Review' in F Fabbrini and M Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Edward Elgar 2019) 199.

III.1. Euro area types of governance

In a first phase, from 2011 to 2013, the EU institutions approved a package of regulations and directives (the so-called Six-Pack and Two-Pack).[9] The Two-Pack applies only to euro area MS and aims to adapt the rules on the European Semester. It introduces a common calendar and common budgetary rules specifically for euro area MS.[10] The new procedures allow euro area MS to strengthen the coordination and surveillance of their budgetary policies to ensure the necessary budgetary discipline in the EMU.[11]

An intergovernmental agreement that differentiates MS is the ESM. This is a permanent intervention instrument created in 2012 with the aim of granting financial assistance to countries in difficulty so that they can finance themselves on the market. To give the ESM a legal basis, art. 136 TFEU was amended, and a third paragraph was added.[12] The same paragraph underlines that the granting of financial assistance "will be subject to strict conditionality". A simplified treaty amendment procedure was used to amend art. 136 TFEU. Based on art. 136 TFEU the ESM was established as an international intergovernmental treaty concluded between the States that are part of the euro area.

The ESM only entered into force in October 2012, due to appeals filed in Germany, Ireland and Estonia concerning its compatibility with their respective constitutions and the use of the simplified treaty amendment procedure. In Germany, the Federal Constitutional Court rejected the appeal against the ESM but called for greater involvement of the *Bundestag* (Federal Parliament) in decisions on financial commitments. In Ireland, there was a preliminary reference to the Court of Justice of the EU, which resulted in a positive outcome in favour of the compatibility of the ESM with the no bail-out clause contained in art. 125 TFEU.[13]

To raise the necessary funds, the ESM issues financial instruments or concludes financial agreements and understandings with its members, financial institutions or third parties. The main criticism of the ESM in southern States has been the strict conditionality attached to the disbursement of financial assistance. These conditions can range from a programme of macroeconomic corrections to the constant respect of predefined eligibil-

[9] Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

[10] Euro area Member States must publish by 30 April their medium-term budgetary plans (stability programmes), also indicating their policy priorities for growth and jobs for the following 12 months (national reform programmes) as part of the European semester on economic policy coordination; euro area Member States must publish their draft budgets for the following year by 15 October; euro area Member States must publish their budgets for the following year by 31 December.

[11] See art. 136 TFEU in combination with art 121(6) TFEU.

[12] Art. 136(3) TFEU: "Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole".

[13] Case C–370/12 *Pringle* ECLI:EU:C:2012:756.

ity conditions (art. 12 ESM Treaty). In the case of loans, conditionality consists of a macroeconomic adjustment programme set out in a memorandum; in the case of precautionary credit lines provided to MS that are in sound economic and financial condition but affected by negative shocks, conditionality is less stringent. The ESM has so far provided financial assistance to Greece, Cyprus, Portugal, Ireland and Spain. As already said, only euro area States are members of the ESM. When a State adopts the euro, it automatically becomes member of the ESM, with full rights and obligations.

The ESM has also been heavily criticised for its governance, which introduces a further differentiation between States on the basis of their economic power. Indeed, it gives each State a voting right in the ESM Board of Governors equivalent in percentage terms to its contribution to the ESM budget, which in turn corresponds to GDP. This discipline established a *de facto* hierarchy among States, giving more power to the larger and economically stronger ones than to the smaller and weaker ones. This breaks a rule of respect for sovereignty and the principle of equality between States that has always been respected by the Community method, which includes States that differ greatly in size and economic power. Considering its content and procedures, which made possible a differentiation among the MS, the ESM has been considered a politically risky solution, and therefore not usable. The ESM Treaty was amended in January 2021.

III.2. Hybrid systems of governance that apply to the euro area and non-euro area Member States

Hybrid measures adopted during the euro crisis are primarily targeted at euro area States but are legally open to participation by all EU States. This is the case with the Six-Pack measures (European Semester) and, within the Banking Union, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM).[14]

The rules of the Six-Pack have been specified and framed in a single system outlining a fiscal union. The Six-Pack also includes procedural rules that allow the European institutions to interact with the national institutions in the state budget approval phase, during the European Semester. The European Semester was introduced to facilitate *ex ante* coordination of MS' economic policies and provides for a set of procedures and acts to ensure the coordination and surveillance of the economic and budgetary policies of the euro area and EU MS. Such measures can be seen as a tightened version of the Stability and Growth Pact and a new mechanism for macroeconomic imbalances which increases surveillance of public deficit and debt in the MS.[15]

[14] On the banking Union see, in this *Special Section*, CA Petit, 'Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting-ins' (2022) European Papers www.europeanpapers.eu 889.

[15] The European Semester begins in November of the year preceding the reference year, when the economic and public finance situation of both the EU and euro area and the Member States is analysed. Between January and March, the economic and budgetary policy guidelines for the EU are adopted. The

The Six-Pack applies to all EU countries. However, the stricter rules providing for the imposition of financial sanctions are only applicable to euro area countries. The ECOFIN Council is organ of reference for national governments, while the initiative comes from the European Commission.

Other mechanisms relate to financial stability and have been designed within the Banking Union. As a completion of the single market, these mechanisms apply to all MS and are more firmly based in the EU Treaties, but some specific rules apply to non-euro area MS. While it is an obligation for euro area States to join the Single Supervisory Mechanism (SSM), non-euro area MS can decide to join if close cooperation exists between the ECB and the national competent authority of that State. However, if a State that decides not to join has branches of banking institutions in another State that is a member of the SSM, these will be subject to SSM supervision if they are large enough to be systemically relevant.

On the basis of the SSM Regulation, the euro and non-euro members have an equal role in the Supervisory Board of the SSM (rule "one member, one vote").[16] However, if a participating State that has not adopted the euro disagrees with a draft proposal of the Supervisory Board, the Governing Council of the ECB will decide on the matter.[17]

III.3. Intergovernmental treaties that apply to all EU Member States

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), better known as the "Fiscal Compact", was signed in 2012. Due to UK opposition European leaders decided to resort to an international treaty outside the Union but open to signature by all MS. Just 25 out of the then 27 States decided to sign it, with the exception of Great Britain and the Czech Republic. However, following Brexit the Czech Republic ratified the TSCG in 2019, and also Croatia (which joined the EU in 2013) has now signed it. This treaty establishes exceptions to the procedures and competences of the institutions laid down in the Treaties and requires that the budgets of the States be in balance or in surplus. In the event of deviations from the medium-term objective, MS must establish binding corrective mechanisms and the Court of Justice of the EU could impose financial penalties to be transferred to the ESM.[18]

six-month period ends with the June European Council when recommendations on country-specific targets and policies are adopted. Budgetary procedures then continue at national level.

[16] Art. 26(6) of the Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[17] Art. 7(8) Regulation 1024/2013 cit. The ECB will decide within five working days, taking fully into account the reasons put forward by the State, and explain in writing its decision.

[18] Under the Fiscal Compact, the rules were to take effect in the national law of the contracting States by 1 January 2014 at the latest "through binding provisions of a permanent nature – preferably constitutional – or whose faithful observance is otherwise strictly guaranteed throughout the national budgetary process". At the same time, the Fiscal Compact provided for an elaborate surveillance method centred on the European Commission, which had to monitor the behaviour of States and report on the provisions

As a rule, the Fiscal Compact applies when a MS decides to join the euro area, unless it declares to be fully or partially bound by titles III (Fiscal Compact) and IV (Economic policy and coordination).[19] The Fiscal Compact also introduced a differentiation among the euro area MS, as it required only the ratification by 12 MS of the euro area to enter into force. Once entered into force, it applies to the other euro area MS following the deposit of their respective instrument of ratification. Up to now the Fiscal Compact (Title III of the TSCG) binds 22 MS of the EU: the 19 MS of the eurozone plus Bulgaria (Titles III and V), Denmark (Titles III, IV and V) and Romania (Titles III, IV and V) who have decided to opt in. The other non-eurozone MS apply only Title V (Croatia, Czech Republic, Hungary, Poland, Sweden). Some degree of differentiation is also allowed within euro area MS, as Latvia and Lithuania have been granted a longer timeframe for implementing the rules of the Fiscal Compact.

Despite the discretion given to MS to apply the Fiscal Compact rules, all the euro area MS joined, given the very strong political pressure exerted by governments in national parliaments to ratify the treaty. The TSCG entered into force on 1 January 2013 following the procedure of ratification by the MS. All the larger MS, including Spain, Germany, France, and Italy, participated from the onset. The aim of the TSCG is to incorporate the content of the Treaty into EU legislation within five years. For the moment, however, the TSCG is remained an intergovernmental treaty.

IV. The pandemic and the Recovery Plan (Next Generation EU)

The pandemic caused by the spread of the Covid-19 virus triggered a new global economic crisis. In the EU, the crisis constituted a key step in raising awareness and changing the approach towards action by the MS.[20] The EU intervened in several areas. First, the SGP and state aid rules were suspended. Second, the Eurogroup relaxed the conditions under which countries can borrow funds through the ESM and removed them if the funds are used to finance healthcare services.

At the European Council of 17-21 July 2020, the historic decision was taken to finance a new plan amounting to some 1,800 billion euro.[21] The plan consists of an agreement on the Multiannual Financial Framework 2021-27 (MFF – the EU's seven-year budget) and a recovery plan called "Next Generation EU" (NGEU). NGEU allows the Commission to fund MS via grants and loans through a new instrument, the Recovery and Resilience Facility, to renovate Europe and make it greener, more digital and more resilient. The EU has become responsible for borrowing money on the financial markets at a better cost than that granted

adopted, and on the Court of Justice of the EU, which could also impose financial penalties to be transferred to the ESM upon the complaint of another Member State.

[19] Art. 1(2): "[...]this Treaty shall apply in full to the Contracting Parties whose currency is the euro. They shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14".

[20] F Fabbrini, 'Europe's Economic & Monetary Union Beyond Covid-19' (December 2020) Gov.ie www.gov.ie.

[21] European Council Conclusion of 17-21 July.

to individual MS and paying it back to the States to finance National Recovery and Resilience Plans (NRRPs). These funds are divided among the MS according to the severity of the crisis that has affected them and can be used either within the framework of existing operational programmes or by submitting an *ad hoc* programme to the European institutions.

The legal basis for Regulation 2020/2094, establishing an EU recovery instrument, was found in art. 122 TFEU.[22] This article allows the Council to decide on a proposal from the Commission and in a spirit of solidarity between MS on appropriate measures to respond to exceptional economic situations. This legal basis was not considered legitimate in the past case of the euro-crisis, as the event was not considered "out of the control of the states" because it was fuelled by the presence of out-of-control debts of some MS. This emphasis on budget debts led to a *de facto* differentiation between northern and southern MS. A different approach is now being followed by the Council in the case of the economic and social consequences of the Covid-19 epidemic, an event for which specific countries cannot be blamed.[23] For this reason, the Council considered that a "coherent and unified approach at Union level" was required.[24] The legal basis also circumscribes the duration of the recovery instrument. Since it is an exceptional response to extreme and temporary events, the intervention must be rapid but also of limited duration and cannot be extended beyond the effects of the pandemic. Of course, there is the question of how long the negative effects of the pandemic will last, but in principle this should be a temporary intervention.

In addition to NGEU and the reform of the MFF, 55 billion euro have been earmarked for cohesion policy 2014-2020 (React EU programme)[25] on the basis of art. 177 TFEU and funds have been set aside to finance MS for the risk of unemployment during the emergency (SURE programme), based on art. 122 TFEU.[26] The novelty of the instruments created to address the coronavirus crisis is that they are all within the EU framework and are addressed to all 27 EU countries, without differentiation. This is so for SURE, React EU and NGEU (see figure 3 on the EMU Governance during the Coronavirus crisis).

[22] Regulation (EU) 2020/2094 of the Council of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the Covid-19 crisis.

[23] P Dermine and M Markakis, 'EU Economic Governance and the COVID-19 Crisis: Between Path-Dependency and Paradigmatic Shift' (2020) International Journal of Public Law and Policy 326.

[24] Recital 5 of the Regulation (EU) 2020/2094 cit.

[25] Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the Covid-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU).

[26] Regulation (EU) 2020/672 of the Council 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.

	EU Legal Framework		Intergovernmental Space
Euro area 19	Euro System Eurogroup Euro summit Two-pack	ESM	
	Six-Pack		
	SSM, SRM		Fiscal Compact
EU 27	React-EU NGEU SURE EUROFIN ESCB		

TABLE 3. EMU Governance after the Coronavirus crisis.

The decision to adopt the NGEU was taken by the European Council unanimously, considering the needs of the various countries, but with the idea of not lowering the common denominator. The discussion brought out groups of countries with common interests. On the one hand, the northern European States (the Netherlands, Sweden, Austria, and Denmark) were successful in capping the next MFF and maintaining the rebates they enjoyed, which allow them to contribute less to the EU budget than they should according to their GDP. These States had proposed a vehicle to provide emergency loans to States and were against the idea of increasing the EU budget. On the other hand, the group of Eastern European countries obtained the removal of a specific reference to the requirement of conditionality for the respect of the rule of law, which would have reduced or even eliminated their power to receive the new funds.[27]

However, the following procedure to approve the rule of law clause has been tortuous. First, the European Parliament succeeded in raising the MFF ceiling.[28] Second, Poland and Hungary decided to veto the decision on the NGEU and the MFF, taking advantage of the fact that the regulation on the general conditionality regime and for the protection of the EU budget has to be adopted by unanimity.[29] However, this move did not avoid a political solution by the European Council, which, at its summit of 11 December 2020, made the application of the conditionality clause subject to the outcome of the future ruling of the

[27] European Council Conclusions of 17-21 July 2020 cit. para. 23 and 30.

[28] Art. 312 TFEU.

[29] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

EU Court of Justice on the legality of the regulation on appeal by Hungary and Poland.[30] This ruling came on 16 February 2022 and legitimised the conditionality mechanism enshrined in the EU regulation, which provides that the Council, on a proposal from the European Commission, can take protective measures such as suspending payments from the EU budget or suspending the approval of a programme remunerated by that budget in case of rule of law violation.[31] Interestingly, the Court identifies rule of law and solidarity as values on which the EU is founded and which must be protected by it. The regulation would give practical effect to these values. In fact, the Court points out, the EU budget is one of the main instruments of solidarity between the MS and its application lies in the mutual trust between the States in the responsible use of the common resources provided by the budget. This holding is antithetical to the interpretation that emerged during the euro crisis, when relations between MS were marked by distrust and different attitudes towards mutualisation of debt, as highlighted above.

On the basis of NGEU the funds allocated to the MS are financed through the issuance of common EU debt - and not with transfers of state funds - to be repaid after 2028 and before 2058 through an increase in own resources ceilings and new EU taxes. An EU fiscal capacity has thus been created that reinforces the EU's ability to act in the event of a crisis in the MS, intervening and giving to those most in need, based on the principle of solidarity.[32]

As said before, the funds of NGEU and MFF are legally addressed to all the 27 EU countries. But as a matter of fact, the sums allocated are divided among the MS according to the severity of the consequences of the crisis that has affected them. A cap is provided for the non-repayable financial support entrusted to the MS. 70 per cent of the sum is allocated on the basis of population, the inverse of the GDP per capita, and the relative unemployment rate of each Member State. 30 per cent is calculated on the basis of the population, the inverse of the GDP per capita, and, in equal proportion, the change in real GDP in 2020 and the aggregated change in real GDP during the period 2020-2021.[33] As of February 2022, 26 member countries have submitted their NRRPs and 22 of them have been approved. The funds are therefore intended for the MS that suffered most in 2020-21. However, such funds are not limited strictly to repay the Covid-19 consequences, as the difficulties encountered by the States during the pandemic derive also from previous cuts in health, pensions, and social services due to the management of the euro area crisis. NGEU can thus have the

[30] European Council Conclusions of 10 and 11 December 2020 p. 1, para. 2(c): "Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment".

[31] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97.

[32] B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 635.

[33] Art. 11 and Annex IV of the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

effect of mitigating the differentiation between the MS from the economic point of view, limiting the divide North/South that was typical of the euro area crisis.

From a strictly economic point of view, however, this is not certain, since part of the funds do not consist of grants, but of loans: they should be repaid and are counted within the debt of the MS. However, the time frame for repayment is so long that NGEU and MFF will have the time to revive the southern MS's economy and put the relationship between the MS on an equal footing. Of course, it will depend on what happens to the other measures that have been suspended, such as the SGP and State aid rules. The previous approach based on controls on the MS has not disappeared. For example, art. 10 of Regulation 2021/241 provides for links between the new NGEU regime and the previous one. In particular, it establishes that funding to the States may be suspended by the Commission if the Council considers that a MS has not taken sufficient measures to correct a government deficit considered excessive, on the basis of the SGP.

Above all, the success of the NGEU will depend on whether its methodology will be maintained in the future, so as to create a kind of EU fiscal power capable of rebalancing the asymmetry between monetary and economic policy described in the previous paragraph. In short, it depends on the sustainability of the willingness to attribute to the EU some competences in the social field and to provide for payment through EU-wide taxes, as envisaged by the NGEU (plastic taxes, carbon border adjustment tax, digital tax and EU financial transaction tax).

The legal basis for NGEU was found in art. 175 TFEU on economic, social and territorial cohesion, which aims to reduce the differences between the development levels of regions and to catch up with the less favoured regions.[34] As stated in the text of the Recovery Instrument regulation, the EU should not only focus on measures that strengthen "competitiveness, growth potential and the sustainability of public finances", but should also introduce "reforms based on solidarity, inclusiveness, social justice and fair distribution of wealth [...] in order to create quality jobs and sustainable growth, ensure equality and access to opportunities and social protection, protect vulnerable groups and raise the standard of living of all Union citizens".[35]

The idea of using art. 175 TFEU as a legal basis for NGEU has the advantage of leveraging a logic of positive intervention since the funds are intended for all MS, without distinction, but at the same time allow them to be allocated to the regions within the States that need them most and that, due to their critical economic situation, have suffered most from the consequences of the pandemic. This is a logic that counterbalances the one based on market forces, which has led to a differentiation in the level of economic

[34] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 on the Recovery and Resilience Facility.

[35] Recital 4 of the Regulation 2021/241 cit.

development of the MS and which EMU has increased following the complete liberalisation of the free movement of capital. This differentiation between States was predicted by the Delors Report, which proposed that the EU institutions should play a leading and encouraging role in structural adjustments to enable those States lagging behind to catch up with those ahead.[36] Moreover, the involvement of local and territorial authorities and citizens foreseen by the NGEU (and cohesion policy) also has the advantage of reducing the democratic gap by establishing a territorial legitimacy or local type democracy.

V. Which differentiation in the EMU? Paths and Issues

In the Maastricht model, differentiation between States within EMU was accepted as a consequence of the UK and Danish objection to the common currency and the different economic conditions of the States. The setting up of the economic and monetary union was influenced by the presence of two coalitions of States that shared different beliefs and interests and offered different solutions to the relationship between economic growth and monetary stability. On one side Germany, the Netherlands and Denmark. On the other side, France, Belgium, and Italy.[37] On the basis of the prevailing theory, price stability was envisaged as a core value of EMU. Euro area MS would also have to show fiscal restraint. A second element of vertical differentiation arose from the asymmetry between monetary (exclusive competence of the ECB) and economic policy, left to the discretion of the States. The asymmetry was reinforced by the presence of the no bail-out clause provided for by art. 125(1) TFEU.

From the point of view of objectives, however, the EMU designed in Maastricht was a well-integrated system within the EU institutional system and the EU Treaties. The differentiation was managed by a set of rules and concerned the different pace at which States would join EMU, which was considered irreversible. Indeed, one cannot but criticise the choice made at Maastricht to place the economic principles of EMU in an international treaty that could only be amended by unanimity, without providing a way out in the event of a shock to the system. The idea behind EMU was that all States would join, sooner or

[36] The risk of asymmetric development is evident from the Delors Report on EMU presented to the European Council in 1989, which states: "historical experience suggests [...] that in the absence of balanced policies, the overall impact [of greater economic integration] on peripheral regions could be negative. Transport costs and economies of scale could favour a shift of economic activity from less developed regions, especially peripheral ones, to more developed areas in the centre. Economic and Monetary Union should encourage and guide structural adjustments that could help the poorer regions to reach the richer ones".

[37] K Dyson and K Featherstone, *The Road To Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999). The most influential group was represented by the German, Dutch and Danish governments and their central banks. These countries saw in price stability the core principle of European monetary policy. Euro area Member States would also have to show fiscal restraint. The second group was led by the French, Italian and Belgian governments and assisted by the European Commission.

later, the EMU, enshrining the principle of a multi-speed Europe as an intrinsic and transitional value in the Treaties. At Maastricht, it was also not yet clear whether the Union would be enlarged to include other States.

The euro crisis highlighted and exacerbated the initial differences between the economic and political preferences of the euro area MS, especially as the number of States had risen to 28. The crisis has reinforced the elements of differentiation that existed in EMU. First, coordination and surveillance among euro area MS has been strengthened through the adoption of the Two-Pack and the Six-Pack and the provisions of the European Semester. While the Two-Pack was aimed specifically at the eurozone, the Six-Pack was aimed at all MS, but sanctions were only applicable to eurozone States. Thus, the role of the Eurogroup and the Euro Summits became increasingly important,[38] as did that of the eurozone, to the extent that discussions began on a eurozone budget and a eurozone Parliament.[39]

To cope with the lack of political control of both the Eurogroup and the Euro Summit, it has been proposed to create a euro area parliamentary assembly, in order to reduce the problems related to the fact that the European Parliament represents all European citizens (art. 14 TEU), including those from countries that are not part of the euro area. It is becoming increasingly difficult for the European Parliament to act as a counterweight to "differentiated" institutions such as the Eurogroup or the Euro Summit, which only include certain countries. It should also be mentioned that members of the European Parliament are elected on a national basis and according to national preferences, while using similar electoral procedures. In the Six-Pack and the Two-Pack, the president of the Eurogroup and the president of the Euro Summit can be invited by the ECO committee of the European Parliament as part of the economic dialogue. In the case of the Euro Summit, some principles of political accountability are provided for in the Fiscal Compact. In addition, there is the role of national parliaments under domestic law; however, the role of parliaments has been emptied precisely in cases where it should have been strengthened, in the case of control over the implementation of financial assistance programmes.

Second, responses to the crisis have been based on the principle of intergovernmentalism with the European Council playing the main role. Most of the solutions envisaged

[38] The Eurogroup has a President that is elected for two and a half years by the majority of the Eurozone countries; in addition, the Commissioner for economic and financial affairs as well as the President of the ECB participate on a regular basis in the meetings of the Eurogroup. Another organ which has seen its power growing is the Euro Summit. It is institutionalized by the TSCG (art. 12) and meets at least twice the year to discuss policy issues related to the euro area, including on governance and economic convergence.

[39] C Joerges, 'Comments on the Draft Treaty on the Democratisation of the Governance of the Euro Area' (2018) European Papers www.europeanpapers.eu 75; N Lupo, 'A New Parliamentary Assembly for the Eurozone: A Wrong Answer to a Real Democratic Problem?' (2018) European Papers www.europeanpapers.eu 83; A Manzella, 'Notes on the "Draft Treaty on the Democratization of the Governance of the Euro Area"' (2018) European Papers www.europeanpapers.eu 93.

are international organisations linked to the EU, so-called hybrid systems such as the ESM and the Fiscal Compact.

Unfortunately, the governance created during the euro crisis has not worked well, because it is based on mistrust, if not distrust, between MS, whose main concern has been not to allow transfers between "rich" and "weak" States. It has also created a problem of legitimacy because the institutions that have emerged as relevant from the crisis – the ECB and the Eurogroup – are independent or informal, not to mention that the strengthening of the executive capacity of European institutions in the economic sphere has not led to the development of parliamentary control, limiting democratic control to that of national parliaments for the ratification of intergovernmental agreements such as the ESM and the Fiscal Compact. Sometimes there is a power of control for national parliaments, as in the case of the Fiscal Compact, but this is only a consultative power. Yet the decisions taken by these technocratic bodies have an impact on citizens' living standards and social rights, affecting the social pact and the European way of life itself.

This is why the NGEU has been defined as a fundamental step for the European Union, a "Hamiltonian moment" that can lead to profound changes in the EMU by virtue of the principle of *path dependency*.[40] Once an EU fiscal capacity has been created, there will be no going back as the EU's fiscal power will become the "new normal". The reference is to Alexander Hamilton, the first American Secretary of the Treasury, who managed to convince his contemporaries to replace the war-time debt of the former colonies and to convert it into joint obligations held by the new federation as a federal debt. Because, as Hamilton maintained in 1792, the "proper funding of the present debt will render it a national blessing".

It is difficult to compare in full the European and American cases. On the American continent, the pooling concerned the past debt accumulated by States due to war. In Europe, pooling concerns future debt, which is being contracted on the European market to invest in long-term projects. Yet, despite the historical and technical differences, the symbolic meaning is clear: can the pandemic function as a detonator to trigger a virtuous process of cooperation and solidarity among MS and lead to a union with a federal-like character and limit differentiation?

VI. Lessons to be learned from differentiation

The problems related to the euro-crisis measures and the adoption of the Recovery Fund have shown that one of the most urgent problems is to provide for a real crisis management system that is not based on intergovernmental organisations. In the latter, decisions are taken by unanimity and not by majority, with the consequence that the economically

[40] Several authors have stressed this change of logic. Among the first commentators, see R Montgomery, 'A Hamiltonian Moment?' (11 June 2020) BRIDGE bridgenetwork.eu.

stronger (or smaller) countries can always block them, deepening the differentiation between strong and weak countries. This is ultimately the problem with the ESM, which was envisaged as the sole crisis management instrument but was not used by any Member State during the pandemic crisis, even though the element of conditionality had been removed. ESM is not politically sustainable in the MS, as it exposes the weaker MS to the decisions and possible vetoes of economically stronger EU countries. A solution could be to bring the ESM back in a modified version within the European institutional framework, in imitation of the Recovery Fund, as suggested by the European Commission.[41]

This solution would have the advantage of strengthening the European institutions (and not the Eurogroup) and making them more politically accountable to the European Parliament, simplifying the current procedures that are now based on the relationship with national parliaments. Moreover, this measure would not only refer to the eurozone States, but would apply to all EU MS, reducing differentiation. Such a change would also have the advantage that it could be based on a broader interpretation of art. 122 TFEU, by construing in a less narrow way the concept of "exceptional circumstances beyond the control of the State".

Of course, the ESM is not a stabilisation mechanism. Therefore, in addition to a reform of the ESM, there should be a fiscal stabilisation tool or an economic government to counterbalance the monetary competence of the ECB, which remains independent. This type of intervention remains a specific issue in the eurozone – considering that the ECB monetary policy applies to the MS that have adopted the euro - and requires specific solutions. The Recovery Instrument could be a reference example, to create a fiscal capacity.

Another possibility to increase the European dimension of the Union, considering the growing international role of the euro, would be to change the mandate of the ECB in order to provide for a double mandate, adding (or emphasising) the task of employment growth to the one of monetary stability, considering that controlling inflation is an objective which has been reached by the ECB, or saying more clearly that the ECB has also the objective of increasing employment, after having reached price stability.

As an alternative, some authors have suggested to have recourse to new intergovernmental agreements or new treaties among some blocks of MS that are more homogenous. The pandemic has shown that Europe is structurally slow in coping with shocks, that have become a recurrent feature of the 21st century. It is also slow in dealing with international relations. Can a hybrid governance, in imitation of the ESM as recently reformed, work better than the present system? The ESM is outside the system of EU law and has limited judicial review but has the advantage of reacting much faster than the NGEU.

Certainly, the success and replication of the NGEU will be conditioned by the effectiveness that national investment programmes financed through EU loans and grants will have in the future. Considering that such projects are mainly managed at local or regional

[41] G Zaccheroni, 'The Future of the ESM within a Hybrid EMU Law' (BRIDGE NetworkWorking Paper 6-2020) 8.

level, NGEU constitutes a real change of perspective as it links the destiny of future innovations in governance taken at EU level - amount of loans and grants, new EU-wide taxes and, maybe, a real fiscal capacity - to the management capability of local, regional and state administrations. This structure however is not new. It goes back to the 1988 reform of the structural funds and to the Treaty of Maastricht, which introduced a new financial instrument, the cohesion fund, with the aim to improve economic growth in a sustainable way in the regions and to stimulate competitiveness. Such reform responded to the logic of positive intervention by the Community to address regional policies and it has always been used for the management of European structural and cohesion funds. From this point of view, it is not so surprising that cohesion policy is now being used to "legitimize" and prompt EU-wide governance reforms, investment programmes and possibly to reduce the differentiation between MS that has emerged during the last economic crises.

Certainly, if we want to raise the amount of funds available to the territories and limit the differences among the regions, it will be necessary to modify the EU budget rules, which are too rigid, especially the unanimity voting rule required by art. 311 TFEU for the Council. According to this rule, only with unanimity is it possible to establish new categories of own resources or to abolish an existing category. This decision enters into force only with the approval of the MS in accordance with their respective constitutional rules. There is a need for a more efficient and more democratic system of decision-making in tax matters based on qualified majority voting. Of course, this would require a modification of the Treaties.

Given the difficulties that differentiated governance systems give rise to and the presence of different groups of MS, a solution for the EU crisis will only be possible when the main governance instruments are embedded in the EU legal framework and the EMU is made more flexible. Only in this way will it be possible to put all EU States on an equal footing and make it possible to have an all-round political discussion to achieve a common goal. Asymmetric solutions do not work well at the moment, because MS do not want to be a second-rate participant. In fact, mechanisms of enhanced cooperation have been applied so far only to minor cases.

Moreover, differentiated governance develops its own characteristics over time, making it more difficult for MS outside the euro area to interact and share the solutions and objectives identified and voted for within it. As a result, there is a risk that out-MS take a negative attitude towards participation or decide to join the euro area, but then feel obliged to apply a regulatory system that they did not contribute to creating, and therefore do not share it.[42]

[42] A Piekutowska and E Kuzelewska, 'Economic and Monetary Union as an Example of Differentiated Integration' (2015) Yearbook of Polish European Studies 165, 186.

VII. Conclusions

Asymmetries are an inherent element of the EU's system of economic and monetary governance. This kind of differentiation will increase if, as European Commission President Von der Leyen has said, the EU intends to pursue accession negotiations with the States of the Western Balkans area. Differentiation is legally possible, either by interpreting the articles of the Treaties extensively or by amending the Treaties, and in particular by substituting the unanimity voting with the majority voting in the area of economic and fiscal governance. The problem that arises, however, is the sustainability of asymmetries within the EU. Differentiations cannot undermine the unity of the legal system or the minimum conditions of its uniformity. To be subject to majority principles within the Union, one must be aware of being part of the community. It is only by virtue of this awareness that States will be able to subject themselves to majority rule, even if they take a different view. The problem is more complex in asymmetrical and stratified systems, such as the EU, because this relationship of political affiliation is twofold, since it applies to the national and European spheres; these two types of affiliation must therefore not be in conflict but rather complementary. In these asymmetrical systems, such as EMU, democratic control conducted at the exclusively European level appears limited, since the European Parliament also includes the political representatives of countries that are not part of the euro area and is exercised *vis-à-vis* opaque institutions, such as the Eurogroup and the Euro Summit.

Any kind of reform that will be approved - which, of course, must take into account the fact that the adoption of the euro is an ongoing process, so some form of body representing the eurozone States and its democratic counterbalances must be envisaged - will have to refer to the principle of loyal cooperation between the EU and the MS, based on art. 4(3) TEU. The fact that the new NGEU and SURE are based on the principle of solidarity between States and apply to all the MS without differentiation bodes well for the development of an effective and accountable system and can be taken as a point of reference.

Of course, it must also be considered that the EU is confronted with increasingly competitive and innovative economic powers at global level. Therefore, an EMU reform should be discussed within the broader EU reform framework. Designing an inefficient and ineffective system of governance, where accountability is opaque and divided among different actors with no obvious responsibility, risks the failure of the European project. In this respect, experts need to reflect on the principles of constitutional homogeneity that are indispensable for all members to accept majority rules. These principles of constitutional homogeneity will have to guarantee the participation of the Member States on the basis of a principle of sustainable equality. Only in this way will it be possible to introduce governance mechanisms that are more flexible and able to take account of the different speed of development and growth of each Member State. Acknowledging this need does not mean giving up pushing for cohesive and inclusive European development programmes but could rather have the advantage of linking the economic growth of the "slower" countries to that of the "faster" ones.

Such an outcome, however, can only be found if a maximum effort is made to bring intergovernmental instruments such as the ESM and the Fiscal Compact into the EU framework and put MS on an equal footing. Only a stronger EU can fight the centrifugal forces disrespecting the rule of law in the Union and have the strength to find new governance patterns that are accepted by all MS (or, better, by all groups of MS).

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

DIFFERENTIATED GOVERNANCE IN THE BANKING UNION: SINGLE MECHANISMS, JOINT TEAMS, AND OPTING-INS

CHRISTY ANN PETIT*

ABSTRACT: This *Article* examines differentiated governance across and within the existing pillars of the Banking Union (BU): the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). Governance covers the decision-making rules, institutional apparatus, and processes – taking due account of the issues created by the incompleteness of the BU. In the daily supervisory and resolution actions, joint teams constitute a significant progress for cooperation, exchange of information and coordination of the work carried in the BU at an operational level, which plays an integrative factor in the systems' governance. Moreover, differentiated governance exists within the systems for banking supervision and bank resolution, but also in its immediate surroundings, that is the consideration for the "ins", "outs", and "opting-ins" Member States that are joining the BU through close cooperation.

KEYWORDS: Banking Union – cooperation – differentiation – Economic and Monetary Union – governance – joint teams.

I. INTRODUCTION

The Banking Union (BU) is the most significant advancement in European integration[1] in the last two decades and its completion features among the priorities of the 2022 French

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[1] S Grundmann and HW Micklitz (eds), *The European Banking Union and Constitution: Beacon for Advanced Integration or Death-Knell for Democracy?* (Bloomsbury Publishing 2019); PG Teixeira, *The Legal History*

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presidency of the Council of the European Union.[2] Yet, seven years after the operations of the BU officially started, there is still a divide within EU-27 between the 19 "ins", the two states with ongoing "close cooperation" (Bulgaria and Croatia), and the six "outs", which brings differentiation across several groups of Member States within the European Union (EU).[3] In particular, institutional differentiation and differentiation in governance, as by-products of differentiated integration,[4] are all at odds with the Banking Union project and creation. This discrepancy is evident considering the BU objectives, based on the adoption of common institutions, single rules and common European approaches.

The creation of the BU addresses the failures observed during the financial, banking, and sovereign debt crises (all captured under the term "great financial crisis"), with the objectives of preventing the doom-loop between banks and sovereigns, avoiding massive bailouts through taxpayers' money, and managing banking crises and failing banks in an orderly manner. As per its institutional and legal foundations, the BU follows a three-pillar structure for the euro area, including a supervisory pillar (the Single Supervisory Mechanism, "SSM"), a resolution pillar (the Single Resolution Mechanism, "SRM"), and a common deposit insurance pillar (European Deposit Insurance Scheme "EDIS", which is not yet achieved). The missing third pillar creates asymmetries in the current BU,[5] not only in terms of the differentiated governance that exists across pillars, but also the acute problems this incompleteness raises within each pillar's remit of action. With the lack of common deposit insurance at the EU level, remaining national divergences mean there is an uneven playing field, with differences that are exacerbated when facing troubled credit institutions (failing or likely to fail), whether on the supervisory and/or resolution

of the European Banking Union: How European Law Led to the Supranational Integration of the Single Financial Market (Hart Publishing 2020); C Zilioli and K Wojcik (eds*), Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021); St Grundmann and Others, 'Editorial' (2017) 18 European Business Organization Law Review 391.

[2] B Le Maire, 'FT Future of Europe: Strengthening Europe's Financial Sector' (21 September 2021) Financial Times europefinance.live.ft.com.

[3] F Schimmelfennig, 'A Differentiated Leap Forward: Spillover, Path-Dependency, and Graded Membership in European Banking Regulation' (2016) 39 West European Politics 483. For a general analysis of several groups' features and dynamics, see in this *Special Section* I Cooper and F Fabbrini, 'Regional Groups in the European Union: Mapping am Unexplored Form of Differentiation' (2022) European Papers www.europeanpapers.eu 951.

[4] F Schimmelfennig and T Winzen, 'Grand Theories, Differentiated Integration' (2019) 26 Journal of European Public Policy 1172, 1190; I Pernice and others, 'Challenges of Multi-Tier Governance in the European Union. Effectiveness, Efficiency and Legitimacy' (2013) European Parliament's Committee on Constitutional Affairs – Compendium of Notes 8.

[5] C Brescia Morra, 'The Third Pillar of the Banking Union and Its Troubled Implementation' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019) 393.

side (e.g., national frameworks in insolvency proceedings, and conditions to access national Deposit Guarantee Schemes).[6]

Differentiated governance raises several issues in the BU, including the general risk to damage the "singleness" of each pillar despite their respective names. Concretely, this undermines the unity of the common policy and measures adopted within each pillar, and eventually is detrimental to the achievement of its objectives – namely, to contribute to the "stability of the financial system within the Union and each Member State",[7] to make banks safer and sounder, and to prevent and manage future crises at bank level (and ultimately, to alleviate banking sector crises at a systematic level). This wording reflects the uneasy compromise between the Union-wide ambition of the BU project and the still significant national realities in its construction. Furthermore, such differentiated governance may jeopardise the uniform application of rules, their interpretation by administrations, their interpretation by courts, their enforcement, and their understanding by the directly concerned entities subject to common supervision and resolution actions.

Nevertheless, differentiated governance may bring some flexibility to the broader BU construction substantively, institutionally and procedurally, in application of so-called multi-speed approach in theories of European integration,[8] which gives a pathway for an integrated core, towards a gradual integration process for the "outs". One key constraint, substantively and procedurally for the BU operations, results from the fact that we do not have yet a single set of rules, despite the "Single Rulebook" in Banking and Financial Regulation.[9] The main issues concern the existence of options and discretion in the Capital Requirements Regulation and Directive and remaining national powers within both pillars to be considered, interpreted and eventually applied by the European bodies.[10] As far as resolution is concerned, the framework lives besides a legal corpus fragmented

[6] O Capolino, 'The Single Resolution Mechanism: Authorities and Proceedings' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer 2019) 247.

[7] Council Regulation (EU) n. 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (SSM Regulation), art. 1. Similarly, the SRM Regulation refers to different settings, Union-wide, or one or several Member States, see art. 10(5) and (10) of the Regulation (EU) n. 806/2014 of 15 July 2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) n. 1093/2010 (SRM Regulation).

[8] S Baroncelli, I Cooper, F Fabbrini, H Krunke and R Uitz, 'Introduction to the *Special Section*: Differentiated Governance in a Europe in Crises' (2022) European Papers www.europeanpapers.eu 857.

[9] Despite further harmonisation with the adoption of the Capital Requirements Regulation, next to the revision of the Capital Requirements Directive in 2013, subsequently revised in 2019, and under review since the October 2021 Banking Package.

[10] G Ferrarini and F Recine, 'The Single Rulebook and the SSM' in D Busch and G Ferrarini (eds), European Banking Union (Oxford University Press 2020) 193; A Witte, 'The Application of National Law by the ECB, Including Options and Discretions, and Its Impact on the Judicial Review' in C Zilioli and K Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021) 236.

along national lines, that is the default national insolvency path (when resolution objectives are not met),[11] and the still existing public aid road, albeit authorised as state aid.[12]

Against this background, this *Article* adopts a contextual approach to reformed EU governance and the new BU institutional and regulatory framework post-euro area crisis. It starts from the observed fact that there is differentiated governance within the BU. Its position within the EU is clear – it is not yet fully a *European* Banking Union. Member States that are not part of the Monetary Union may join under a "close cooperation". Hence, the current participants in BU constitute a "fore-runner" group, which is based on the integrated Eurozone.[13] This constitutes one type of differentiated governance as we will see. My approach to governance in this *Article* is delimited as follows. I will analyse decision-making rules and processes, as well as the legal and institutional framework for the two existing pillars.[14] On the substantive level, BU governance stems from EU primary and secondary law, which include SSM and SRM law (legal corpus formed together with the "Single Rulebook"). A component of the BU stems, however, partly from international law: the Single Resolution Fund (SRF).[15] It is an emergency fund that can be called upon to support the resolution of a failing bank within the BU. This sets a private risk-sharing element in the BU[16] and, in particular, the transfer and mutualisation of contributions to the SRF are foreseen in an intergovernmental agreement (IGA), signed by 26 Member States in 2014.[17]

[11] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) n. 1093/2010 and (EU) n. 648/2012, of the European Parliament and of the Council Text (BRRD). Recital 45 states "[a] failing institution should in principle be liquidated under normal insolvency proceedings" and along a similar wording, see also SRM Regulation cit., recital 59.

[12] *E.g.*, the cases of the Venetian Banks with aid measures from the Italian State in their liquidation, or the precautionary recapitalisation of Monte dei Paschi di Sienna. For the Venetian Banks, see O Capolino 'The Single Resolution Mechanisms' cit., 265–7.

[13] S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) European Papers www.europeanpapers.eu 867; E Jones and others, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration' (2016) Comparative Political Studies 1010, 1023.

[14] Governance, as an action of steering and controlling, covers the decision-making rules, processes, practices, and outcomes. See, J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) EL 1. "'Behaviour" is also relevant within practices and outcomes, but is outside the scope of the legal analysis in this article, see European Commission, *European Governance: A White Paper* eur-lex.europa.eu 8.

[15] F Fabbrini, 'On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context' (2014) 21 Maastricht Journal of European and Comparative Law 444, 452.

[16] PG Teixeira, 'The Future of the European Banking Union: Risk-Sharing and Democratic Legitimacy' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019) 142–3.

[17] Without the UK (at that time) and Sweden, see Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund [2014].

Moreover, processes are shaped with secondary law and complemented by an ever-increasing amount of BU soft law – an essential element in the post-crisis reforms within the Economic and Monetary Union (EMU). On the institutional level, the two existing pillars rest upon different legal bases in EU primary law, which have had an impact on their institutional and decision-making features (i.e., the European Central Bank (ECB) – an existing EU institution – hosted the SSM on the basis of art. 127(6) TFEU, while the Single Resolution Board (SRB) is an agency within the SRM, created on the basis of art. 114 TFEU).

Do the two existing BU pillars epitomise differentiated governance? To answer this question, I draw on three categories of differentiated governance in the BU, based on a multilevel approach to the two systems for banking supervision and bank resolution. First, differentiated governance can be understood in a cross-pillar perspective, and, in its geographical scope (i.e., "ins" and potentially "opting-in" Member States). This EU-level type of differentiation concerns the institutional and regulatory architecture within the BU, and the differentiation between euro area and non-euro area Member States. Second, differentiated governance also exists at the local or national level, in particular through diverse national settings and distinct governance models of supervisory and resolutions authorities. Third, the "core" of the BU pillars, examined through "joint teams" that are present in the SSM and the SRM, also contributes to the governance of the systems. In simple terms, those teams virtually bring together supervisors sitting in Frankfurt and resolution actors in Brussels, together with their counterparts at the national level. I argue for that they have an integrative function in the governance of each pillar. The original contribution lies, therefore, in the combined analysis of macro and micro-level governance within the supervisory and resolution systems' governance.

The *Article* proceeds as follows. Section II focuses on governance – in terms of rules, institutions and processes – within the supervisory and resolution pillars. Section III investigates the micro-level contributions of the joint teams in ongoing supervision and resolution, which demonstrate their integrative function in the governance of SSM and SRM. Building on the institutional and legal framework discussed at the macro and micro-level of BU governance, section IV examines the degree of BU differentiated governance when placed in the Union-wide perspective, considering in particular the opting-ins and close cooperation. Namely, the potential participation of non-euro area Member States changes the level of differentiation in BU governance, and in a distinctive manner between the first and the second pillar. This puts in parallel BU participation and euro area membership.

II. Banking Union: supervisory and resolution pillars' governance

This section introduces in general terms the institutional apparatus of the SSM and the SRM, and decision-making rules and processes for each pillar. This short excursus recalls the features of differentiated governance already extensively analysed for the Banking

Union.[18] This lays the foundations for examining the core of supervision and resolution with joint teams in the mechanisms' governance in the following section.

There has been a significant centralisation of competence for European supervision and resolution with the creation of the Banking Union, but the forces at stake are much more nuanced between what is called the "local" and "central" levels in simple terms. Hence, the national competent authorities for supervision in the first pillar, and for resolution in the second pillar, have their part to play within the EU legal and institutional framework. The distinction follows the groups of significant institutions and less significant institutions: these are respectively under the direct supervision of the ECB (115 significant institutions as of November 2021) and of the national authorities (which are counted in thousands).[19] This split is also relevant in the second pillar, with a caveat that the SRB is not only competent for the significant institutions identified by the ECB but also a few "other cross-border groups" that have entities in at least two Member States.[20] In other words, smaller entities that do not have a cross-border presence (and therefore do not represent a systemic risk in principle), remain under the supervision of national authorities and the scrutiny of resolution authorities.

The SSM includes the National Competent Authorities (NCAs) from the participating Member States and the ECB, which form a system for banking supervision in the Banking Union. The SSM, hosted at the ECB, includes decision-making bodies whose functions have been determined by EU primary and secondary law with an institutional apparatus that is considered semi-rigid.[21] The Governing Council, one of the ECB decision-making bodies according to the Treaties, has the final word on supervisory decisions. The Supervisory Board, created by the SSM Regulation, only approves draft supervisory decisions, submitted to the Governing Council for a non-objection procedure.[22] All participating Member States' national authorities (whose membership is mandatory for euro area Member States) vote and participate equally in the decision-making bodies, together with ECB representatives. The Member States opting to join have a transitional arrangement

[18] N Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (2014) CMLRev 1609; G Barrett, 'The European Banking Union and the Economic and Monetary Union – A Re-Telling of Cinderella with an Uncertain Happy Ever After?' in G Lo Schiavo, *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 10; F Schimmelfennig, 'A Differentiated Leap Forward' cit. 483.

[19] ECB, *List of Supervised Entities* www.bankingsupervision.europa.eu. Apart from some circumstances in which an LSI is brought under the direct supervision of the ECB, and *vice e versa*, a significant institution is considered an LSI under particular circumstances and remains under the supervision of the national authority.

[20] SRB, *List of Other Cross-Border Groups* www.srb.europa.eu.

[21] CA Petit, 'The SSM and the ECB Decision-Making Governance' in G Lo Schiavo (ed.), *The European Banking Union and the role of law* (Edward Elgar Publishing 2019).

[22] The rules and processes for decision-making are determined in SSM Law, the SSM Regulation and SSM Framework Regulation together, in addition to some guidance in institutional documents from the ECB *e.g.*, the Supervisory Manual.

between their national authorities and the ECB that operate through a close cooperation agreement, which leads to some differentiated governance (see section IV).

The SRM includes the National Resolution Authorities (NRAs) from the participating Member States and the Single Resolution Board (SRB) created by secondary law[23] with an agency status (in line with the Meroni doctrine).[24] It forms a rather differentiated system for bank resolution in the BU with several layers of complexity (beyond the scope of this article).[25] The decision-making process is triangular: in addition to the SRB, the European Commission and the Council of the EU are involved for some procedures and decisions in the SRM, in particular the dimensions of resolution related to state aid (for the Commission), and after the adoption of a resolution scheme by the SRB.[26] Both the European Commission and the Council of the EU are key actors that can potentially object to a resolution scheme.[27] Despite the complexity, all institutions and the SRB aim at applying "uniform rules and a uniform procedure" for resolution.[28] Overall, the SRB is responsible for decision-making with different formats, via its plenary and executive sessions.[29] Depending on the case, relevant NRAs' board members are taking part, and, on an *ad hoc* basis, observers from relevant resolution authorities of non-participating Member States may also take part in such session if the group at stake has subsidiaries or significant branches in those non-participating Member States.[30] Finally the European Commission and the ECB have some observers in all meetings of the SRB, while the SRB attendance as observer on the supervisory side has developed in practice. The participating Member States' NRAs vote and participate equally in the SRB, together with SRB representatives. In contrast with the first supervisory pillar, the Member States' authorities under close cooperation join the SRB under the same footing as with all other members (see section IV).

The SRB is also responsible for the SRF, which has a special position within the BU framework. As said in the introduction, an IGA – an international legal act outside the EU legal order – pools resources from the national to the Union level. The SRF would be used

[23] SRM Regulation cit., art. 42.

[24] D Busch, 'Governance of the Single Resolution Mechanism', in D Busch and G Ferrarini (eds), *European Banking Union* (Oxford University Press 2020) 394–5; with a different view on the implications of the Meroni doctrine, see P Lintner, 'De/Centralized Decision Making Under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) European Business Organization Law Review 591.M Patrin, 'Meroni Behind the Scenes: Uncovering the Actors and Context of a Landmark Judgment' (2021) European Papers www.europeanpapers.eu 539, 543.

[25] D Busch 'Governance of the Single Resolution Mechanism' cit.; O Capolino 'The Single Resolution Mechanism' cit. 248–251.

[26] D Busch 'Governance of the Single Resolution Mechanism' cit. 394.

[27] SRM Regulation cit., art. 18(7).

[28] *Ibid*. art. 1.

[29] The rules for decision-making and processes are determined in SRM Law, including the SRM Regulation, the BRRD, and some institutional guidance from the Single Resolution Board, *Introduction to Resolution Planning* www.srb.europa.eu.

[30] SRM Regulation cit., art. 53(1).

after the shareholders, and then the creditors of the credit institution under resolution have borne the first losses, as per the bail-in provided in the resolution framework.[31] Its aims are to support the efficient application of resolution tools and exercise of resolution powers, in line with the objectives of the BU, that is, through the mutualisation of contributions of the banking sector, to avoid the recourse to taxpayers' money and break the link between sovereigns and banks.[32] In fact, the contributions of banks and certain investment firms established within the 21 BU participating Member States are for now compartmentalised (with contributions collected by the NRAs).[33] The contributions reached, in the course of 2021, 52 billion euros with a funding capacity that will nearly double from 2022[34] with the expected entry into force of the common backstop to the SRF – should the latter not be enough to finance the resolution of a failing bank or several banks in trouble.

Those SRF features create some differentiation from the standpoint of the jurisdictions and administrations involved with the already introduced asymmetry between Union-wide and euro area setting (i.e., the SRF exists beside NRAs/national resolution funds across the EU).[35] There is nevertheless a specific treatment for the resolution of smaller entities. Indeed, within the scope of the BU, for those "smaller" entities that are put under resolution, if the resolution action necessitates the use of the SRF, the SRB will be responsible for the resolution schemes of less significant institutions (which are normally under the remit of NRAs).[36]

Another level of differentiation relates to the legal framework as some rules remain outside EU Law with the SRF IGA (amended and signed, but not yet fully ratified).[37] However, this differentiation may be temporary: a review, expected within ten years of entry into force of the SRF IGA, may lead to the incorporation of the substance of the Agreement into the EU legal framework. This is similar to the as-yet unsuccessful proposal put forward in 2017 by the European Commission to bring the European Stability Mechanism (ESM, which is an intergovernmental organisation with responsibilities for banks' recapitalisation during and after the crisis) into the EU legal framework as a "European Monetary Fund".[38]

[31] Arts 15 and 2 of the SRM Regulation cit. There is a bail-in condition of at least 8 per cent of total eligible liabilities.

[32] Recital 19 and art. 67 of the SRM Regulation cit.

[33] Art. 100 of the BRRD cit.

[34] Single Resolution Board, *Single Resolution Fund grows by €10.4 billion to reach €54 billion* www.srb.europa.eu, and for the backstop, see European Council, *Statement of the Eurogroup in inclusive format on the ESM reform and the early introduction of the backstop to the Single Resolution Fund* www.consilium.europa.eu.

[35] Including in non-euro area Member States as per the BRRD, see MMT Thijssen, 'Judicial Review of the SRB's Contributions and Fees Decisions' in C Zilioli and K Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021) 444–5.

[36] Art. 7(3) and Recital 28 of the SRM Regulation cit.

[37] European Council, *Agreement amending the Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund* www.consilium.europa.eu.

[38] Proposal COM/2017/0827 final of the European Commission of 6 December 2017 for a Council Regulation on the establishment of the European Monetary Fund.

But, beyond institutional and substantive law differentiation, the SRF administration hosted by the SRB, has a role in ensuring a "uniform administrative practice" in resolution financing as well as preventing national divergences.[39] Furthermore, with the latest amendments to the ESM Treaty, the BU has been further completed in resolution funding with the adoption of a common backstop. The common backstop strengthens and complements the second pillar of the BU.[40] The ultimate goal of mutualisation, with one per cent of the amount of covered deposits by 2023, and the presence of an SRF common backstop could ease decision-making in the governance settings of both the SSM and SRB. At the same time, the SRF common backstop operates through an ESM revolving credit line under which loans can be provided,[41] which clearly remains in the hands of the 19 Member States that are parties to the ESM Amending Agreement, which is intergovernmental. And, in the event of the use of contributions from the SRF prior to the backstop, the Council has a veto power, namely it can object to the resolution scheme and to a material modification of the amount of the Fund.[42] Therefore, those intergovernmental features lead to a political choice that is deeply linked to the willingness of Member States to keep their fiscal responsibilities and budgetary sovereignty.[43]

At a distinct level from the decision-making bodies and resolution financing, an additional layer of differentiated governance is found in the counterparts within the pillars, i.e. the national authorities. Considering the number of national settings with authorities involved in the mechanisms, the argument is a general one here. Each system relies on an interplay with national authorities that have themselves diverse national settings (based on a sectoral, functional, or integrated model, whether for supervision and resolution or more broadly for horizontal financial supervision and central banking). This brings further differentiation to some extent with a treatment of cases in a national reality that can be in dissonance with the EU legal framework (e.g., the European resolution regime on one hand, and the liquidation and insolvency procedures in national laws, on the other hand).[44]

Nevertheless, an integrative element can be identified in the mandate given to the members "from" the national settings who contribute to the European supervision/resolution level. Indeed, a representative from national authorities sits in the SSM/SRM decision-making-bodies: the representatives must act and contribute to decision-making in

[39] Recital 19 of the SRM Regulation cit.

40 J Aerts and P Bizarro, 'The Reform of the European Stability Mechanism' (2020) Capital Markets Law Journal 159, 164.

[41] Art. 18a of the Agreement amending the Treaty establishing the European Stability Mechanism [2021].

[42] Art. 18(7)(3) of the SRM Regulation cit.

[43] PG Teixeira, 'The Future of the European Banking Union' cit. 143.

[44] LS Morais, 'Lessons from the First Resolution Experiences in the Context of Banking Recovery and Resolution Directive' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019); O Capolino 'The Single Resolution Mechanism' cit. 259–260; L Janssen, 'The EU Bank Resolution Rules and National Insolvency Law' in M Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar Publishing 2019).

the interest of the Union as a whole (SSM legal framework)[45] or in the general interest (SRM legal framework).[46] This obligation to act in the general interest/interest of the Union as a whole can be considered as an integrative factor – in the sense of steering supervision and resolution policies in the same direction in the whole system. It leads to an obligation to disregard national interests and change the perspective with the general interest and the interest of the Union as a whole.

But, this could still face some hurdles in pragmatic terms, such as coalition-building in the Boards and divergences that can result from differing national contexts, let alone to mention the damages caused in consensus building due to the missing third pillar and the shortcomings in the progressively built up SRF. The question is then whether the decision-making processes and governance form a sum of national interests to achieve European banking supervision and resolution objectives or go beyond this mere aggregation to truly achieve a general interest in common supervision and resolution, which ultimately represents the *singleness* of each mechanism.

Differentiated governance is, therefore, found in both pillars, due to the institutional apparatus, some decision-making rules, and the remaining unharmonised substantive laws existing in both supervision and resolution. Some elements in pillars' governance are still playing a somewhat integrative force (such as the duty of decision-makers to act in the general interest or the interest of the Union as a whole), as is now further demonstrated with the setting of joint teams present in the two pillars.

III. Single supervision and resolution: the integrative factor of joint teams

This section examines internal core governance elements of the SSM and the SRM through the setting of joint supervisory teams (JSTs)[47] and internal resolution teams (IRTs), operating within the first and second pillar, respectively. I elaborate on joint teams' contributions to on-going supervision and resolution as an integrative factor in the governance systems for banking supervision and bank resolution within the BU. The use of common methodology, approaches, and a diffusion within each mechanism and across mechanisms contributes to integrating governance, albeit the teams are organised

[45] Arts 19(1) and 26(1) of the SSM Regulation cit. va for the Supervisory Board; art. 26(10) for the Steering Committee, and art. 4(3) of the Regulation (EU) 673/2014 of the ECB of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure.

[46] Art. 47 of the SRM Regulation cit. Note the SRB representatives and its chair should act independently and objectively in the interest of the Union as a whole, and Recital 32 of the SRM Regulation cit.

[47] Note that joint structures exist with the same spirit for "more targeted" ongoing supervisory work, for example with on-site inspection teams (OSI) and crisis management teams. OSIs are provided for in art. 12 of the SSM Regulation cit., the second stems from practice. OSI teams are responsible of the field work in comparison with the JSTs that operate offsite.

diversely in terms of size, composition and workflows.[48] In essence, the composition and rationale of those joint teams is intended to prevent national biases, supervisory/regulatory captures, and even some of the supervisory and regulatory failures observed during the crises in some jurisdictions. In spite of their rather remote and virtual character,[49] those teams constitute a significant progress for cooperation, exchange of information and coordination of the work carried in the BU, in comparison with the prior state of affairs with only Colleges for supervision and resolution.

The joint teams contribute to decision-making in banking supervision and resolution. In particular, they contribute to the preparation necessary prior to decision-making proper in banking supervision and resolution. It means JSTs prepare draft supervisory decisions before their submission to the Supervisory Board for approval and the ECB Governing Council for a non-objection procedure. The adopted decisions are addressed to significant institutions under the direct supervision of the ECB. IRTs are established to support the SRB in the assessment of recovery plans and in the drawing up of resolution plans[50] and prepare decisions for the SRB extended executive sessions. In other words, they support the execution of SRB's resolution tasks with regard to entities or groups under the direct responsibility of the SRB (significant and cross-border banks that are less significant).[51]

The rationale of joint teams is evident in different parts of the legal framework of each pillar. The important features are to combine expertise and diversity and to carry out their daily work in cooperation and good faith. In the SSM constitutive Regulation, despite the absence of the terminology "JST", the rationale of their creation is to ensure "geographical diversity with specific expertise and profile".[52] Those teams include supervisors from ECB staff and NCAs' staff, who are responsible for the supervision of a significant institution.[53] In contrast, IRTs do not find their purpose expressly framed in the SRM Regulation.[54] Nevertheless, the participation of observers from non-participating Member States is stressed[55] and, as we will see, it is a distinctive feature of IRTs in comparison

[48] The *Article* does not compare the specific organisational setting of those teams due to their evolutive and dynamic character which follows inter alia some regular rotations of their members, and the changes operated in the banking corporate governance of the supervised entities.

[49] Decision (EU) 2017/274 of the ECB of 10 February 2017 laying down the principles for providing performance feedback to national competent authority sub-coordinators and repealing Decision (EU) 2016/3 (ECB/2017/6).

[50] Decision of the Single Resolution Board (SRB) of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the SRB and National Resolution Authorities, art. 24(4)(a) and (c).

[51] *Ibid*. art. 24(1). Set for all banks subject to the SRB.

[52] Recital 79 of the SSM Regulation cit.

[53] European Central Bank, *SSM Supervisory Manual. European Banking Supervision: Functioning of the SSM and Supervisory Approach* www.bankingsupervision.europa.eu 118.

[54] Recital 37 of the SRM Regulation cit. echoes the relevant provision from the Regulation, *i.e.*, art. 83 of the SRM Regulation cit.

[55] *Ibid*. Recitals 37 and 117, and art. 83(3).

with the JSTs. The decision framework for the cooperation within the SRM and between the SRB and the NRAs gives more insights on their rationale. Namely, IRTs "act as the main forum of day-to-day cooperation",[56] and they strive to work on the basis of consensus and in good faith among the members of the IRTs.[57]

The composition is quite similar, with one exception related to the observers present on the SRM side. The teams' composition is introduced for each pillar and is only briefly compared, as I focus here on their functions within the two mechanisms. Each JST in the SSM includes a coordinator from the ECB's staff, together with supervisors from the ECB and the NCAs, and sub-coordinators that are from NCAs. NCAs' staff members are appointed by the respective NCAs.[58] It is important to note that the coordinator of the JST cannot be from the Member State where the significant institution is established[59] (in the spirit of avoiding national biases) and is rotated regularly across JSTs (avoiding leniency or forbearance). On the SRM side, IRTs may be established by the SRB,[60] and as with the SSM, it is composed of SRB staff and staff of the NRAs. NRAs' staff members are appointed by the respective national authority.[61] They may include observers from NRAs of non-participating Member States, where appropriate.[62] The novelty is indeed found in those observers from non-BU authorities which account for the cooperation in European Resolution Colleges, in a Union-wide setting. IRTs include a coordinator from the SRB and some sub-coordinators (one per NRA), in a quite similar vein to their supervisory counterparts. Sub-coordinators, who are affiliated to the national authorities in both mechanisms, operate as "transmission chains"[63] between the local environment and the team members sitting in Frankfurt or Brussels.

All in all, joint teams may have different sizes, compositions (in terms of quantity of staff members), and organisation, which reflect the diversified business models of the banks and banking groups under assessment. And yet, this organisational difference across team is outweighed by the common functions they have within the governance of the mechanisms.

[56] Art. 24(2) of the SRB Decision 2018, n 50 cit. Note this paragraph was added: this SRB decision amends the prior and first SRB Decision publishing the cooperation framework in June 2016.

[57] *Ibid*.

[58] Art. 4(1) of the Regulation (EU) n. 468/2014 of the ECB of 16 April 2014 establishing the framework for SSM cooperation between the ECB, the national competent authorities and the national designated authorities (SSM Framework Regulation). Note that the ECB and NCAs consult with each other and agree on the use of NCAs resources, see art. 4(5).

[59] European Central Bank, *Guide to Banking Supervision* www.bankingsupervision.europa.eu 14.

[60] IRTs exist for cross-border banking groups with legal entities in two different participating Member States. See SRB Annual Report 2018 (2019), 71.

[61] Art. 25(3) of the SRB Decision 2018, n 50 cit. Like the first pillar, the SRB and NRAs consult each other and agree on the use of NRA resources, see art. 25(2) cit.

[62] Art. 83(3) of the SRM Regulation cit.

[63] For the SSM, see E Chiti and F Recine, 'The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position' (2018) EPL 101, 110.

There are some bridges between the two mechanisms, including at the level of those joint teams, also when early signs of concerns arise for some institutions. The coordinator of an IRT (affiliated to the SRB) plays the role of single point of contact between the IRT and the JST and has a special duty to establish a "regular collaboration and information exchange"[64] among the two teams. This constitutes another virtual common forum where the core of the first and second pillar come together, albeit in an informal way. This channel is particularly relevant when the operations for a bank crisis management starts at institution-specific level.

Therefore, the differentiated governance analysed in section II should fully account for the contributions of core elements within the systems for banking supervision and bank resolution. The setting of joint teams is admittedly one piece of the overall institutional and governance puzzle. It is necessary to acknowledge other actors than the decision-making bodies contributing to processes of ongoing supervision and resolution in each pillar. Notwithstanding imperfect harmonisation, there are common methodologies and approaches, developed from so-called "horizontal functions" in the organisation of the ECB and the organisation of the SRB.[65] Those common approaches constitute a supporting element of the joint teams' integrative function in the governance of each mechanism, at an instrumental level. Again, joint team members come from the NCAs staff and the NRAs staff, and through their potential multiple affiliations to different teams (a possibility acknowledged without exact data available to assess those cross-affiliations),[66] they also contribute to common approaches and diffusion of common methodologies in supervision/resolution. For instance, a supervisor from the French *Autorité de Contrôle Prudentiel et de Résolution (ACPR)* will be in JST 1 and 2, and a resolution staff from the Central Bank of Ireland will be in IRT A and IRT B.

However, this dual or multiple affiliation may raise issues of multiple lines of command for some of the teams' members. The integrative function might suffer some limitations with regard to the staff members of the joint teams that are under two sources of managerial control from the ECB/SRB and the NCAs/NRAs. Should some incompatibility or dissonance arise, this may partly impair the integrative force joint teams can play in the governance of the mechanisms. Put simply, the two hats of national supervisors sitting in joint teams mean that they carry their work within the BU and the responsibilities attached to their NCAs/NRAs affiliation. But, this limit is only meant to be temporary, until the common methods and approaches are widely adopted and accepted at the level of significant and less significant institutions for both systems, and ultimately with a truly *Single* Rulebook and European culture for supervision and resolution.

[64] Art. 26(7) of the SRB Decision 2018 n 50 cit.

[65] Formerly DG MS IV, now horizontal line supervision, and for the SRB, directorate for resolution policy and cooperation.

[66] Art. 25(4) of the SRB Decision 2018 n 50 cit. and art. 4(2) of the SSM Framework Regulation cit.

Through their composition, joint teams benefit from the local informational advantage and knowledge. This ensures continuity in bank supervision and resolution and conformity with remaining specificities of national laws and powers (e.g., fit and proper assessment, unharmonised insolvency laws). Schematically, this leads to integrating approaches in (a given) differentiated environment. There are other important elements for integrating the processes and preparatory work prior to the decision-making itself, which pertain to common culture and human resources aspects, the mobility of the actors, and their socialisation across the systems. They are beyond the scope of the legal analysis in this *Article*.

IV. Banking Union "waiting room": from differentiation to integration

Different phases to join the BU create some differentiation in the pillars' governance, which stem from the legal framework itself. As I will argue in this section, this differentiation might be alleviated with the (quasi) simultaneous membership of the euro area. This accounts for the BU layer added to the EMU construction. To be sure, with the status of new participating Member States, the new "ins" are in a sort of "waiting" room before their full integration into the BU. There is some differentiation as to the voting rules and governance arrangements across the two pillars during close cooperation. The JSTs are also established in case of participating Member States under close cooperation.[67] Once the participating Member States have joined the euro area, this entails the full integration into the BU and the Monetary Union.

Three stages can be identified for the Member States joining the Banking Union. Those three stages correspond to the following phases: pre-joining (the Member States outside the Banking Union and the euro area), close cooperation as a participating Member State in the Banking Union, and full integration in the Banking Union once the Member State is also a member of the euro area. Therefore, each phase entails a specific form of differentiated governance that is now further described. Prior to joining, the governance is surely differentiated as Member States are outside the mechanisms (also designated as "outs"). When Member States gain the status of participating Member States, their competent authorities have established a close cooperation with the ECB, which results in a partly differentiated governance, due to unequal participation in decision-making and governance. Lastly, once they have joined the euro area, the governance can be considered fully integrated ("ins" in both supervisory and resolution pillars).

The focus is on the second and third stage which have already seen some evolutions in the Banking Union. In contrast, the first stage is a rather static observation that six Member States are for now outside the Banking Union strictly (i.e., Czech Republic, Hungary, Poland, Romania and Sweden, and a Member State with an opt-out, Denmark). The

[67] Art. 115(3) of the SSM Framework Regulation cit. At the time of writing those new teams are only freshly established, with no public information available.

second and third stage have been partly undertaken by two non-euro area Member States at the time of writing, Bulgaria and Croatia.[68] The competent authorities of Bulgaria and Croatia joined the SSM and the SRM formally as of 1 October 2020.[69] In the abstract, a non-euro area Member State can request the establishment of a close cooperation between its competent authority and the ECB to join the SSM,[70] which leads to joining the second pillar – the SRM – as a "participating Member State".[71] Hence, "participating Member State" designates both the Member States whose currency is the euro (and that joined the Banking Union with a mandatory participation from the start) and the Member States whose currency is not the euro which have established a close cooperation. They are forming a "fore-runner" group, as highlighted in the introduction of this article.

The second stage reflects a process of integrating the BU with some differentiation in the first pillar and across pillars. On the SSM side, the Member State that benefits from the establishment of a close cooperation does not have full rights of participation in terms of decision-making and governance arrangements. Its competent authority has a member sitting in the Supervisory Board, but it does not yet have a Governor sitting in the ECB Governing Council (formerly adopting supervisory decisions under the non-objection procedure). Hence the differentiation results from constraints at EU primary law level which consecrates the Governing Council as one of the decision-making bodies of the ECB with membership restricted to euro area Member States. The Supervisory Board is based on secondary law and only approves draft decisions then proposed to the Governing Council (in which the non-euro area members do not have a seat). On the SRM side, the voting rights are full, with no special arrangements provided in the legal framework. The drawback of the agency form examined above may in this way turn into an advantage. Indeed, the Bulgarian and Croatian National Banks (NRAs in the two new participating Member States) have representatives in the SRB's plenary session and extended executive sessions with the same rights and obligations as other members.[72] The arrangements in the first pillar result in a less than ideal outcome for non-euro

[68] Decision (EU) 2020/1015 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) (ECB/2020/30); Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka (ECB/2020/31); MJ Nieto and D Singh, 'The Path to Euro Area and Banking Union Membership: Assessing the Incentives for "Close Cooperation" and Adherence to the Exchange Rate Mechanism II' (2021) SUERF Policy Brief.

[69] Single Resolution Board, *Bulgaria and Croatia Set to Join the Single Resolution Mechanism* www.srb.europa.eu.

[70] Art. 7(2) of the SSM Regulation cit., and art. 5 of the Decision ECB/2014/5 cit.

[71] Art. 2(1) of the SSM Regulation cit., and art. 4(1) of the SRM Regulation cit.

[72] Single Resolution Board, *Bulgaria and Croatia Set to Join the Single Resolution Mechanism* cit.

participating Member States, of an "expedient"[73] nature, with unequal participation. On the front of the SRF, and the access to the common backstop discussed above, the non-euro area Member States that have established a close cooperation with the ECB/SSM have parallel credit lines for the SRF alongside the ESM.[74]

Moreover, banking supervision led under close cooperation raises some adjustments of the powers held by the ECB in accordance with the SSM legal framework. In general terms, the relationship between the ECB and the NCA under close cooperation is more distant, with specific actions and procedures required for steering and guiding the new counterparts in the system. Importantly, the ECB does not have directly applicable powers over the significant and less significant institutions established in the Member State who joined in close cooperation.[75] Nevertheless, a warning mechanism at the initiative of the ECB may lead to the suspension or the termination of the close cooperation.[76] Those governance arrangements shed light on the specificities of close supervisory cooperation, the "waiting room" to the first pillar.

However, they are some safeguards for the competent authority of the Member state in close cooperation to express its voice. This is possible at different levels of the decision-making process when opposing a draft decision (both Supervisory Board and Governing Council), but it may intervene at high costs. A real opposition may lead to a termination of the close cooperation with immediate effect so that the competent authority is not bound to the contested decision.[77] This outcome would be a high price to pay for expressing disagreement. After this it would be impermissible to enter into a new close cooperation during the three years following the termination's publication in the Official Journal.[78] Those provisions are for now theoretical, and it is doubtful that only one decision would create such an escalation during the period of close cooperation. A termination would be symptomatic of much deeper disagreement on a set of issues rather than one single decision submitted to the SSM decision-making process.

It is important to note that the SSM Regulation itself indicates the imperfection of the governance arrangements in its Recital 85: "[a]rticle 127(6) TFEU could be amended [...] to eliminate some of the legal constraints it currently places on the design of the SSM". But changes of the Treaties require unanimity (the same voting rule that was applied for the adoption of the SSM Regulation under a special legislative procedure) and would necessarily lead to a review of the SSM legal framework at secondary level.

[73] E Ferran, 'European Banking Union and the EU Single Financial Market: More Differentiated Integration, or Disintegration?' in B de Witte and Others (eds), *Between Flexibility and Disintegration : the Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 263.

[74] See Recital 9a of the Agreement amending the ESM Treaty cit.

[75] Hence it used instructions, art. 7(1) of the SSM Regulation cit., and general instructions in respect of less significant institutions.

[76] Art. 7(5) of the SSM Regulation cit.

[77] *Ibid*. art. 7(8).

[78] *Ibid*. art. 7(9).

In light of this, the simultaneous joining of the euro area and the Banking Union would address some of the limits examined above. It would remove the two-tier system existing for NCA under close cooperation, and lead instead to a more integrated decision-making governance, with a governor in the Governing Council and a member sitting in the Supervisory Board. But this practical solution is only feasible if associated with political willingness. Indeed, the more or less extended transitory period of the close cooperation is a consequence of the rules and the result of decision-makers and politicians involved in the respective negotiations. In accordance with the legal framework, as soon as a Member State joins the euro area, the close cooperation ends on that very same date the derogation is abrogated (as per arts 139 and 140 TFEU).

It is argued that this phase should be transitional, of a rather short period, and lead to inclusion in the Banking Union insofar as the negotiations to join the euro area have been led in parallel. As a matter of fact, the Bulgarian and Croatian authorities had signalled their intention to join the Exchange Rate Mechanism II (ERM II) and the Banking Union simultaneously, therefore with a view to becoming a euro area Member State and a participating Member State in the SSM with full rights rather rapidly. Moreover, the Eurogroup expressed its political willingness to commit to such approach for a simultaneous membership of non-euro area Member States joining the Banking Union and the Monetary Union in the future (e.g., after Bulgaria, it was reiterated for Croatia). However, this is in practice more delicate as the conditions for joining are assessed under different legal and constitutional frameworks. A strict parallelism for opt-ins is desirable but its practical implementation is not facilitated by the current framework that leads to a certain period of time that is incompressible. Bulgaria and Croatia joined the ERM II in July 2020 and need to stay within it for at least two years before they can join the euro area, with two convergence reports due in the course of 2022.

The new authorities under close cooperation that join the "participating Member States" NCAs gain only partly rights and voice in the SSM governance, while the agency structure of the SRB seems to overcome the inequality of participation in the first pillar. The full integration in the euro area will mark the full participation in the Banking Union.

V. Conclusion

Differentiated governance in the BU exists and will be present for a while. Borrowing from theories of differentiated integration, (temporary) differentiated governance can be a catalyst for reaching integrated governance, ultimately. A fully integrated governance can be an ideal, towards which some steps are already being undertaken to streamline the decision-making process within the crisis management framework review that is ongoing, or with the first enlargement of the BU with new "participating Member States".

Notwithstanding several features of differentiated governance in the SSM and SRM systems, in terms of rules, institutions and processes, I analysed core elements that can and should constitute an integrative factor in the governance of both systems. Namely, joint

teams foster information sharing, facilitate technical and granular assessment in an integrative way in ongoing supervision and resolution actions. Their existence at the core of both mechanisms is instrumental for an informed decision-making governance accounting for the local realities and diversity across the BU. They are an intermediate component that will remain relevant until the EU is able to host real cross-border banking groups and create the conditions for their operations in a truly European banking market, in a Union-wide setting, with a federalised institutional, supervisory and regulatory approach. Those core teams for supervision and resolution (and the ones set for institution specific crisis management, which could not be analysed in the scope of this article) are instrumental in a BU currently set on a rather functional model. They will need to be interwoven with the (long-awaited) third pillar's core governance, once created. The road is still long ahead as special institutions and governance arrangements exist in the BU legal framework and suffer from unharmonised substantive rules applied in ongoing supervision/resolution (that hamper the achievement of the objectives of each pillar and the Banking Union). Yet, the concerns for the unity and integrity of the internal market are omnipresent in both legal frameworks,[79] even though institutionally and in daily supervision and resolution, the reality is, once again, more diverse and sometimes fragmented (as in liquidation, insolvency and some remaining national options and discretion).[80]

Overall, the *singleness* suffers from differentiated governance at different levels, remaining institutional and substantive law differentiation across and within pillars, and the non-existing third pillar. Decision-making process and governance could be considered as achieving a common interest in supervision and resolution. This common interest should represent one of the core features of the singleness of the two existing mechanisms. This approach is generally supported by some provisions found in the EU legal framework. In support of this view, representatives of national authorities sitting in decision-making bodies must act and contribute to decision-making in the interest of the Union as a whole or the general interest (respectively, in the SSM and SRM settings), the concerns for unity and uniformity in both supervision and resolution as emphasised (art. 1 in the SSM Regulation and SRM Regulation), and generally, the existence of different tools and legal solutions to ensure common approaches in supervisory and resolution actions. This approach is also supported by the objectives underpinning the overall BU, i.e. the cross-border dimension and the system approach, which call for going beyond mere national perspectives.

And yet, there are several elements that give rise to an aggregation of national interests within the two mechanisms' governance, especially in instances where the institutions are facing difficulties as in resolution cases or non-resolution cases dealt with at the national level. In the legal framework, some provisions curb a single approach, once again, due to the remaining options and discretion in the hands of the legislators and

[79] *Ibid*. art. 1, and art. 6 of the SRM Regulation cit.

[80] I Angeloni, "Beyond the Pandemic: Reviving Europe's Banking Union' (2020) CEPR Press voxeu.org.

competent authorities, the application of national laws at the EU level, and (national) diverging legal frameworks. How could decision-makers pursue a common interest if the legal and institutional framework still brings them back to national grounds and realities in policy-making?

The national compartments of the SRF will ultimately be replaced with a truly "single" fund,[81] once the nationally-driven calculation approach no longer applies, and the full mutualisation of transferred contributions from banks is reached in 2023. In general, the BU safety nets, until now criticised as insufficient if assessed against the constitutive objectives of the BU, have gained credibility in their scope of action with the forthcoming common backstop, the ongoing review of the resolution framework, provided the third pillar for common deposit insurance is delivered in the near future.

Differentiated governance does not create barriers to entry, provided this is of a temporary nature for the "outs" to be "ins" eventually. The joining of Bulgaria and Croatia as "participating Member States" (at the time of writing in ERM II) show some attractiveness of the BU construction – and progress in convergence criteria, with ultimately a slightly larger core euro area which will be strengthened with the completion of the Banking Union. The expression "participating Member State" itself merits some attention. It combines the notion of participation and membership, which are not equivalent. No one uses participating Member States of the euro area, but members of the euro area. Here this expression accounts for the institutional and governance constraints on the overall Banking Union framework, which exists within a multi-speed EU that has already had the euro area at its core for more than two decades.[82] Developing practice and political will may speed up the participation for a quasi-equivalent membership between the Banking Union and the Monetary Union.

[81] M Thijssen 'Judicial Review of the SRB's Contributions and Fees Decisions' cit. 447.

[82] S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' cit.

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

DIFFERENTIATION IN THE EU MIGRATION POLICY: THE 'FRACTURED' VALUES OF THE EU

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ABSTRACT: As with the whole Area of Freedom, Security and Justice (AFSJ), EU migration policy is one area of EU policy-making in which differentiated integration has found its clearest expression. Owing to its intergovernmental roots, differentiated governance has been considered the necessary compromise for a deeper integration in this policy field since the Amsterdam Treaty entered into force. The adoption of flexible mechanisms aimed to accommodate the political interests of some Member States. While many of the technical intricacies related to this special institutional set-up have now disappeared in the aftermath of Brexit, looking at the possible intersections between the recent migration and rule of law "crises" has brought to the fore a more serious form of disagreement between the Member States on the deeper values – or the possible absence thereof – with respect to EU migration policy. This has become especially clear in the way in which the Court of Justice of the EU (CJEU) seems to have adopted a disconnected approach in its case law relating, respectively, to the "rule of law crisis" and the "migration crisis" so far. This *Article* argues that beyond the fragmented scope of the EU migration policy caused by differentiation, lies a deeper "fracture" on the values that underpin it. In this sense, it invites for a more careful examination of what could become a widening gap by examining especially the relevant case law of the CJEU on asylum in the aftermath of the "migration crisis".

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I. INTRODUCTION

I.1. FROM INITIAL REJECTION TO ACCEPTANCE OF DIFFERENTIATED INTEGRATION AS AN INSTITUTIONAL FEATURE OF THE EU MIGRATION POLICY

As is the case with the whole Area of Freedom, Security and Justice (AFSJ), the EU migration policy is one area of EU policy-making in which differentiated integration has found its clearest expression. As Ariane Chebel D'Appollonia put it: "[t]he EU's immigration policy illustrates a system of differentiated integration *par excellence*".[1] Owing to the intergovernmental roots of the EU migration policy, differentiation has appeared as the necessary compromise for further integrating this policy field after the adoption of the Amsterdam Treaty.[2] Through the adoption of a flexible approach to integration in this field, the "opt-in/opt-out" arrangements aimed to accommodate the political interests of some Member States. While many of the technical intricacies related to this special institutional mechanism have now disappeared in the aftermath of Brexit, the recent "migration crisis" has brought to the fore a more serious form of disagreement between the Member States when it comes to the deeper normative[3] foundations of the EU migration policy. This *Article* argues that beyond the fragmented scope of the EU migration policy caused by its differentiation, lies a deeper "fracture" on the values that underpin it. From the more formal perspective, these values directly relate to art. 2 TEU, which gives a broad overview of the normative foundations of the EU. These values include: "the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

Initially, the negative impact of differentiation – in the sense of "variable geometry" – on the larger EU integration process was heavily criticised, especially in the way in which

[1] A Chebel d'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' (2019) Comparative European Politics 192.

[2] See for instance K Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) CMLRev 1047, 1057 ff; B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' in B Martenczuk and S Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (VUBPRESS 2008) 493.

[3] In the context of this *Article*, "[n]orms are defined as 'collective expectations' about proper behaviour for a given identity [...]. [N]orms can be *constitutive* (acting as rules defining an identity) or *regulative*, acting as standards for the proper enactment or deployment of a defined identity [...]". See K Zwolski, 'The EU and a Holistic Security Approach after Lisbon: Competing Norms and the Power of the Dominant Discourse' (2012) Journal of European Public Policy 988, 990 (emphasis in the original text cited). In this sense, "norms" are approximate notions to "values" and "principles".

it applied to the AFSJ and to migration as an essential dimension thereof.[4] Jörg Monar described it this way: "The amazing range of 'flexibility' in justice and home affairs offers an unprecedented scope for accommodating the diverging interests of Member States. Yet the price to be paid for this 'flexibility' is a plethora of new problems and risks",[5] and especially the "major risk of legal fragmentation and political tensions [...]".[6] In this respect, Steve Peers said that the AFSJ had an "inauspicious start".[7]

More recently, there seems to be more acceptance of differentiated integration as being a structural feature of the EU's institutional architecture.[8] Deirdre Curtin has observed that: "Differentiation has become a stable element of the EU legal system".[9] Similarly, Bruno De Witte notes that: "The existence of a controlled system of differentiation between Member States has now become a stable characteristic of EU law".[10]

While accepting differentiated integration as an inevitable feature for the EU legal order to function, the same authors also express their concern over the "fuzziness"[11] or the lack of clarity[12] that differentiated form of governance has induced to the "contours of the EU legal order".[13]

I.2. The "migration crisis" and the "fractured values" of the EU migration policy: differentiated integration as an indicator or a catalyst?

Although it is still difficult to fully appreciate the impact of differentiated integration in the context of the recent so-called "migration crisis", it goes without saying that the simple existence of differentiation has introduced a high level of complexity in the functioning of EU migration policy, making it more difficult to find a way out of the crisis. This is what Ariane

[4] J Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) ELR 320.

[5] *Ibid*. 334.

[6] *Ibid*. 335.

[7] S Peers, 'Justice and Home Affairs: Decision-Making after Amsterdam' (2000) ELR 183, 191.

[8] For instance, see A Chebel d'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit.; D Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' (EUI Working Papers RSCAS 37-2020) and B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 9.

[9] D Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' cit. 3.

[10] B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit. 23.

[11] *Ibid*. 25.

[12] Deirdre Curtin remarks that: "Overall, differentiated integration blurs the lines between supranational and intergovernmental, between ins-and-outs-members, between EU and international law. The clarity of the European project is affected, and so is the democratic accountability line between the Union's institutions and its citizens". D Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' cit. 22.

[13] B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit.

Chebel d'Appollonia refers to as being the outcome of a process of "chaotic differentiation"[14] that is slowly embedded across time and on a rather contingent basis. In particular, she sets out three factors: First, "historical contingencies",[15] "such as successive enlargements"[16] and "the refugee crisis following the collapse of former USSR".[17] Second, there is the "*raison d'être* of the EU immigration policy"[18] relating to the "motivations of member states in their attempt to protect their national interest while having to address common transnational issues".[19] And third, there is "... the assumption that some elements of flexibility – related to the decision-making process, participation, and implementation – are unavoidable in pursuit of the EU integration project".[20] In other words, "...[d]ifferentiated integration (...) had already become part of the DNA of EU migration policy before the 2015 refugee crisis [and w]hat was already a multi-layered system became even more chaotic when EU member states reacted to this crisis by abusing [*sic*] legal elements allowing flexibility".[21] This is what Nadine El-Enany also refers to as a form of "informal flexibility".[22] Chebel d'Appollonia gives the example of Germany triggering the "sovereignty clause" of the Dublin III regulation to assume the responsibility for examining the asylum claims of Syrian refugees who would have otherwise applied for international protection in other Member States.[23] In this respect, she points to the attitude of some Member States – including Hungary and the Czech Republic – that allowed Syrian refugees to transit through their territory to apply for international protection in another Member State.[24] While it would be difficult to disagree that the somehow flexible legal framework of EU migration policy has given way to severe discrepancies in the reactions of Member States during the recent crisis, a closer look at them might actually highlight another dimension of differentiation in this field, which tends to be overlooked. This other dimension of differentiation would go beyond the legal technicalities to interrogate what could be considered a differentiation – or as the article argues a "fracture" – in the deeper values or norms that shall or should underpin EU migration policy and perhaps the AFSJ as a whole. As Chebel D'Appollonia stated, this is best reflected in the diverging reactions of at least some Member States during and in the aftermath of the crisis. In this sense,

[14] A Chebel d'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit. 194 ff.

[15] *Ibid*. 194-195.

[16] *Ibid*. 194.

[17] *Ibid*.

[18] *Ibid*. 195.

[19] *Ibid*.

[20] *Ibid*. 196.

[21] *Ibid*.

[22] N El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 362, 368 ff.

[23] A Chebel D'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit. 196.

[24] *Ibid*. They were not the only ones, see: case C-646/16 *Jafari* ECLI:EU:C:2017:586. In this case, Croatia and Slovenia respectively allowed the transit of the applicants – asylum-seekers – to Germany and Austria.

it is unsettling that some of the issues currently addressed by the CJEU as part of its case law on the "rule of law crisis" appear to be somehow disconnected from its recent case law on migration and in particular, asylum. It would be over-ambitious to assess comprehensively how "values" are diverging between the EU Member States when it comes to how they approach EU migration policy. Therefore, this article will limit itself to examining a few concrete cases illustrating the way in which the unaddressed 'fracture' in the values underlying the integration process in the field of immigration might reveal the widening gap of the EU integration project itself. This paper is structured as follows. Section II looks at how differentiation concretely operates as a governance tool in the field of migration. To do so, this section starts by defining the scope of the EU migration policy today, before exploring its intergovernmental roots as the best factor explaining the resort to differentiated governance in this field. Last, this section briefly examines the institutional challenges caused by the differentiated governance of the EU migration policy and in particular, the way in which differentiation has made its functioning particularly complex.

Finally, section III examines a facet of differentiation that relates to the deeper values underpinning the EU migration policy. Relying on a few examples stemming from the recent "migration crisis" and its aftermath, this final section will highlight how in spite of the formal adherence of the EU migration policy to the fundamental values – and especially fundamental rights – that lie at the heart of the EU integration project, there is no solid(ified) agreement between the EU Member States regarding the values on which this policy is actually based. In this sense, the intergovernmental roots of the EU migration policy translate in the lack of a genuine cohesion between the Member States on these values. To better illustrate this point, this final section will focus on the way in which the CJEU appears to have somehow "dis-connected" its case law on the "migration crisis" and on the "rule of law crisis". This article concludes with an invitation to further analyse and reflect on what may be perceived as the "fractured values" of EU migration policy.

II. Differentiation as a governance tool: the intergovernmental roots of the EU migration policy

II.1. Defining EU migration policy

Before looking at the evolution of EU migration policy, it may be useful to recall what this policy field includes. Since the Lisbon Treaty, migration-related issues are an essential part of Title V of the TFEU on the AFSJ. More precisely, according to art. 67(2) TFEU, the EU "…shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals (…)".

Unlike the formulation of the Amsterdam Treaty whereby measures related to external border control, asylum and immigration were "flanking measures" to the establish-

ment of free movement of persons within the EU,[25] the Lisbon Treaty makes the realisation of a common policy in the field of asylum, immigration and external border control, a policy objective in its own right.

Although they are conceptually – and irreducibly – connected to one another, it may be useful to briefly review the legal bases for achieving each part of what can be broadly defined as the migration policy.

First, the establishment of an integrated system of external border controls[26] was always envisioned as the external dimension – and essential requirement – for the abolition of internal border controls through the establishment of the Schengen area. In this field, the TFEU provides for legal bases – among others – on short-term visas,[27] external border checks,[28] the conditions under which non-EU nationals may enjoy freedom of movement,[29] measures for the gradual establishment of an integrated system for the management of the EU's external borders[30] and the absence of control on persons crossing internal borders.[31]

Second, as regards asylum – more widely understood as international protection within the EU legal framework[32] – art. 78(2) TFEU goes on to detail the different subject matters for adopting EU legislation in this field. They include the definition of a uniform status of asylum and subsidiary protection and the definition of a common system of temporary protection for displaced persons in the event of a massive inflow. EU legislation may also determine the common procedures for granting and withdrawing the uniform asylum or subsidiary protection status, the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection and the standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. Art. 78(2)(g) TFEU also lays down a legal basis for establishing "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection". This provision does not appear to have been ever used, even at the heart of the "refugee crisis". It seems that less legally constraining instruments were preferred such as the EU-Turkey Statement[33] or the EU-Afghanistan Joint Way Forward[34]. Last – but not least – art. 78(3) TFEU provides for the adoption of emergency measures in "the event of one or more Member States being confronted

[25] Art. 61(a) of the Consolidated Version of the Treaty Establishing the European Community (1997).
[26] Art. 77(1) TFEU.
[27] Art. 77(2)(a) TFEU.
[28] Art. 77(2)(b) TFEU.
[29] Art. 77(2) (c) TFEU.
[30] Art. 77(2)(d) TFEU.
[31] Art. 77(2)(e) TFEU.
[32] International protection covers: "traditional" asylum in the sense of the 1951 Geneva Convention, subsidiary protection and temporary protection.
[33] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.
[34] Joint way forward of 2 October 2016 on migration issues between Afghanistan and the EU.

by an emergency situation characterised by a sudden inflow of nationals of third countries [...] for the benefit of the Member State(s) concerned".

Third, in the field of immigration – *stricto sensu* – art. 79(2) TFEU provides for the legal bases for adopting EU legislation as regards the following: the conditions of entry and residence of non-EU nationals and the standards on the issue by Member States of long-term visas and residence permits "including those for the purpose of family reunification"; the definition of the rights of non-EU nationals who reside regularly in a Member State, including the conditions that govern their movement to and residence in other Member States; the irregular immigration and unauthorised residence, including the removal of irregular immigrants and last combating trafficking in human beings, especially women and children. Two other provisions are worth mentioning: the first one sets out a legal basis for the EU to adopt international agreements with third countries for the purpose of the readmission of their respective nationals staying irregularly in their territories (art. 79(3) TFEU). The second one relates to the reserved competence of the Member States to determine the volume of admission of third-country nationals coming to the EU to work (art. 79(5) TFEU).

The current legal bases that exist in the field of migration represent quite an achievement in light of the rather tortuous history of this policy field. Indeed, since its beginning, the EU migration policy has faced considerable hurdles, which explains some of the structural issues that is still faces today – including its differentiated pattern of integration.

II.2. The evolution of the EU migration policy: from a purely intergovernmental to a quasi-fully integrated policy

To understand differentiated governance as one inherent feature of EU migration policy, it is useful to recall its deep intergovernmental roots. This comes from the fact that, traditionally, Member States have always been reluctant to fully relinquish control over this very sensitive area of national sovereignty. As Giorgia Papagianni pointed out: "...[T]o the extent that migration related issues are concerned Member States have always managed to secure their central role as well as to reserve a predominant position in that area..."[35] As she explains: "It is true that in general Member States have a strong interest in cooperating; however, one should not forget that the entry and residence of foreigners in each Member State's national territory is primarily perceived as a sovereign right, the exercise of which is based on principally national economic, social and political considerations".[36] The so-called "migration case"[37] of 1987 constitutes a clear example of the initial reluctance of the Member States to envision the integration of their migration policies beyond security issues. Although this case may seem outdated, it is quite telling about the original

[35] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff 2006) 199.

[36] *Ibid*. 200.

[37] Joined cases C-281/85, C-283/85 to C-285/85 and C-287/85 *Federal Republic of Germany and others v Commission* ECLI:EU:C:1987:351.

attitude of the Member States when it comes to integrating migration issues within the EU institutional framework. In this case, on 8 July 1985, the Commission had adopted a Decision setting up a prior communication and consultation procedure on migration policies in relation to non-EU countries (based on former art. 118 of the Treaty establishing the European Economic Community (EEC) [please put *in extenso*], social policy). Several Member States questioned its competence to do so, as for them migration issues rather pertained to their public security, which was beyond the scope of Community competence. While the Court declared the decision to be partially void, it also stated that: "…[T]he argument that migration policy in relation to non-member States falls entirely outside the social field, in respect of which Article 118 [EEC] provides for cooperation between the Member States, cannot be accepted".[38] However, the Court was not more specific as to which part of this policy was not pertaining to public security.

Taking this as the "common denominator"[39] explaining Member States' "actions and reactions to the process of forging a common policy at the EU level",[40] Papagianni defines the following tendencies as underlying in this policy field. First, the "indisputable preference for intergovernmentalism and 'flexible' solutions".[41] Second, "a certain rigidity, a secrecy obsession and mistrust by the Member States towards both the general public and the other national and EU actors"[42] and last the adoption of a "rather pragmatic and security-oriented approach".[43]

While some of these features have clearly softened over time – in particular the second one – looking at how EU migration policy has developed provides a wealth of examples to illustrate how each of these trends have manifested in the different steps leading to the elaboration of what the Lisbon Treaty envisions as a common EU migration policy. The rather bizarre geographic construction of EU migration policy – best described as its "variable geometry" – or rather "variable geography" – is still one of its most peculiar features to this day. In this respect, one can only agree with Steve Peers that: "Since the normal EU rules on decision-making, legal instruments, and judicial control have applied to EU immigration and asylum law for a number of years, the question of the territorial scope of Justice and Home Affairs (JHA) measures remain the only issue that clearly differentiates JHA issues from most of the rest of EU law".[44] Echoing Giorgia Papagianni, the "complexity of this issue results from the reluctance of several 'old' Member States to participate fully in the EU integration in this area (…), the unwillingness of all 'old' Member

[38] *Ibid*. para. 18.
[39] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 200.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid*. 202.
[43] *Ibid*. 203.
[44] S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2016) 26.

States to apply the full Schengen acquis immediately to new Member States, and the interest among several non-Member States in adopting the relevant EU measures".[45]

To better understand the way in which differentiated integration has always been a key dimension of EU migration policy, it is important to look at its intergovernmental origins.[46] Before their integration within the former "first" or "Community pillar" following the adoption of the Treaty of Amsterdam in 1997, migration-related issues were at the heart of intergovernmental cooperation between the EU Member States. The best – and most successful – expression of this cooperation was the signature of the Schengen Agreement in 1985 and the subsequent adoption of an international Convention for its implementation in 1990. The Schengen *acquis* was subsequently included in the former "first" or "Community" pillar through the adoption of a separate protocol to the Amsterdam Treaty.

Following the adoption of the Amsterdam Treaty, differentiated integration in the field of migration has meant mostly a variation in the territorial scope of application of EU legal measures. In other words, not all EU legal measures apply to all Member States – or not in the same way – and not all the States to which EU legal measures on migration apply are EU Member States. This latter hypothesis corresponds to the inclusion of so-called associated States to the Schengen "system" – namely States that take part in the European Economic Area (EEA): Iceland, Lichtenstein and Norway, on the one hand, and Switzerland, on the other.[47] Not only these countries are part of the Schengen system but they are also part of the so-called "Dublin" system establishing different criteria to determine the State that is responsible for examining an asylum claim. The specific situation of the EU Member States which have most recently joined the EU is also to be mentioned, especially in connection with the application of the Schengen *acquis*.

Although most of the institutional peculiarities of the EU migration policy disappeared with the adoption of the Lisbon Treaty, one last feature of this policy area is still enduring. With the adoption of the Amsterdam Treaty, the door was open to differentiation – that is differentiated governance among Member States. In this sense, three Member States did not participate fully in the new Title IV and/or the Schengen *acquis*. This was the case of Ireland and the UK – which overall followed a similar position – and Denmark. For these three Member States, separate protocols were added to determine the extent of their participation in this new policy framework. The next subsection will elaborate on how differentiated governance concretely works in the field of migration by looking at the rules governing its fragmented territorial scope.

[45] *Ibid*.

[46] For a complete overview of the evolution of the EU migration policy, see: S Peers, 'EU Justice and Home Affairs Law (Non-Civil)' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 269.

[47] F Filliez, 'Schengen/Dublin: The Association Agreements with Iceland, Norway and Switzerland' in B Martenczuk and S Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* cit. 145. For more details on these States, see: S Peers, *EU Justice and Home Affairs Law* cit. 37 ff.

II.3. The institutional challenges of differentiation for EU migration policy: defining the territorial scope of EU migration law

The most visible impact of differentiated integration is a general one that is not limited to migration-related issues. It mainly consists in the lack of uniform application of EU law across the EU territory. In other words, different rules will apply differently depending on the Member State and even beyond the EU territory. When it comes to migration more precisely, another key issue concerns the lack of legal certainty that non-EU nationals might face in the application of EU law to their specific legal situation. This situation is particularly detrimental in the field of asylum.[48] In this latter respect, Nadine El-Enany has argued that: "The field of asylum should be entirely free from differentiated integration arrangements. As a field of law which directly affects the rights of individuals in a context in which their physical survival and psychological wellbeing is at risk, the field of asylum law is unlike other competences of the EU where there is scope for differentiated integration".[49]

In the field of migration, differentiated governance has had different definitions, ranging from "variable geometry"[50] to integration "*à la carte*"[51], "flexible" integration,[52] "closer cooperation" and more recently "enhanced cooperation".

The underlying logic behind this form of governance in EU migration policy is twofold. First, to make the rules in the field somehow "optional" in the sense that Member States should freely decide to apply them or not. The second aspect of differentiated governance relates to its variable geographical scope of application.

Steve Peers gives a very detailed overview on the way in which the territorial scope of measures in the field of migration is articulated.[53] Currently, differentiation concerns two Member States: Ireland on the one hand – which used to share a similar position with the UK in this respect – and Denmark. The Irish – and formerly British – exceptions are covered by three protocols: Protocol n. 19 on the Schengen *acquis* integrated into the framework of the European Union, Protocol n. 20 on the application of certain aspects of art. 26 TFEU and Protocol n. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. As for the Danish exceptions, they are covered by Protocol n. 22.

As Giorgia Papagianni has explained, the position of Ireland – and formerly the UK – differed from Danish objections. While the Ireland and the UK were rather concerned

[48] N El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' cit. 362.

[49] *Ibid*. 362-363.

[50] B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' cit.

[51] A Chebel D'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit. 192; G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 30.

[52] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 30.

[53] For a general overview of the territorial scope of application of EU migration law, see: S Peers, *EU Justice and Home Affairs Law* cit. 26-41.

with the very objectives of the measures adopted on migration, Denmark was rather concerned with their legal status.[54] In this sense, as a contracting Party to the Schengen Agreement, Denmark "was willing to participate in a cooperation concerning the establishment of an 'area without internal frontiers'",[55] however, "it contested, mainly for internal political reasons, the transfer of such a competence to the community level. It opted instead for the maintenance of such cooperation within the intergovernmental sphere".[56]

As for Member States that accede to the EU, the Schengen *acquis* is binding but it is not applicable immediately.[57] For them, the *acquis* may only apply after the adoption of a unanimous decision by the Council. This approach has been replicated for Bulgaria and Romania – although they have applied to participate in the Schengen Information System (SIS) since 2010. As the latest Member State to have joined the EU in 2013, Croatia has not yet joined the Schengen system either. Nine of the ten Member States that joined the EU in 2004 have participated in the full Schengen system since December 2007 – and since March 2008 for air borders. Because it is still divided between its Greek and Turkish parts, Cyprus is another Member State that does not yet participate in the Schengen System.

When it comes to participating non-EU States, the participation of Norway and Iceland in the Schengen system was deemed necessary, after the accession of Denmark, Finland and Sweden, to preserve the Nordic Passport Union between those five States.[58] As for Switzerland and Lichtenstein, they participate in the Schengen System respectively since 2008 and 2011.

It is notable that all of these non-EU countries also participate in the "Dublin" system. In this sense, it is interesting that in a recent case, the Court of Justice has established that an application for asylum in Norway could not be considered as holding the same legal status as an application for international protection within the EU.[59]

[54] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 30

[55] *Ibid*.

[56] *Ibid*.

[57] For more details on the situation of States acceding to the EU, read: S Peers, *EU Justice and Home Affairs Law* cit. 36 ff.

[58] *Ibid*. 37.

[59] Case C-8/20 *L.R.* ECLI:EU:C:2021:404. For a brief analysis, see: J Silga '*L.R*: An Asylum Application made to Norway is not an "Application for International Protection" under EU law' (25 May 2021) EU Law Live eulawlive.com.

III. Intersecting the migration and rule of law "crises": Unveiling a deeper layer of differentiated integration?

III.1. From the institutional to the normative dimension of differentiation in the EU migration policy

The territorial scope of application of EU migration law reveals a real challenge. This is not only because of the peculiar geography of the EU territory when it comes to the application of migration rules but also because of all the complexities brought about by this fragmented territory. Several questions have arisen in this respect. These questions also extend to the realm of the external action of the EU in which the issue of finding the adequate legal basis for concluding agreements pertaining to migration issues was further complicated by the peculiar positions of the UK and Ireland.[60] In a way, one may hope that, in spite of all the deep institutional and constitutional challenges that it has triggered, the withdrawal of the UK – now a "disempowered outsider"[61] – might constitute an opportunity to bring EU Member States closer when applying EU law measures in the field of asylum and migration.

While this hope is sound from the institutional point of view, the same cannot be said about what we may call the "normative crisis" of the EU migration policy revealing the deep disagreement – if not "fracture" – that exists between Member States on the values that lie at the foundation of this policy. Reflecting the different ways in which the Member States have reacted during the recent "refugee crisis", this "crisis" relates to the fact that there is no deep agreement between the Member States on the "values" that underpin and guide the EU migration policy. This is connected with the different histories of the Member States and as a consequence their political choices and identity – somehow akin to their national identity – which the EU is bound to respect. However, not reflecting more deeply on this question could seriously jeopardise any effort to address the way in which a common EU migration policy will be designed and function effectively in the future.

First of all, it is useful to recall that the normative basis of EU migration policy has always been ambiguous, and this ambiguity plagues it to this day. As previously mentioned, migration-related concerns are traditionally framed as security issues by States. For practical reasons, early cooperation on migration issues was deemed necessary to achieve other related purposes and it increasingly became clear that this integration would progress to the extent that we can observe today in Title V of the TFEU. Nevertheless, the Member States were always cautious that such integration would not mean that

[60] See: B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' cit.; J Silga, 'Assessing the Consistency of EU Development Cooperation with Readmission in the EU-Philippines Agreement Case – A balancing Exercise' (2015) ELR 439, 452 ff.

[61] D Curtin, 'Brexit and the EU Area of Freedom, Security and Justice – Bespoke Bits and Pieces' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 182, 199.

they were losing their sovereign control on whom to admit in their territory and under which conditions – except in very limited circumstances.

From the purely legal point of view, it is clear that after the adoption of the Lisbon Treaty, migration-related issues are part of the wider constitutional framework of the EU – including general principles and fundamental rights. However, the Treaties themselves provide for some "spaces" of ambiguity in which it is unclear how some migration-related issues fall under these rules or not. An important provision to highlight in this sense is art. 72 TFEU, according to which Title V "[…] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". More fundamentally, art. 67(1) TFEU provides in a rather obscure way that: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". This emphasis on the respect of the different legal systems and traditions of the Member States already signals that it is an accepted fact that the national migration policies differ from one another. This seems to be somewhat contradictory with the claim of art. 2 TEU whereby, "…[the foundational] values [of the EU] are common to the Member States […]".

Exploring this argument in-depth would be impossible given the limited space. However, looking at the recent caselaw of the CJEU gives the best indication of how this normative debate is concretely settled – or not – at the EU level.

In the context of the recent crisis, this normative question has acquired a particular significance. Indeed, the arrival of an unprecedented number of people to the EU territory seeking international protection made the question of which "values" are actually guiding the EU migration policy more acute. In light of the diverging reactions of the Member States, and the related issues of the malfunction of the Dublin system, it became clear that while most Member States were not particularly ready – and even fewer were enthusiastic – to receive more asylum-seekers, some were less ready and enthusiastic than others.

This found a particular expression in the case that was brought before the Court by Hungary and Slovakia to obtain the annulment of the relocation decision adopted by the Council in support of Greece and Italy on the basis of art. 78(3) TFEU.[62]

While the Court dismissed their actions, it is interesting to note that the two Member States – supported by Poland – raised some arguments relating to the fact that accepting the relocation of asylum seekers would threaten their ethnic homogeneity.[63] The Court rejected these arguments both because it would make the relocation scheme practically useless[64] and for their clearly discriminatory undertones.[65] It is fortunate that the Court did not "dive" too deep into these rather alarming arguments on this occasion. However,

[62] Joined cases C-643/15 and C-647/15 *Slovakia v Council* ECLI:EU:C:2017:631.
[63] *Ibid*. para. 302.
[64] *Ibid*. para. 304.
[65] *Ibid*. para. 305.

it is also regrettable that the Court did not take this opportunity precisely – because of the alarming nature of these arguments – to reaffirm more strongly that the EU migration policy is anchored in the broader EU constitutional framework as expressed in art. 2 TEU. In this respect and as we will see in the following subsection, another point that is regrettable is the fact that so far, the Court has made no explicit connection between the "migration crisis" and the "rule of law crisis" in its case law. In this sense, it is useful to remember that the Court did not follow the invitation of former Advocate General (AG) Bobek in its Opinion in *Torubarov*.[66] Instead, the Court only implicitly connected its case law on the two issues.

One particular "hint" indicating that the Court does not entirely consider the two issues to be separate relates to the latest cases of the Court of Justice in the field of asylum concerning Hungary and adopted in the aftermath of the "migration crisis". In this sense, while the case law related to the rule of law crisis in other Member States, such as Poland and Romania, has essentially focused on judicial independence, the core of the "struggle" between Hungary and the European Commission has been taking place in the field of asylum. In spite of that, it is striking that the Court has not been more explicit in connecting its case law on the "rule of law crisis" and especially the way in which it has strengthened the concept of the right to an effective remedy and its migration case law after 2015/2016.

III.2. *Worlds apart*? The dis-connection between the rule of law and migration "crises" in the case law of the CJEU

When one looks at migration in general and asylum in particular, it is impossible not to connect it with the "rule of law" broadly understood and especially, the way in which the Court has recently developed this notion with respect to the right to an effective remedy. In particular, in its judgment of February 2018 based on a claim of the Trade Union of the Portuguese Judiciary,[67] the Court clearly stated? that: "The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".[68]

As the scholarship has already extensively commented,[69] this ruling has built a rather unexpected bridge between art. 2 TEU and art. 19(1) TEU, second indent, whereby: "Member States shall provide remedies sufficient to ensure effective legal protection in the

[66] Case C-556/17 *Torubarov* ECLI:EU:C:2019:626.

[67] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[68] *Ibid*. para. 36. This case opened the way for a very rich line of cases, including: case C-284/16 *Achmea* ECLI:EU:C:2018:158; case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586; case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România'* ECLI:EU:C:2021:393.

[69] See among others: N Kirst, 'The Perspective from Luxembourg: How Does the European Court of Justice Respond to The Rule of Law Crisis Within the Member States?' (2020) Trinity College Law Review 108;

fields covered by Union law". In doing so, the Court overcame the question pertaining to the material scope of application of art. 47 of the Charter of Fundamental Rights, which had been – this far – the only textual and formal translation of the principle of individuals' right to an effective judicial protection under EU law. This astute extension of the scope of application of the right to an effective remedy – thanks to the newly gained relevance of art. 19(1) TEU – was the first step for the Court to develop its subsequent case law on judicial independence in the Member States facing a "rule of law backsliding".[70]

When it comes to asylum, it is important to clarify right away that the right to an effective remedy is not particularly controversial in this field, whether from the legislative[71] or judicial[72] point of view. The first case in which the Court was given the opportunity to make a connection between its emerging case law on the "rule of law crisis" and the right to an effective remedy in relation to asylum was the *Torubarov* case.[73]

In this case, Mr Torubarov had applied for international protection in Hungary in December 2013 following which the Hungarian Immigration Office rejected his application in August of the following year. He subsequently brought an appeal against this decision before the Hungarian Administrative and Labour Court and in May 2015, the Administrative and Labour Court annulled the decision of the Immigration Office and ordered it to conduct a new procedure and make a new decision. In September 2015, a new law was introduced that withdrew the power of administrative courts to vary ("alter") the administrative decisions on international protection. As a result of this, Mr Torubarov found himself at the heart of a procedural "ping-pong"[74] between the Immigration Office, which kept rejecting his application for international protection and the Administrative and Labour Court, which kept annulling the rejection decisions without being able to actually end this.

Eventually – seized of a third appeal – the Administrative and Labour Court decided to refer a question to the CJEU for a preliminary ruling asking whether it may vary an administrative decision on international protection (relying on art. 46(3) of the Directive 2013/32 – 'Procedures Directive' – read in conjunction with art. 47 of the Charter). The question that the Court had to answer in this case was whether the duty of the national

A Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence' (2020) Maastricht Journal of European and Comparative Law 105.

[70] Laurent Pech and Kim Lane Scheppele define the "rule of law backsliding" as "...[t]he process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party". L Pech and K Lane Scheppele, 'Illiberalism Within Rule of Law Backsliding in the EU' (2017) CYELS 3, 10.

[71] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, art. 46.

[72] For example, see: case C-585/16 *Alheto* ECLI:EU:C:2018:584. See also *Torubarov* cit.

[73] *Torubarov* cit.

[74] It is precisely with the metaphor of table tennis or "procedural ping-pong" that AG Bobek opened his Opinion: case C-556/17 *Torubarov* ECLI:EU:C:2019:339, opinion of AG Bobek, para. 1.

judge to ensure an effective judicial protection meant that s/he must vary an administrative decision, even when this is prohibited by national law. Following the Opinion of AG Bobek in this case, the Court gave a positive answer.

To be clear, the Court had already explained in its prior ruling *Alheto*[75] that:

> "Article 46(3) of Directive 2013/32 would be deprived of any practical effect if it were accepted that, after delivery of a judgment by which the court or tribunal of first instance conducted, in accordance with that provision, a full and *ex nunc* assessment of the international protection needs of the applicant by virtue of Directive 2011/95, that body could take a decision that ran counter to that assessment or could allow a considerable period of time to elapse, which could increase the risk that evidence requiring a new up-to-date assessment might arise".[76]

However, in this case, the Court had left open the question of the practical consequences of a judicial decision that would be contrary to the administrative decision.

In spite of their shared conclusion, the Court and AG Bobek adopted a slightly different reasoning. AG Bobek anchored his reasoning as part of what he called the "broader (constitutional) picture"[77] in relation to the case law developed by the Court in the broader context of the "rule of law crisis" starting with the case on the Trade Union of the Portuguese Judiciary.[78] In doing so, he did not restrict himself to applying and developing the case law of the Court specifically pertaining to the question that was asked in the context of asylum. As he pointed out: "The clarifications [already] given by the Court in (...) [this case law] constitute an expression, in the specific field of international protection, of more general principles related to the requirement of effective judicial remedy now enshrined in Article 47 of the Charter and referred to in the second subparagraph of Article 19(1) TEU".[79] After making this statement, he went on to emphasise that: "effective judicial review" is the "bedrock of the rule of law".[80]

On the other hand, the Court did not follow this constitutional approach. Rather, it located its decision within the field of asylum and it relied on the need to ensure the "practical effect" of the right to an effective remedy as highlighted in *Alheto* and the role of the national judge in this specific context.[81] The Court confirmed its findings in a subsequent judgment of March 2020[82] in which AG Bobek also gave his Opinion, albeit without making further connections with the judicial developments relating to the "rule of law" crisis. Actually, it does not seem that this connection was ever attempted again after *Torubarov*.

[75] *Alheto* cit.
[76] *Ibid*. para. 147.
[77] *Torubarov*, opinion of AG Bobek, cit. paras 48-62.
[78] *Associação Sindical dos Juízes Portugueses* cit.
[79] *Torubarov*, opinion of AG Bobek, cit. para. 48.
[80] *Ibid*. para. 49.
[81] *Torubarov* cit. paras. 61-78.
[82] Case C-406/18 *PG* ECLI:EU:C:2020:216.

This does not mean, however, that there has been no condemnation by the Court of Justice of the Hungarian legal framework targeting asylum-seekers – far from it. This is what the following cases adopted in the context of Hungary – a Member State facing a "rule of law backsliding" clearly illustrate.

First, in another judgment of March 2020[83] (the so-called "Tompa" case), the Court ruled out that a new ground for concluding to the inadmissibility of an asylum application could be introduced by the Hungarian legislator in addition to the exhaustive list, already existing in the "Procedures Directive".[84] In substance, this new ground of inadmissibility related to the fact that some asylum-seekers had previously transited through Serbia, which the Hungarian legislator considered a "safe country of transit".

Second, in a judgement of the following month,[85] opposing the European Commission to the Czech Republic, Hungary and Poland, the Court established that these three Member States had failed to respect their obligations to relocate asylum-seekers as required by the two relocations decisions adopted in 2015 for the benefit of Greece and Italy. In doing so, the Court actually "gave teeth" to its previous ruling of September 2017.[86]

In a third judgment of May 2020,[87] the Court gave quite an extensive ruling on the conditions of asylum seekers stranded in the Röszke transit zone, among others with reference to their detention regime and their right to an effective judicial protection – in connection with the principle of primacy.

Fourth, in a decision of December 2020,[88] opposing the European Commission to Hungary, the Court declared that Hungary had violated several obligations under EU asylum law among others by imposing that applications for international protection of asylum-seekers arriving from Serbia could only be made in the transit zones of Röszke and Tompa, in which a systematic detention regime had been set up.

Last but not least, in a judgment of November 2021,[89] the Court ruled that Hungary had violated its obligations under the relevant EU asylum law *inter alia* by adopting legislation criminalising people who, in connection with an organising activity, provided assistance to asylum seekers, where it could be proved beyond all reasonable doubt that these people were aware that their asylum application would be rejected.

As these cases show, the Court has been quite outspoken in condemning – with the support of the European Commission – the violations carried out by Hungary against the

[83] Case C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompa)* ECLI:EU:C:2020:218.

[84] Art. 33 Directive 2013/32/EU cit.

[85] Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257.

[86] *Slovakia v Council* cit.

[87] Joined cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendeszeti Főigazgatósáa Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

[88] Case C-808/18 *European Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029.

[89] Case C-821/19 *Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile)* ECLI:EU:C:2021:930.

fundamental right to asylum. These rulings, which have been all adopted in the course of a short time and in particular in the context of the ongoing "rule of law crisis" may all point to the underlying intention of the Court to set some limits to how Member States may react in the context of both the rule of law and migration "crises". However, this connection appears to be implicit – at best – and it does definitely not go as far as fully embracing recent judicial developments as part of the 'broader constitutional' context as AG Bobek had initially suggested in *Torubarov*.

IV. Final remarks

This *Article* briefly reviewed the way in which differentiated integration has evolved in the field of EU migration policy with a view to revealing – beyond the technical difficulties of this particular institutional setup – a deeper "normative fracture" between the EU Member States as to the "core of values" that should guide the development of the EU migration policy. To do so, this *Article* especially looked at the way in which the CJEU has so far appeared reluctant to explicitly connect the issues pertaining to the rule of law and the migration "crises" in its case law. To conclude, it would be interesting to mention three tentative hypotheses that might explain this disconnection.

First, it appears that the case law of the Court in the context of the "migration crisis" has not been entirely coherent so far in connection with the right to an effective remedy. The two major examples in this respect are: the case relating to the EU-Turkey Statement[90] and the *X and X*[91] case on humanitarian visas. While the Court did not even take the opportunity to examine the former controversial measures, it did have a chance to decide on the problem of the humanitarian visas to be issued in the context of the conflict raging in Syria. Unfortunately, its position was quite disappointing,[92] all the more so as the European Court of Human Rights followed in its footsteps.[93]

Then, the Commission – and hypothetically the Court itself – might have been slightly selective as to the assessment of the way in which (other) Member States have failed to fulfil their obligations under EU asylum law. To be clear, the violations of the rights of asylum-seekers in Hungary were not acceptable and it goes without saying that the Court took the right decision. But what about other Member States? The main example – and coincidentally one of the Member States closely related with institutional "variable geometry" – is Denmark. Since the beginning of the "refugee" crisis, this Member State has

[90] See: Order of the General Court T-192/16 *NF v European Council* ECLI:EU:T:2017:128 and Order of the General Court T-193/16 *NG v European Council* ECLI:EU:T:2017:129.

[91] Case C-638/16 PPU *X and X* ECLI:EU:C:2017:173.

[92] For an overall critical review of the case law of the European Courts during the "migration crisis", see: J Silga and C Warin, 'Europe, Year 2020. What Ever Happened to the Right to Asylum?' (2 May 2020) EU Law Live eulawlive.com.

[93] ECtHR *M.N. and Others v Belgium* App. n. 3599/18 [5 March 2020].

adopted some more than controversial measures aiming at deterring asylum-seekers from entering its territory. The most well-known example was the adoption of the very much decried "jewellery law" (as part of Bill n. L87 adopted in January 2016),[94] threatening to seize the assets of asylum-seekers deemed to be too affluent as a way to contribute to the expenses for their own maintenance in this country.[95] While these highly contested measures were not implemented to the extent that was initially feared, this Member State did not stop there. More recently, Denmark passed another much criticised Bill n. L226 (in June 2021) providing for the externalisation of asylum procedures in third countries.[96] It also denied the renewal of the temporary residency status of some Syrian refugees considering that security in Damascus and Greater Damascus had improved.[97] In light of these alarming developments in the aftermath of the "migration crisis", the UN High Commissioner for Refugees expressed its concerns and formulated some recommendations to Denmark.[98] EU Commissioner Ylva Johansson also expressed her disapproval of the latest Danish Bill.[99] Some Members of the European Parliament (MEPs) similarly voiced their concerns[100] and some even demanded the European Commission to take more concrete action towards Denmark.[101] While this Member State is not part of the AFSJ by virtue of differentiated integration, this Member State is subject to the overall EU constitutional framework, including arts 2 and 19(1) TEU. Applying the same reading

[94] For a commentary, read: UI Jensen and J Vested-Hansen, 'The Danish "Jewellery Law": When the signal hits the fan?' (4 March 2016) EU Migration Law Blog eumigrationlawblog.eu. It is interesting to note that the parts of this Bill pertaining to the restriction of family reunification for refugees were held to be incompatible both with the relevant EU Law (the standstill clause provided under art. 13 of Decision n. 1/80 of the Association Council of 19 September 1980 on the development of the Association between the EU and Turkey) and with art. 8 of the European Convention on Human Rights (ECHR). On the incompatibility of the same legislation with EU law, see: case C-89/18 *A* ECLI:EU:C:2019:580. As for the incompatibility of the Danish legislation with art. 8 ECHR, see: ECtHR *M.A. v. Denmark* App. n. 6697/18 [9 July 2021].

[95] N Stokes-Dupass, 'Mass Migration, Tightening Borders, and Emerging Forms of Statelessness in Denmark, Norway and Sweden' (2017) Journal of Applied Security Research 40, 52 ff.

[96] For a commentary, see: N Feith Tan and J Vested-Hansen, 'Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law' (15 November 2021) EU Migration Law Blog eumigrationlawblog.eu.

[97] See question for written answer to the Commission E-002239/2021 (26 April 2021), *Revocation of residence of Syrian refugees in Denmark*, www.europarl.europa.eu. See answer by Commissioner Johansson (9 July 2021) www.europarl.europa.eu.

[98] United Nations High Commissioner for Refugees, *Recommendations on Strengthening Refugee Protection in Denmark, Europe and Globally* www.unhcr.org.

[99] Y Johansson, 'TimeToDeliverMigrationEU- Sending applicants for international protection outside the European Union is a bad idea' (18 June 2021) European Commission Blog Post ec.europa.eu.

[100] See *Revocation of residence of Syrian refugees in Denmark*, answer by Commissioner Johansson cit.

[101] On this point, read: Letter sent by Nikolaj Villumsen, Malin Björk and María Eugenia Rodríguez Palop (MEPs) to the attention of Josep Borrell and Ylva Johansson 'On the subject of the Danish Government's externalization of asylum seekers to third countries outside of the EU' (23 June 2021) left.eu.

of these provisions to Denmark could only contribute to better ensuring the general respect of the rule of law in the EU.

Last, the current institutional framework does not appear to be particularly promising for the rights of asylum-seekers in particular, as illustrated by the New Pact on Migration and Asylum that was proposed by the Commission in September 2020.[102] In this respect, it is quite interesting that as one of its arguments for justifying its violations of the EU asylum law in the most recent case mentioned previously, Hungary relied on an amendment of the current "Procedures Directive" that was currently in discussion by the EU legislature.[103]

For the time being, it seems that the Court has not clearly decided to which extent it is ready to follow the "tacit agreement" of Member States to disagree as to which values are guiding the EU migration policy. As a final conclusion, this paper would like to invite the Court to provide a clearer guidance on this point as the absence thereof might further undermine the constitutional framework of the EU beyond the current crises.

[102] For an analysis, see: J Silga and C Warin, 'The EU's New Pact on Migration and Asylum: Efficiency at the Expense of Rights?' (5 December 2020) EU Law Live eulawlive.com.

[103] *Commission v Hungary (Incriminationde l'aide aux demandeurs d'asile)* cit. para. 32.

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

THE RULE OF LAW IN THE EU: CRISIS, DIFFERENTIATION, CONDITIONALITY

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ABSTRACT: The EU's decade-long rule of law crisis has normalized into an everyday constitutional and political experience. The lens of differentiated governance calls for a close inquiry into the legal and political dynamics – processes, incentive structures and inter-institutional conflicts – that are consequential for the future of the Union as a "community of values and of laws". Tracing the debate on financial sanctions (budgetary conditionality) in the broader context of the rule of law crisis, this *Article* argues that the future of Europe hinges on attributing practical, political and legal significance to the founding values set forth in art. 2 TEU. Without respect for these founding values differentiated governance as a set of political or legal practices and as an academic-intellectual project has no purpose or endpoint.

KEYWORDS: art. 2 TEU – conditionality – crisis – differentiation – rule of law – values.

I. INTRODUCTION

The EU's decade-long the rule of law crisis has normalized into an everyday constitutional and political experience. By 2021 legal claims of national constitutional identity have been translated into political attacks on the primacy of EU law and the authority of the CJEU. In legal scholarship old debates about legal pluralism were reignited with a new urgency.[1]

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[1] *E.g.* G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

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The rule of law crisis presents a genuine challenge for scholarship on European integration. Encouraging lessons from the lasting, positive effects of pre-accession conditionality on post-accession compliance[2] started to give way to concerns about a steady post-accession decline in the quality of democratic deliberation in new member states.[3] Surveying grand theories on European integration Hooghe and Marks show that intergovernmentalist, neofunctionalist and postfunctionalist approaches capture different aspects of the illiberal democracy challenge.[4] Despite reservations about the scale and practical impact of democratic backsliding (the source of the rule of law crisis),[5] by 2020 Kelemen expressed concerns about the Union lack of capacity (and willingness) to address the rule of law crisis resulting in a state of authoritarian equilibrium within the Union.[6]

Traditionally the literature on differentiated integration has focused on legal mechanisms that enable member states and non-state entities (EU institutions) to cooperate in a flexible manner towards an ever-closer Union.[7] In the past decade, scholarship on differentiated integration has moved towards covering differentiated politicization,[8] differentiated governance,[9] and – more recently – has started to reckon with differentiated disintegration.[10] Disintegration amidst the rule of law crisis forcefully poses the question whether the fundamental values of the Union (art. 2 TEU) – such as the rule of law – can be differentiated.[11]

[2] T A Börzel and U Sedelmeier 'Larger and More Law Abiding? The Impact of Enlargement on Compliance in the European Union' (2016) Maximizing the Integration Capacity of the European Union: Lessons of and Prospects for Enlargement and Beyond (MAXCAP) userpage.fu-berlin.de.

[3] A Gora and P de Wilde, 'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law' (2020) Journal of European Public Policy 342 (based on the V-dem dataset).

[4] L Hooghe and G Marks, 'Grand Theories of European Integration in the Twenty First Century' (2019) Journal of European Public Policy 1113, 1128.

[5] L Cianetti, J Dawson and S Hanley, 'Rethinking "Democratic Backsliding" in Central and Eastern Europe – Looking beyond Hungary and Poland' (2018) East European Politics 243.

[6] RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) Journal of European Public Policy 48.

[7] For a recent comprehensive overview of the literature see N Pirozzi and M Bonomi, 'Governing Differentiation and Integration in the European Union: Patterns, Effectiveness and Legitimacy' (2022) The International Spectator 1.

[8] P de Wilde, A Leupold and H Schmidtke, 'Introduction: The Differentiated Politization of European Governance' in P de Wilde, A Leupold and H Schmidtke (eds), *The Differentiated Politicization of European Governance* (Routledge 2015) 3; P de Wilde, 'No Polity of old Politics? A Framework for Analyzing the Politicization of European Integration' (2011) Journal of European Integration 55; M Zürn, 'Politicization Compared: At National, European and Global Levels' (2019) Journal of European Public Policy 977.

[9] See in this *Special Section* S Baroncelli and others, 'Introduction to the *Special Section*: Differentiated Governance in a Europe in Crises' (2022) European Papers www.europeanpapers.eu 857. Also recently S Lavenex and I Križić, 'Governance, Effectiveness and Legitimacy in Differentiated Integration: An Analytical Framework' (2022) The International Spectator 1.

[10] B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017); J E Fossum, 'Democracy and Differentiation in Europe' (2015) Journal of European Public Policy 799.

[11] R D Kelemen, 'Is Differentiation Possible in the Rule of Law?' (2019) Comparative European Politics 246.

The lens of differentiated governance calls for a close inquiry into the legal and political dynamics – processes, incentive structures and inter-institutional conflicts – that are consequential for the future of the Union as a "community of values and of laws". Tracing the debate on financial sanctions (budgetary conditionality[12]) in the broader context of the rule of law crisis, this *Article* argues that the future of Europe hinges on attributing practical, political and legal significance to the founding values set forth in art. 2 TEU. On 16 February 2022, the CJEU expressed this sentiment in the following words:

> "the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law, and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based … on the commitment of each Member State to comply with its obligations under EU law and to continue to comply… with the values contained in Article 2 TEU, which include the value of the rule of law".[13]

Section II revisits key themes in the debate on differentiated governance in the age of the rule of law crisis. Section III provides a closer look at the dynamics of dialogue-based approaches to safeguarding the founding values, with a focus on the introduction of budgetary conditionality. Section IV maps the gradual escalation of attacks on the primacy of EU law. Section V traces the outlines of the CJEU's response to the emerging state of affairs, highlighting the contributions of the case law to reduce disintegration through differentiation. The conclusion reminds that differentiated governance even of an ever-looser Union[14] hinges on effectively safeguarding the founding values set forth in art. 2 TEU. Without respect for these founding values differentiated governance as a set of political or legal practices and as an academic-intellectual project has no purpose or endpoint.

II. Differentiation: From pragmatic problem-solving to mode of governance

II.1. Differentiated governance: The normalization of disintegration

Scholarship on differentiated integration and differentiated governance focuses on the flexibility of the EU's legal framework in the face of adversity, unexpected challenges (or the

[12] Regulation (EU) 2020/2092 of the European Parliament and Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[13] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 129.

[14] F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (OUP 2020).

embarrassment of protracted accession processes).[15] Therein, differentiation is as much a feature of legal and institutional design as a matter of institutional (political) practice.

Differentiation may well be the force that enables the EU to muddle through challenges.[16] At the same time, the legal architecture that enables differentiated governance serves recalcitrant and/or illiberal member states equally well. To borrow an example from Thym: "the crisis of monetary union does not originate primarily in the asymmetric non-participation of some Member States but in the structural deficits of both the Treaty design and its implementation".[17] While a legalistic-technical definition of differentiation leads to the reassuring conclusion that it "removes the most Eurosceptic states from the most advanced integration schemes and circumvents their veto on future integration decisions",[18] differentiation also provides ample opportunities for illiberal member states to take advantage of EU membership without respecting the values it is built on or its legal foundations.

Accounts of differentiation regularly recall the positive experiences of closer cooperation under the Treaties (like the EMU), pointing also to further modalities of intergovernmental cooperation fostered outside the Treaties (like the ESM or the Fiscal Compact). Key examples of enhanced cooperation under the Treaties include the Schengen *acquis* or the creation of the European Public Prosecutor's Office (EPPO) (over the objection of several member states, including Hungary and Poland). The experiences of the eastern enlargement of the Union inspired the introduction of the elaborate Cooperation and Verification Mechanism (CVM) to complete the Bulgarian and Romanian accession in the face of slow and contentious progress over deliverables. In these cases, differentiation meant buying time in order to make a community of values and of laws work.

The logic of differentiated governance is premised on the genuine political commitment of a member state to observe the terms of Union membership, with its benefits and burdens. The unanimity requirement in the domain of Common Foreign and Security Policy may be the perfect incentive for forging compromises between the member states, yet "a common commitment to values and norms is an insufficient basis for policy consensus on what are still largely perceived to be the foreign policy interests of individual member states".[19] At the same time, the *à la carte* approach in the Area of Freedom, Justice and Security has led to extreme fragmentation, to the point of routinely recognized

[15] See *e.g.* B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 9-27.

[16] F Fabbrini, *Brexit and the Future of the European Union. The Case for Constitutional Reforms* (Oxford University Press 2021) 81.

[17] D Thym, 'Competing Models for Understanding Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 28.

[18] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 121.

[19] S Blockmans, 'Differentiation in CFSP: Potential and Limits' in S Blockmans (ed.), *Differentiated Integration in the EU: From the Insider Looking Out* (CEPS 2014) 46.

disintegration.[20] And even in the terrain of enhanced cooperation, it is hard to overlook that the member states that refuse to join the EPPO continue to enjoy the benefits of membership without the burdens of adhering to the applicable legal safeguards.

Fabbrini describes this unfortunate side-effect to be a "new height" of differentiated integration.[21] The new integration theory of Jones, Kelemen and Meunier proposes a conceptualization in terms of *failing forward*, wherein "lowest common denominator intergovernmental bargains led to the creation of incomplete institutions, which in turn sowed the seeds of future crises, which then propelled deeper integration through reformed but still incomplete institutions".[22]

Legal differences between policy areas may permit the emergence of overlapping governance regimes: Economic integration (the single market premised on the four freedoms) appears to be less fragmented than other policy areas.[23] One fear is that due to a seemingly unstoppable proliferation of mechanisms fostering flexibility differentiation leads to disintegration – to the point of endangering "the core principles and values of the European integration project".[24] As de Witte notes, due to differentiation "the contours of the EU legal order have become rather fuzzy", to the point that the CJEU's "old ideal of EU legal rules being 'fully applicable at the same time and with identical effects over the whole territory of the Community' has become unattainable".[25]

A decade into the rule of law crisis scholarship on differentiation has to account for a new form of disintegration: The normalization of national reluctance to respect the primacy of EU law. In 2021, the Polish Constitutional Tribunal issued two rulings in a few weeks, also defying the CJEU,[26] while the Romanian Constitutional Court banned lower courts from following a CJEU judgment.[27] These judgements followed in the footsteps of the German Constitutional Court,[28] directly disputing a judgment of the CJEU on the European Central Bank's Public Sector Purchase Programme (PSPP/*Weiss*). In response President Koen

[20] See this *Special Section* J Silga, 'Differentiation in the EU Migration Policy: "The Fractured" Values of the EU' (2022) European Papers www.europeanpapers.eu 909.

[21] F Fabbrini, *Brexit and the Future of the European Union* cit. 81.

[22] E Jones, RD Kelemen and S Meunier, 'Failing Forward? Crises and Patterns of European Integration' (2021) Journal of European Public Policy 1519.

[23] S Fabbrini, 'Differentiation or Federalisation: Which Democracy for the Future of Europe?' (2021) ELJ 1, at 3-4.

[24] B De Witte, A Ott and E Vos, 'Introduction' in De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit.

[25] B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit. 25.

[26] See section IV for details.

[27] See case C-83/19 *Asociaţia "Forumul Judecătorilor din România" and Others v Inspecţia Judiciară and Others* ECLI:EU:C:2021:393 and the refusal of the Romanian Constitutional Court banning lower courts from following it. See Romanian Constitutional Court judgment of 8 June 2021 n. 390.

[28] German Constitutional Court judgment of 5 May 2020 n. 859/1.

Lenaerts of the CJEU in a newspaper interview posited that "the first member state that ignores a judgment could unravel the entire European legal order"[29] (emphasis added).

These challenges against the primacy of EU Law quickly travelled from the legal to political sphere. On 19 October 2021, the European Parliament held a debate on the rule of law crisis and the primacy of EU law (in the shadow of an art. 7 TEU process that appears to be rather dormant in the Council). In his speech in the European Parliament, PM Morawiecki emphasized that the Constitutional Tribunal's October ruling is narrow and very specific, affecting particular provisions of the Treaty in a specific case.[30] He also cited several examples, where European constitutional courts, including the German Constitutional Court, took similar stances.[31] For its part, the European Parliament emphasized that it

> "[d]eeply deplores the decision of the illegitimate 'Constitutional Tribunal' of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU; expresses deep concern that this decision could set a dangerous precedent; underlines that the illegitimate 'Constitutional Tribunal' not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland".[32]

and that "no EU taxpayers' money should be given to governments that flagrantly, purposefully and systematically undermine values enshrined in Article 2 TEU".[33]

In a subsequent letter addressed to fellow heads of government and all European institutions before the upcoming meeting of the European Council, PM Morawiecki argued for imposing limits on the primacy of EU law.[34] He called financial sanctions (budgetary conditionality) devoid of legal foundation, an instance of blackmail by EU institutions that are usurping powers "they do not have under the Treaties".[35] The terms of the discussion in the European Council were not made available to the general public. (Subsequently, the CJEU's judgment on budgetary conditionality confirmed the legal foundations of the conditionality regulation.)

That EU integration is a process of managing successive crises is taken for granted in the literature on differentiation. In turn, discourses on differentiation dilute the

[29] C de Gruyter, 'President Koen Lenaerts: "Europese Hof komt meer center stage' (17 May 2020) NRC www.nrc.nl.

[30] 'Statement by Prime Minister Mateusz Morawiecki in the European Parliament' (19 October 2021) www.gov.pl.

[31] *Ibid*.

[32] Resolution 2021/2935(RSP) of the European Parliament of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law, para. 1.

[33] *Ibid*. para 11.

[34] 'Letter from Prime Minister Mateusz Morawiecki to the Heads of Governments and the Presidents of the European Council, the European Commission and the European Parliament on relations between national law and European law' (18 October 2021) www.gov.pl.

[35] *Ibid*.

distinction between ordinary politics and crisis management. Combined with the rise of illiberal political actors inside the Union[36] and the increasing popularity of claims framed in terms of national sovereignty, the crisis management mentality embedded in differentiation literature present a genuine challenge for the governance of the Union.[37] To start, notice how the crisis management mentality reinforces of sovereigntist claims in the face of plain legal argument. As an illustration: In late November 2021, Hungarian Prime Minister Viktor Orbán called on the Commission "to suspend all infringement procedures that undermine the measures taken by member states to protect the territorial and national integrity of their citizens and their security".

Furthermore, in constitutional terms, this distinction between ordinary politics and crisis management (emergency) makes a considerable difference. Being in a permanent state of crisis management creates the distinct sense of governance through improvisation, a succession of flexible and adaptable practices that are enabled – but not constrained – by legal rules. The adverse effect of the normalization of crisis management (in lieu of ordinary politics and regular governance) is clear even without the bogey man of a Schmittian sovereign who runs politics as a series of decisions about the exception. When constitutional and legal rules are relegated into mere formalities, governance is replaced by the competition of raw political ambitions. Consequently, the emergence of naked sovereignty claims is both a symptom and a product of disintegration through differentiation in the Union. The familiar antidote for taming political ambitions in constitutional democracies has long been a gesture of pre-commitment, a voluntary subscription to a set of rules and principles that take precedence before rules produced by the regular political process.

II.2. Getting to "a community of values and of laws"

In her first state of the union address in September 2020, the President of the European Commission, Ursula von der Leyen, made the Union as a "community of values and of laws" a central theme of the Commission's work programme.[38] President von der Leyen's tribute to Walter Hallstein's political genius, complemented by the invocation of trust strongly resonates with a line of argument developed by Professor Armin von Bogdandy in a recent article.[39] Recalling that Hallstein's concept of Rechtsgemeinschaft is richer than mere "integration through law",[40] von Bogdandy argues that Hallstein's concept is political in the sense that "it regulates by means of policies (today art. 26 ff TFEU), not, however, because it is a disputed object or forum of public debate. In other words: the

[36] L Hooghe and G Marks, 'Grand Theories of European Integration in the Twenty First Century' cit.

[37] S Fabbrini, 'Differentiation or Federalisation' cit. 23.

[38] Ursula von der Leyen, 'State of the Union Address' (16 September 2020) ec.europa.eu.

[39] A von Bogdandy, 'Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace' (2018) EuConLR 675.

[40] *Ibid*. 681.

community of law was set up for regulatory politics, not for politics that deal with crises that might tear apart the body politic".[41]

The terms and stakes of the discussion between regulatory politics and the politics of crises are best explained with an illustration on the fate of the Commission's proposal for budgetary conditionality in defense of the rule of law, tabled in May 2018.[42] This proposal was triggered by the lack of progress surrounding the art. 7 TEU processes commenced against Poland and Hungary for exposing the rule of law to the risk of serious breaches. In response to the Commission's initial proposal, Hungarian Prime Minister Viktor Orbán was quick to proclaim that he was ready to veto the entire EU budget in the Council over the conditionality mechanism, adding pragmatically that "[t]here has to be unanimity, so Hungarians don't have to be worried".[43] This episode illustrates the differences between regulatory politics and political crisis management.

Indeed, von Bogdandy is concerned that as a narrow, legal concept, and especially in the manner as it is enforced by the CJEU, the rule of law is driving Europe apart. Thereupon he calls for recalibrating the concept of the rule of law through the positive force of trust: "chang[ing] from concern about the effectiveness of Union law to mutual trust among institutions highlights the latest European transformation".[44] This switch of perspectives does not only allow but requires pragmatically ignoring occasional violations of legal rules.[45] Strengthened by trust the rule of law becomes a cohesive force: It restores confidence in "Europe's self-understanding as a union of liberal democracies",[46] "the only transnational space close to Kantian peace and effective legal protection".[47] This requires European institutions to do less to safeguard the rule of law, and not more, in order to avoid antagonizing member states and citizens any further.

This approach runs the risk of treating the rule of law as a vessel for aspirations, a symbol of a better future in times of trouble – without a normative edge or practical consequences.

Note that in her 2020 State of the Union address President von der Leyen mentioned "ensur[ing] that money from our budget and NextGenerationEU is protected against any kind of fraud, corruption, and conflict of interest". Yet, the speech itself did not reference the Commission's controversial proposal for imposing budgetary conditionality at all. At this moment, President von der Leyen's silence could be read as a recognition of a hard-won

[41] *Ibid*. 684.

[42] Proposal for a regulation 2018/0136(COD) of the European Parliament and of the Council of 2 May 2018 on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

[43] France24, 'Hungary's Orbán Threatens Budget Veto' (4 May 2018) France24 www.france24.com.

[44] A von Bogdandy, 'Ways to Frame the European Rule of Law' cit. 692, original emphasis.

[45] *Ibid*. 694.

[46] *Ibid*. 693.

[47] *Ibid*. 697-8.

compromise about the Commission's conditionality proposal reached on the sidelines of negotiating an unprecedented recovery plan to address the effects of the COVID pandemic in the European Council.[48] Alternatively, this silence could also be interpreted as the new Commission giving up on securing respect for the rule of law through legal sanctions.

Predictably, images of a better future painted by President von der Leyen in terms of "a community of values and of laws" were openly attacked in the parliamentary debate following the State of the Union address. Ryszard Legutko – the co-chair of the European Conservatives and Reformists (also a professor of philosophy who is an intellectual architect of illiberal politics in Poland) – mobilized the founding value of democracy against the Commission's vision of Union as a community of values and of laws.[49] He accused the Commission of "brutal majoritarianism", submitting that on account of defending the rule of law the "mainstream majority wants to crush every form of dissent" and that "European Institutions wants to switch off democratically constituted institutions of the nation states".[50]

The constitutional bass for asserting claims about national identity "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" is art. 4(2) TEU, the provision that gives effect to the sovereign equality of Member States. The extent to which theories on differentiation will accommodate sovereigntist rhetoric depends on their working definition of democracy, penchant for people's power and subsidiarity, and their acceptance of founding values or principles that are beyond differentiation through the processes of ordinary politics. Authors differ depending on whether they address the rule of law crisis as a series of symptoms associated with the accommodation of "core state powers" in a particular policy area,[51] or a larger phenomenon akin to the migration crisis or Brexit that imperils the foundations of the Union as a "community of values and the of laws".[52] Crisis scenarios with an appreciation for the constitutional dimension of the Union take into account the nature of member states' initial commitment to the member ship at the time of accession to the Union, the responsibilities institution, their relations with member states and the nature of the relationship of member states to each other.

[48] J Morijn, 'The July 2020 Special European Council, the EU budget(s) and the Rule of Law: Reading the European Council Conclusions in their Legal and Policy Context' (23 July 2020) EU Law live eulawlive.com.

[49] 'Co-Chairman Prof. Ryszard Legutko on the State of the Union Speech' (16 September 2020) ecrgroup.eu.

[50] *Ibid*.

[51] N Pirozzi and M Bonomi, 'Differentiation and EU Governance: Key Elements and Impact' (2022) The International Spectator 160, 163.

[52] RD Kelemen, 'Is Differentiation Possible in the Rule of Law?' cit. 246.

III. The rule of law crisis: From dialogues to conditionality

III.1. Muddling through political dialogue: From art. 7(1) TEU to annual reports

A decade of polite dialogue managed to stall into irrelevance art. 7(1) TEU processes against Hungary and Poland in the Council. In response to open attacks on the Union's founding values (art. 2 TEU) by democratically elected illiberal governments of some member states, EU institutions gradually developed the so-called rule of law toolbox.[53] The latest tools include a comprehensive annual reporting mechanism on the rule of law that covers all member states, and a new regulation[54] that permits withholding EU funds from a member state that poses a risk to the Union's financial interest through breaching the principles of the rule of law (art. 3). In the meantime, the Parliament called for consolidating some of the existing mechanisms into a new EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.[55] The Parliament's proposal was based on the understanding that "Parliament, the Commission and the Council (the 'three institutions') share political responsibility for upholding Union values, within the limits of the powers conferred on them by the Treaties" (recital N).

The contrast between the Commission's emphasis on the inspirational ideal of the rule of law and the Parliament's emphasis on constitutional responsibilities is best illustrated by the Commission's mellow response to the ongoing Bulgarian constitutional crisis. Following a corruption scandal revolving around EU funds[56] and months-long street demonstrations then-Prime Minister Borissov launched a hasty constitutional amendment process seeking judicial reform and considerably reducing the parliament's size. On September 10, 2020 – a week before the State of the Union address – Commissioner Jourova responded to harsh criticism in Parliament's LIBE Committee by saying that "If democracy does not work bottom-up and top-down, *the Commission cannot do much if the things go too wrong in the member state* [...] We have to bear in mind what the Commission is and isn't".[57]

First, the Commission's rule of law toolbox is not the product of strategic engineering: It is a collection of miscellaneous instruments that yielded accidental benefits in response to illiberal national actors. This is especially true for the tools primarily meant to ensure economic cohesion and policy coordination (such as the European Semester). Second, the Commission's tools are complemented by the measures used by (or at least available

[53] European Commission, *The EU's Tule of Law toolbox* ec.europa.eu.

[54] Art. 3 of Regulation (EU) 2020/2092 of the European Parliament and Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[55] Report 2020/2072(INL) of the Committee on Civil Liberties, Justice and Home Affairs of 29 September 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.

[56] C Oliver, 'How Bulgaria Became the EU's Maffia State' (9 September 2020) Politico www.politico.eu.

[57] M de la Baum, 'Jourová Faces Heat over EU's Soft Approach to Bulgarian Corruption' (10 September 2020) Politico www.politico.eu (emphasis added).

to) other EU institutions, sometimes independent of the Commission's actions (*e.g*. the Parliament's own initiatives). Third, the rule of law toolbox evolved over time, against a backdrop of serious contestation regarding their legal basis as well as their appropriateness. As a result, the tools themselves reflect compromises. In short, these tools and mechanisms were not designed to address a full-fledged crisis shaking the foundations of the EU legal order. And calls for addressing the systemic violations of the founding values through systemic infringement action so far have not been met.[58]

III.2. From dialogues to budgetary conditionality: On veto threats and flexible legal frames

The Commission's approach to managing the rule of law crisis has long rejected hard, non-negotiable sanctions. The decade-long dialogue has created a climate where EU institutions do not need to explain their hesitance address the recalcitrance of illiberal member states. As predicted by Schimmelfenning and Sedelmeier's external incentives model, despite ample positive and negative incentives "once backsliding occurred in Hungary and Poland, EU institutions were unable to redress it due to the lack of credible sanctions".[59] By contrast, the budgetary conditionality mechanism proposed by the Commission requires clearly labelling breaches of the rule of law that put the financial interests of the Union at risk.

The logic of creating positive incentives has been advocated for reinvigorating the cohesion policy, as a tool of differentiation in the General Affairs Council in November 2016.[60] At this point, it is almost pedantic to recall that the EU institution dedicated to crimes against the EU's financial interests is the EPPO, which Hungary and Poland are refusing to join in the sovereigntist spirit of protecting the competences of their national prosecutors' offices. When courting these two governments to sign up to the EPPO in 2017, Commissioner Vera Jourova told journalists that "she would propose for the next Multiannual Financial Framework (MFF) to "simplify" and "soften" cohesion rules if countries agree to come under the new EU prosecutor's oversight".[61]

[58] KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3.

[59] F Schimmelfennig and U Sedelmeier, 'The Europeanization of Eastern Europe: The External Incentives Model Revisited' (2020) Journal of European Public Policy 814, 822.

[60] European Council, 'Council Conclusions on Results and New Elements of Cohesion Policy and the European Structural and Investments Funds' (16 November 2016) www.consilium.europa.eu. In the context of reducing administrative burdens on disbursement the Council was committed to "Broader application of proportionality and the introduction of differentiation into the implementation of the ESI Funds programmes based on objective criteria and positive incentives for programmes" (para 29(f)).

[61] J Valero, 'Commission Offers Softer Rules to Hungary, Poland to Soften EU Prosecutor Deal' (6 October 2017) Euractive www.euractiv.com.

The conversation turned from positive incentives to conditionality for funding in the European Parliament ahead of the revision of the Common Provisions Regulation (CPR).[62] In its discharge decision for 2018, the Parliament was "deeply concerned that members of these oligarch structures draw on Union funds particularly in the area of agriculture and cohesion to strengthen their position of power". [63] The Commission's 2018 proposal for the new CPR included suspending payments in case "there is a reasoned opinion by the Commission in respect of an infringement under art. 258 of the TFEU that puts at risk the legality and regularity of expenditure".[64] The negotiation on the Commission's 2018 proposal for imposing budgetary conditionality was subject to a multi-step inter-institutional dialogue in the ordinary course of the legislative process, *i.e*. the very format that Hungary and Poland learned to master over the years.

The day after the State of the Union address, in September 2020 the European Parliament condemned the state of the rule of law in Poland detailing numerous violations with the forensic precision familiar from similar earlier resolutions.[65] The 21 distinct grounds range from multiple guarantees of judicial independence, freedom of speech, assembly and association, as well as LGBT rights. The Hungarian government was ready to offer its support to Poland, calling the EP resolution devoid of facts, adding in the spirit of grand ideals that: "The condemnation of Poland is a political stance, yet another attack of European liberals on Christian, conservative Poland".[66] In return, the Polish government was ready to back the Hungarian veto threat on the EU's multi-annual budget, complete with COVID recovery fund (NextGenEU), over the budgetary conditionality mechanism proposed by the Commission.[67]

The veto threat required stretching EU law to its limits, well into the twilight zone between ordinary regulatory politics and crisis management. Although by that time the regulation on budgetary conditionality had already been approved as an EU legal act by the

[62] Report 2016/2326(INI) of the Committee on Regional Development of 24 May 2017 on building blocks for a post-2020 EU cohesion policy.

[63] Decision (2019/2055(DEC) of the European Parliament of 13 May 2020 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, section III – Commission and executive agencies.

[64] See art. 91(1)(d) of the Proposal COM(2018) 375 final 2018/0196(COD) for a Regulation of the European Parliament and the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument.

[65] Resolution COM(2017) 0835 of the European Parliament of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

[66] Cabinet Office of the Prime Minister, 'European Parliament's Decision Condemning Poland has no Factual Foundations' (18 September 2020) miniszterelnok.hu.

[67] M de la Baum, H von der Burchard and D M Herszenhorn, 'Poland joins Hungary in Threatening to Block EU's Budget and Coronavirus Recovery Package' (18 September 2020) Politico www.politico.eu.

Council and the Parliament, in December 2020 the European Council adopted in its conclusions a number of conditions to the implementation of the new conditionality regulation in practice.[68] According to Polish Prime Minister Morawiecki, "the conclusions are a permanent act of the European law, they're close to primary law, they're close to the treaty. They're above regulations. Regulations can be changed, but a regulation that has to be in line with these conclusions that we've adopted is not so easy to change. It can only be changed if we change the conclusions in the future, which would require unanimity".[69]

While Prime Minister Morawiecki's take on the legal force of the European Council's conclusions may be unorthodox, his public statement clearly echoes a keen interest in shaping EU law through novel means, with reference to the weight of unanimity between national governments. Differentiation enthusiasts may see the force afforded to the European Council's conclusion as a tool of flexibility that facilitated avoiding a veto over the MFF. The price of differentiation, however, may well be further legal disintegration,[70] a rather dangerous prospect, considering that these additional conditions – worded in a mix of diplomatic language and legal references – expressly acknowledge the need "to respect the national identities of Member States inherent in their fundamental political and constitutional structures".[71] This language echoes the sovereigntist political rhetoric that has become a staple of political dialogues with illiberal political actors.

As acknowledged in the European Council conclusions, Poland and Hungary filed a challenge against the legality of the conditionality mechanism before the CJEU in the spring of 2021.[72] Initially the Commission insisted – in line with the expectation of these member states – that it was not going to invoke the mechanism before the judgment of the CJEU, despite the European Parliament's continued insistence.[73] The Commission appears to have changed its position as illiberal member states continue to undermine judicial independence and resort to even more direct attacks on the primacy of EU law, escalating the rule of law crisis.[74]

Recall that the budgetary conditionality is the consequence of practical difficulties with applying art. 7 TFEU, which ought to apply when there is a "clear risk of a serious breach" of the founding value of the Union. To be able to say that a particular behaviour (even when the facts are not disputed) "affects" a subject in a "sufficiently direct way"

[68] Conclusions EUCO 22/20 of the European Council meeting of 10 and 11 December 2020 www.consilium.europa.eu.

[69] A Brzozowski and M Mojak, 'Rule of Law Split Looms Over Poland's Ruling Coalition' (10 December 2020) Euractiv www.euractiv.com.

[70] C Hillion, 'A(nother) Lost Opportunity? The European Council and Domestic Assaults on the EU Constitutional Order' (3 November 2021) Verfassungsblog verfassungsblog.de.

[71] Conclusions EUCO 22/20 cit.

[72] *Hungary v Parliament and Council* cit. and *Poland v Parliament and Council* cit.

[73] V Makszimov, 'Commission May Face Trouble over Rule of Law Conditionality Guidelines' (25 Marcch 2021) Euractiv www.euractiv.com.

[74] See below, section IV.

requires a series of discretionary decisions on rather unclear and imprecise terms. It is exactly the type of legal drafting that runs counter to the basic premises of the rule of law, emphasizing clarity, foreseeability, and anti-arbitrariness. Thus, it is a serious achievement on Hungary's and Poland's part to drive EU institutions so far into mocking the rule of law in the spirit of defending it, as a prime illustration of failing forward in the spirit of differentiated governance.

While the Hungarian and Polish challenges against the conditionality regulation were pending before the CJEU, the European Parliament intensified its demands on the Commission to put the mechanism to work (March 2021,[75] June 2021[76]). Then in October 2021, the European Parliament decided to take the ultimate step and turned to the CJEU[77] against the Commission's failure to use the conditionality mechanism.[78]

On November 20, 2021 the Commission leaked correspondence it was about to send to both the Polish and the Hungarian governments to indicate that the Commission was ready to trigger the budgetary conditionality mechanism.[79] In the case of Poland lack of judicial independence and direct attacks on the primacy of EU law were named as key concerns. In the case of Hungary, the Commission's letter demanded robust measures against state-sponsored corruption and transparency of public funds (including from the Hungarian national budget), together with safeguards for judicial independence. The letter followed the Commission's announcement of infringement action, complete with a periodic and a lump sum penalty, for the Hungarian government's failure to enforce the CJEU's judgment protecting the rights of asylum seekers.[80] It was this infringement action that triggered Prime Minister Orbán to call on the Commission to suspend all infringement procedures in defense of territorial and national integrity.[81]

IV. Differentiated governance and the sovereigntist challenge to the primacy of EU law

In the early days of the rule of law crisis, the constitutional discourse was replete with reservations phrased in terms of defending national constitutional identity, paying lip service

[75] Resolution 2021/2582(RSP) of the European Parliament of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism.

[76] Resolution 2021/2711(RSP) of the European Parliament of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092.

[77] Case C-657/21 *Parliament v Commission* filed on October 29, 2021.

[78] L Bayer, 'Parliament Sues Commission for Not Using New Rule of Law Power' (29 October 2021) Politico www.politico.eu.

[79] L Bayer and Z Wanat, 'EU Commission Questions Hungary and Poland on Corruption, Judiciary' (20 November 2021) Politico www.politico.eu.

[80] European Commission, *Migration: Commission Refers Hungary to the Court of Justice of the European Union over its Failure to Comply with Court Judgment* ec.europa.eu.

[81] 'PM Orbán in a Letter to Ursula von der Leyen' (22 November 2021) About Hungary abouthungary.hu.

to the Treaties. In 2019, Fabbrini and Sajó warned about the destructive potential of constitutional identity narratives, presenting how they undermine the process of European integration.[82] Their caveats appear to have been too modest, as a decade into the rule of law crisis the direct judicial challenges against the primacy of EU law are reinforced by the robust contributions of illiberal leaders in the European political discourse on the national as well as the European level. Strong national sovereigntist language has been normalized into the European public discourse, assisted by processes of differentiated governance that favor adaptation through continuing dialogue (and inaction) to conditionality backed by credible sanctions, even when such sanctions aim to preserve the foundations of the Union's constitutional order. The CJEU is the direct subject of illiberal attacks.

On October 7, 2021 – in response to Prime Minister Morawiecki's request – the Polish Constitutional Tribunal declared arts 1 and 19 of the TEU unconstitutional under the Polish Constitution.[83] In a majority decision, the Tribunal asserted the primacy of the Polish Constitution over EU law (the TEU) and defended the sovereignty of Poland in the face of an "ever closer Union". The case potentially affects the legitimacy of hundreds of judges appointed by PiS, the Polish ruling party.[84] This outcome was hardly a surprise: This is the escalation of the rather bitter dialogue concerning the independence of the Disciplinary Chamber of the Polish Supreme Court.[85] In response, the Commission swiftly reaffirmed the primacy of EU law and the binding force of all CJEU rulings on national authorities, including national courts.[86] In a joint statement, the German and French foreign ministers supported the Commission, calling respect for the values and legal rules of the Union a moral imperative.[87]

The Polish Constitutional Tribunal followed a judgment of the CJEU a day earlier in the case of Judge *Zurek*, emphasizing that the principle of the primacy of EU law "requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States".[88] The Polish Constitutional Tribunal's October 2021 ruling was

[82] F Fabbrini and A Sajó, 'The Dangers of Constitutional Identity' (2019) ELJ 457.

[83] Constitutional Tribunal of Poland judgment of 7 October 2021 n. K3/21.

[84] L Woznicki, 'CJEU Receives Another Case Questioning the Legitimacy of Hundreds of PiS-Appointed Judges' (9 April 2021) Wyborcza wyborcza.pl.

[85] Joined cases C-585/18, C-624/18 and C-625/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982; case C-824/1 *A.B. and Others (nomination of judges to the Supreme Court)* ECLI:EU:C:2021:153; case C-791/19 *Commission v Poland (Disciplinary regime for judges)* ECLI:EU:C:2021:596; case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)* ECLI:EU:C:2021:798.

[86] European Commission, *European Commission Reaffirms the Primacy of EU Law* ec.europa.eu

[87] Federal Foreign Office, 'Joint statement by the Foreign Ministers of France and Germany on the Decision by the Polish Constitutional Tribunal' (7 October 2021) www.auswaertiges-amt.de.

[88] *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)* cit. para. 156; repeated in *Commission v Poland (Disciplinary regime for judges)* cit. para. 18.

in line with its earlier ruling on July 14, 2021, where a 5 judge panel of the Polish Constitutional Tribunal ruled that the interim measures imposed by the CJEU interfered with the organization of the Polish judiciary in an ultra vires manner.[89]

It is tempting to explain the twists and turns of the rule of law crisis as illustrations of a difficult integration process, or a phase where new members re-negotiate the terms of belonging to the Union. After all, compliance rates with CJEU judgements are far from perfect in other – including older – member states.[90] Thus, creative compliance is hardly a specialty of illiberal member states.[91] Still, it would also be a mistake to use the familiar tropes of differentiated integration to diffuse tensions, as the blanket narrative of differentiation conceals the efforts of EU institutions – especially the CJEU – to defend the founding values of the Union and the premises of the European legal order. These efforts are especially important, as the CJEU provides other European constitutional actors with ample guidance for addressing illiberal constitutional mockery and chicanery in defence of the Union as a community of values and of law.

V. Halting disintegration: The CJEU on the Union's legal foundations

In recent years, the CJEU has taken to defending the Union's founding values and legal foundations to counter the normalization of illiberal democracy in the Union.[92] The CJEU's focus has been on halting disintegration through defending the judicial architecture of the legal order, putting an end to constitutional retrogression and securing the minimal legal preconditions of membership, while leaving plenty of room for differentiated governance. In recent years the CJEU has started strategically highlighting the fundamental constitutional significance of seemingly technical legal rules.

In the *Zurek* case, the CJEU emphasized that the individual benefits stemming from an independent and impartial judiciary:

> "requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded".[93]

[89] Constitutional Tribunal of Poland judgment of 14 July 2021 n. P7/20.

[90] G Falkner, 'A Causal Loop? The Commission's New Enforcement Approach in the Context of Non-compliance with EU Law Even After CJEU Judgments' (2018) Journal of European Integration 769.

[91] A Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) Public Administration 685.

[92] Arguably, the CJEU's record is less robust in preliminary references when the principle of mutual trust is at play: see L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) Hague Journal of the Rule of Law 1.

[93] *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)* cit. para. 108.

Making the benefits of EU membership and EU law personal certainly resonates with the idea(l) of Europe as a community of values and of laws. It translates the abstract ideal or aspiration of the rule of law to a practical personal experience, in terms of the enjoyment of benefits of EU membership and EU law. This is an account of the "community of values and of laws" that calls for active institutional involvement in order to preserve that community and the individual membership benefits (rights) of its members. Arguably, this responsibility does not fall on the CJEU alone, but is equally a task for other EU institutions, including the Commission.

To date, the 2022 judgment of the CJEU on budgetary conditionality stated in the most robust terms that the obligation to respect the rule of law "is a specific expression of the requirements resulting, for the Member States, from their membership of the European Union, pursuant to Article 2 TEU"[94] and that this is an obligation that "flows directly from the commitments undertaken by the Member States vis-à-vis each other and with regard to the European Union".[95] The CJEU added that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".[96]

The same judgment also acknowledges the premises of differentiated governance expressed in art. 4(2) TEU, within limits that follow from respect for shared values, such as the rule of law.[97] This aspect is especially important from the perspective of differentiated governance, as it suggests due to their accession member states cannot make strong unilateral sovereignty claims without regard to the nature of their membership in the Union. The emphasis on shared values is an expression of community between the member states that also sets limits to disintegration through differentiation.

That the rule of law is a core value in a Union as a "community of values and of laws" should certainly not come as a surprise for member states that joined the Union in accordance with the Copenhagen criteria. That the independence and impartiality of national judiciaries is part and parcel of the rule of law is equally evident. The CJEU's approach safeguarding the independence and impartiality of national courts does not entail erasing the heterogeneity of national judicial systems.[98] Rather: defining European minimum standards ensures that judicial cooperation, and trust across national legal systems

[94] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 231.

[95] *Ibid*.

[96] *Ibid*., para. 232.

[97] *Ibid.* paras 232-234.

[98] I Damjanovski, C Hillion and D Preshova, 'Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts' (31 May 2020) EUIDEA euidea.eu.

is founded on the institutional reality of judicial independence and impartiality (and is not replaced by myth or deceit).

The CJEU's judgment on budgetary conditionality carefully builds on its earlier case law that sought to halt the disintegration of the legal order. The CJEU confirmed the significance of *pre-commitment* to the foundations of the Union's constitutional order and expressed objections to *constitutional retrogression* regarding the Union's founding values.

While the principle of non-retrogression is familiar from the area of socio-economic rights, it is far from well-developed as a general principle of human rights law or constitutional law.[99] Recently, in the Maltese judges' case, the CJEU addressed the issue of constitutional retrogression on the level of ground principles, reading art. 2 TEU in conjunction with art. 49 TEU. The CJEU asserted that a Member State's decision to join the Union is an instance of constitutional pre-commitment.[100] According to the CJEU, a Member State's free and voluntary commitment to the Union's founding values at the time of accession entails that a Member State cannot amend its constitution after accession to the effect of reducing the existing protection its constitution provides to the Union's founding values.[101]

The consequences of viewing EU accession as a gesture of pre-commitment to the Union's founding values are significant for boosting the capacity of EU institutions and of national courts to address illiberal democratic backsliding. As a result, an emphasis on pre-commitment is a powerful tool to arrest disintegration and assists with resettling the premises and foundations of differentiated governance. After all, the point of differentiated governance is the daily a functioning the Union, its single market and numerous policy areas.

Before attacks on the primacy of EU law became so prevalent, the Commission preferred to counter disintegration through defending the four freedoms, as its default solution, whenever possible. This approach avoids the grand words (and uncertainties) associated with defending the Union's constitutional order and founding values, and often falls back on the technical terrain of secondary EU law. The 2020 State of the Union address stressed the need "to restore the four freedoms – in full and as fast as possible", in order to build a world we want to live in. This approach rooted in the fundamental freedoms is meant to recast community law as a trustworthy frame of regulatory politics in the European Rechtsgemeinschaft. By putting its policy objectives in terms of the four fundamental freedoms, the Commission marked the lines of legal contestation over the future of the Union. This is a line which the Commission is used to holding, through infringement action. Attacks on the primacy of EU law, however, do not spare the four freedoms. Rather, such attacks present a robust challenge to the functioning of the single

[99] BTC Warwick, 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) Human Rights Law Review 467. Admittedly, it is also a contentious topic in EU law ever since case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

[100] Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311 paras 60-61.

[101] *Ibid*. para. 63.

market (*i.e*. the stronghold that was assumed to be spared from the adverse effects of differentiation leading to disintegration).

Furthermore, the CJEU's emphasis on pre-commitment and non-retrogression enable the Commission and the European Parliament to demand respect for the founding values outside the (severely compromised) framework of art. 7 TEU. Thus, the CJEU's judgment on budgetary conditionality has potentially far-reaching implications, as it highlights the practical significance of legal and political obligations undertaken at the time of accession. At a minimum, it confirms the constitutional (normative) basis of the Parliament's efforts in defense of the founding values, despite the Commission's reluctance to act. Recall here the Parliament's insistence on the shared responsibility of the Parliament, the Commission and the Council of the EU for upholding Union values under the Treaties.[102] Brexit sheds new light on this responsibility as well as on the value and consequences of membership in the Union, in and beyond the single market.

The emphasis on pre-commitment and non-retrogression is an equally important source of inspiration and guidance for national courts at a time when the founding values of the Union are challenged by political actors on the national level. The rapidly unfurling war on the concept of gender in the name of defending Christian values (and illiberal Christian democracy) provides ample opportunity for recasting national constitutional debates in terms of *pre-commitment*. The consequences of embedding pre-commitment in constitutional interpretation are well illustrated in the judgment of the Romanian Constitutional Court that found a statutory ban on "spreading the theory of opinion of gender identity" in public schools unconstitutional in December 2020.[103] The Constitutional Court referred to ECtHR jurisprudence and several elements of the EU acquis to demonstrate the transformation of the meaning of constitutional equality protection since EU accession; it concluded that combating gender stereotypes has been attached to the traditional approach the roles of men and women in society.[104] What gives constitutional significance to such developments in EU secondary law on the national level is the pre-commitment to upholding the founding values of the Union embedded in the decision to join the EU.[105] It goes without saying that the adherence to pre-commitment counters the forces of disintegration and thus reinforces the foundations of the Union's constitutional order.

The jurisprudence of the CJEU should and does assist other European constitutional actors with clarifying positions in dialogues about the rule of law, and especially, for invoking budgetary conditionality. The long-running conflict over the independence of the Polish judiciary provides ample illustration for such inter-institutional dialogue, especially on how differentiated governance serves illiberal constitutional actors on the national

[102] Recital N. of Report 2020/2072(INL) cit.

[103] Constitutional Court of Romania judgment of 16 December 2020 n. 907.

[104] *Ibid*. para. 76.

[105] As a side note, the Romanian judgment demonstrates the significance of unblocking the legislative process on the Horizontal Discrimination Directive, urged by the July 8 EP resolution (para. 21).

level. At the same time, experiences of such dialogue provide helpful guidance for defusing the current tension triggered by the Polish Constitutional Tribunal's defiance of the primacy of EU law and the lawful authority of the CJEU. Thus, unpacking the political and legal forces behind differentiated governance assists with exposing dynamics that lead to disintegration that damages the foundations of the European constitutional order.

VI. Conclusion

The discourse of differentiated governance can explain not only the flexibility of the EU legal order, but also different degrees of commitment in the member states to European integration, and ultimately to membership. Differentiation, however, cannot and should not be used to excuse the wilful violation of the founding values of the Union or the foundation of the EU legal order, the primacy of EU law. Without such foundations there is no basis for differentiated governance, as the premises of a "community of values and of laws" disappear.

The recent rulings of national courts declaring the primacy of national law over EU law and follow up statements of illiberal politicians are both a symptom of the escalation of the rule of law crisis, and a reminder that fascination with differentiated governance easily loses sight of disintegration – and the membership benefits it supplies to illiberal governments. At the same time, studying the rule of law crisis through the lens of differentiated governance provides an opportunity for resetting the terms of the EU's response to the strategic and systemic disrespecting of the legal foundations of the EU. Several strands in the recent jurisprudence of the CJEU provide support and inspiration for doing so, such as the express recognition of pre-commitment and a rejection of retrogression regarding the founding values. Recognizing such ills and attaching credible sanctions to them is the only way to halt the dismantling of the Union's legal order, a process that runs in defiance of the commitments member states made upon their entry to the Union. Consistent reminders of the lasting significance of such pre-commitment are also a solid foundation for guarding the constitutional idea(l) of the Union as a "community of values and of laws". The CJEU has made major advances to this effect in its recent judgment on the budgetary conditionality. Now it falls on the Commission to active the mechanism against offending member states.

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

REGIONAL GROUPS IN THE EUROPEAN UNION: MAPPING AN UNEXPLORED FORM OF DIFFERENTIATION

IAN COOPER* AND FEDERICO FABBRINI**

ABSTRACT: Within the EU there are several regional forums in which member states cooperate with one another outside the EU institutional framework. The purpose of this *Article* is to define, identify, compare and explain these intra-EU bottom-up regional groups (BURGs). A BURG may be defined as a group of geographically proximate current EU member states engaging in a form of institutionalized and active cooperation that is institutionally separate from the EU. By this definition this *Article* identifies at least thirteen BURGs. Comparing the BURGs, this *Article* observes that they vary according to their longevity (including whether they were established pre- or post-accession), institutional complexity, policy scope, and frequency of meeting. Explaining BURGs, this *Articles* argues that they may serve one or more of four purposes – integration vanguard, functional cooperation, policy coordination, or resistance. These BURGs represent an unexplored form of differentiated governance within the EU. They do not conform to the classic definition of differentiated integration, which is measured according to whether member states opt-out of common EU policies. Rather, they are a bottom-up form of differentiation, that sits at an intermediate level between the member states and the EU.

KEYWORDS: bottom-up – cooperation – differentiation – European Union – integration – regional groups.

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I. Introduction

Within the European Union (EU), there are numerous regional groups of member states that engage in formalized cooperation that is separate from their cooperation within EU institutions. By our reckoning, there are thirteen such groups that are currently active. They are found in every part of Europe – North, South, East and West – and every current EU-27 member state participates in at least one. These groups vary in numerous ways. Some of these groups are long-standing (*e.g.* Benelux, established in 1944) whereas others are quite recent creations (*e.g.* New Hanseatic League, established in 2018). They range in size from two members (Franco-German Cooperation, Iberian Summit) to 12 (Three Seas Initiative). Some are deeply institutionalized (*e.g.* Baltic Assembly) whereas others are only minimally so (*e.g.* Weimar Triangle, Slavkov Triangle). Some involve extensive cooperation across a range of policy areas (*e.g.* Visegrád Group) whereas others are focused on one policy area only (*e.g.* Salzburg Forum). Some are focused mainly on internal cooperation (*e.g.* Central European Defence Cooperation) whereas others are also concerned with policy coordination at the EU level (*e.g.* EuroMed and the Nordic-Baltic groups). Despite these variations, all these groups represent forms of bottom-up cooperation that reside at an intermediate level between the individual member state and the EU as a whole.

The purpose of this *Article* is to examine the phenomenon of regional caucusing in the EU, with the aim of mapping this unexplored political dynamic, and consider its consequences for the process of European integration. As such, this *Article* pursues a dual objective. On the one hand, it endeavors to identify the bottom-up regional groups (BURGs) of cooperation existing in the EU, compare their function, and assess their organization. On the other hand, this *Article* analyzes the impact that these regional groups have on EU integration, distinguishing between groups that pursue a purely administrative framework of cooperation and groups which instead are created to serve as agenda-setting arenas, multiplying the capacity of participating member states to shape EU policies within the EU governance architecture.

As such, this *Article* fills a gap in the law and political science literature on European integration. While many regional experts may have studied one or another of these groups on an individual basis, there has been very little research conducted with the aim of analyzing and comparing them as a general phenomenon. Indeed, this is reflected in the fact that there is not even a commonly accepted name for these groups – variously called "partnerships, alignments, blocs, alliances or groupings"[1] – let alone a commonly

[1] I Rūse, 'Nordic-Baltic Interaction in European Union Negotiations: Taking Advantage of Institutionalized Cooperation' (2014) Journal of Baltic Studies 230.

accepted definition of what they are. Only a few works have sought to give a comprehensive survey of the BURGs within the EU. Those that have done so[2] are not up to date with recent developments in this rapidly evolving field, which has seen the creation of three new BURGs since 2015 (the Slavkov Triangle, the Three Seas Initiative, the New Hanseatic League) and the significant upgrade of an older one (Franco-German Cooperation, strengthened by the Aachen Treaty of 2019). More recent work in this field has been less comprehensive, tending towards shorter pieces analysing the bottom-up cooperation among member states in the light of the policy challenges created by the euro-crisis,[3] Brexit[4] and Covid-19.[5] Many of the works in the wider literature focus on one single BURG as their object of study[6] rather than comparing them or studying them as a general pan-EU phenomenon. Some works have more broadly focused on BURGs in one particular region, *i.e*. Central and Eastern Europe,[7] which has seen a proliferation of multiple adjacent, overlapping and nested BURGs. Some scholars have mainly focused their attention on one BURG but are also alert to broader questions such as how to typologize BURGs[8] or how to study inter-BURG cooperation, as seen for example in the relations of the Baltic Assembly with Benelux and the Visegrad Group.[9] Another scholarly angle is to look at how a single member state can stake out its diplomatic position through its engagement

[2] M Dangerfield, 'The Visegrád Group in the Expanded European Union: From Preaccession to Postaccession Cooperation' (2008) East European Politics and Societies 630; A Inotai, 'Correlations between European Integration and Sub-Regional Cooperation: Theoretical Background, Experience and Policy Impacts' (1998) Russian & East European Finance and Trade 3; M Klemenčič, 'Formal Intergovernmental Alliances in the European Union: Disappearing or Still Alive?' (2011) EUSA Twelfth Biennial International Conference; I Rūse, *(Why) do Neighbours Cooperate? Institutionalised Coalitions and Bargaining Power in EU Council Negotiations* (Budrich UniPress 2013) 1.

[3] G Lewicki, 'Hansa 2.0. A Return to the Golden Age of Trade?' (2019) Polish Economic Institute 1.

[4] E Brattberg, K Brudzińska and B Pires de Lima, 'Contending European Views on a New Post-Brexit Balance' (25 March 2020) Carnegie Endowment for International Peace carnegieendowment.org.

[5] KO Lang and N Von Ondarza, 'Friends in Need: the Corona Pandemic Changes the Landscape of Groups and Coalitions in the EU' (2020) Stiftung Wissenschaft Und Politik Comment 1.

[6] M Górka, 'The Three Seas Initiative as a Political Challenge for the Countries of Central and Eastern Europe' (2018) Politics in Central Europe 55; V Kleinberga, 'Bowling Together: Nordic Baltic Six in the European Union' (2019) Latvijas intereses Eiropas Savienībā 17; M Vidal and J Wouters, 'The Trials and Tribulations of the Benelux' in T Giegerich, D Schmitt and S Zeitzmann (eds), *Flexibility in the EU and Beyond: How Much Differentitation Can European Integration Bear?* (Nomos - Oxford Hart Publishing 2017) 283.

[7] L Cabada,'The Visegrad Cooperation in the Context of Other Central European Cooperation Formats' (2018) Politics in Central Europe 165; V Jančošekovà, 'Regional Cooperation in Central and Eastern Europe and its Implications for the EU' (2017) European View 231.

[8] M Dangerfield, 'The Visegrád Group in the Expanded European Union' cit. 630.

[9] RM Cutler and A von Lingen, 'Emerging Interregional Parliamentarism: The Case of the Baltic Assembly' in M Müftüler-Baç, K Raube and J Wouters (eds), *Parliamentary Cooperation and Diplomacy in EU External Relations* (Edward Elgar Publishing 2019) 120.

with multiple BURGs, *e.g*. Poland[10] or Austria.[11] But overall, it is evident that there is a gap in the literature, exposing a pressing need for an up-to-date and comprehensive survey of regional groupings within the EU.

This *Article* therefore goes beyond this *ad hoc* scholarship, by assessing the phenomenon of regional grouping from a broader theoretical perspective and reflecting on its implications for EU integration studies, and especially theories of differentiated governance. In particular, we argue that this kind of bottom-up political cooperation represents a particular form of differentiation within the EU, albeit one that is not always recognized as such. This is because much of the analysis of differentiated integration is focused on the extent to which common EU rules are not applied uniformly across the EU due to the various derogations and opt-outs that apply to different member states.[12] The problem with this rule-based conceptualization is that it is effectively a top-down measure of differentiation in that it takes full application across the whole EU as the baseline and then measures deviations away from that. This is of course a valid and very useful kind of analysis, but it cannot capture the complete picture because it tends to leave out forms of bottom-up cooperation such as those analysed here.

It should be emphasized that BURGs as defined here are institutionally separate from the EU and do not significantly encroach upon the competences of the EU. Many of the BURGs are largely informal in structure, lacking a legal personality and any formal decision-making capacity, and so do not have "competences" in the legal sense. Furthermore, the BURGs are generally forums for interstate cooperation in policy areas outside the EU's sphere of exclusive competence, in fields in which the EU competence is shared with the member states (*e.g*. energy, transport, justice and home affairs) or supporting of the member states (*e.g*. industry, tourism).[13] Many of the BURGs involve cooperation in foreign policy, a field in which member states retain significant policy autonomy even if it is also in part an EU-level competence. Moreover, some BURGs operate as forums for policy coordination, in which groups of member states coordinate their positions on current EU policy questions, but they do not have "competence" as such in these policy areas. For all these reasons, BURGs do not conform to the most common definition of differentiated integration, which typically occurs when one or more member states do not participate in a common policy where the EU has competence and has taken legislative action.

[10] A Kirpsza, 'With Whom to Cooperate in Brussels? The Effect of Coalition-building with the Three Seas Initiative, Visegrad Group and Germany on Poland's Success in EU Lawmaking' in M Grabowski, A Mania and T Pugacewicz (eds), *Global Politics in the 21st century: Between Regional Cooperation and Conflict* (Peter Lang Verlag 2019) 205.

[11] P Müller, 'Europeanization and Regional Cooperation Initiatives: Austria's Participation in the Salzburg Forum and in Central European Defence Cooperation' (2016) Austrian Journal of Political Science 23.

[12] F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press 2020) 3.

[13] There is one BURG which does encroach on an area of exclusive EU competence: Benelux, which is among other things a customs union that pre-dates the EU customs union and is recognized in the EU treaties, as discussed below.

BURGs are a different form of differentiation insofar as they represent "bottom-up" cooperation that occurs frequently outside the EU's field of competence.

This *Article* aims to provide a comprehensive study of BURGs, defined as forms of cooperation among EU member states that are not institutionally connected to the EU, whether or not they promote European integration. Our method is to first identify the BURGs according to objective criteria, and then to compare them; this avoids selection bias. In fact, what will be observed below is that a BURG may *i)* work in favour of European integration, *ii)* work against European integration, or *iii)* have a neutral effect with respect to European integration; and indeed, the disposition of a given BURG towards European integration may change over time. The literature on differentiated integration in the EU has generally focused on cases of *i)*, while leaving aside cases of *ii)* and *iii)*. In this way, this survey makes an important contribution to the literature on differentiated integration in the EU precisely because it broadens the field of empirical analysis to include all instances of institutionalized cooperation among member states within the EU.

This *Article* is structured as follows. Section II provides a definition of regional groups, clarifying what are the properties which we regard as necessary for a specific regional form of cooperation to fall within our definition of the concept; and it offers a list of existing EU regional groups. Section III compares the existing regional groups, classifying them with regard to their longevity (pre- vs. post-accession), institutional structure (thick vs. thin), policy scope (sectoral vs. general) and the degree to which they are active/inactive. Section IV examines the different purposes which the BURGs may serve – integration vanguard, functional cooperation, policy coordination, or resistance. Section V, finally, concludes and reflects on the potential for further research on regional groups as a tool to enrich understanding of EU integration and differentiated integration.

II. Defining BURGS

Europe is a geographical region of complex interdependence in which there are multiple forms of international cooperation among states both within and outside the EU. In this *Article* we are only concerned with a particular form of cooperation, one that takes place inside the EU but is not part of the EU institutional structure. For this reason, we have five criteria by which we define an intra-EU Bottom-Up Regional Group (BURG). A BURG is a form of international cooperation that meets the following five criteria: *i)* it is institutionalized cooperation; *ii)* it is currently active; *iii)* its participants are all current EU member states; *iv)* it is institutionally separate from the EU; and *v)* the participating states are geographically proximate, by belonging to the same regional area of the EU. Further elaboration of these five criteria is provided below, along with examples of other forms of cooperation that they exclude, in order to clarify the nature of the BURGs that are the subject of this *Article*.

II.1. Institutionalized cooperation

We define an intra-EU BURG as a group that is institutionalized, *i.e*. it has permanence that is regularly reproduced in practice. For example, a BURG could be classified as institutionalized if regular meetings, among ministers or parliamentarians, were held under its auspices – although, as we explain in Section III below, the depth of organizational structuring of BURGs can vary significantly from one regional group to another. What this criterion excludes is temporary tactical alliances among member states such as are manifest, for example, when they cast their votes together in the Council of the EU.[14] It also excludes groups of EU member states that are sometimes described as having a collective identity but which lack any institutional form. For example, the "Founding Six" – the original six member states of the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) – are sometimes described as a distinctive group, but we cannot find any extant institutional manifestation of this particular group identity – except, perhaps, a one-off meeting by the Foreign Affairs Ministers of the Six prior to the UK's Brexit referendum[15] – and so we do not classify this group as a BURG.

II.2. Currently active

Closely related to the previous criterion, we define an intra-EU BURG as one in which cooperation is currently active. The rationale for this criterion is that our purpose here is not to provide an historical account of all BURGs that have existed within the EU but only to survey those that currently exist. This excludes forms of cooperation among EU member states that existed previously but have been dissolved or fallen into disuse. One example of BURG that no longer exists is the Western European Union (WEU), a military cooperation organization that was active in the late 1980s and 1990s, made up of EU member states that were also members of the North Atlantic Treaty Organization (NATO): Over time the tasks of the WEU were transferred to the EU and it was dissolved in 2011. In this *Article*, we have applied this criterion liberally so as to include those BURGs that are currently active even if there have been some gaps in their recent past activity – *e.g*. they have not always held an annual meeting. For this reason we include both the Slavkov Triangle (aka the Austerlitz Triangle/Trilateral) of Austria, the Czech Republic and Slovakia, founded in 2015, and the Weimar Triangle (France, Germany, Poland) founded in 1991, because both of them held meetings in 2020.[16]

[14] M O Hosli, 'Power, Connected Coalitions, and Efficiency: Challenges to the Council of the European Union' (1999) International Political Science Review 371.

[15] E Zalan, 'EU Founding States Pledge Deeper Integration' (10 February 2016) EuObserver euobserver.com.

[16] I Romanyshyn, 'The Surprise Return of the "Weimar Triangle"' (7 January 2021) EuObserver euobserver.com; NewsNow, 'Matovic: Borders between Slovakia, Czech Republic and Austria Remain Open' (9 September 2020) NewsNow newsnow.tasr.sk.

II.3. Only current EU member states

We define an Intra-EU BURG as one in which only current EU member states are full members. The rationale behind this criterion is that our purpose is to analyze BURGs as a phenomenon that is internal to the EU, and European integration. This criterion does have the effect of excluding important regional cooperation forums that include countries both inside and outside the EU, such as the long-standing Nordic Council (founded in 1952), which includes three EU member states (Denmark, Finland and Sweden) and two non-EU countries (Norway and Iceland), along with the semi-autonomous regions of Åland, the Faroe Islands, and Greenland. This criterion also excludes regional cooperation that involves the UK (now an ex-member-state as of 31 January 2020), most notably its multi-layered bilateral relationship with Ireland, including the British-Irish Council, the Common Travel Area and the British-Irish Parliamentary Assembly.[17] Prior to Brexit, the UK-Ireland Common Travel Area was an important instance of differentiated governance within the EU in that it was a separate zone of passport-free movement outside of the Schengen area. However, now that the UK has left, this bilateral relationship is no longer an intra-EU BURG.

II.4. Institutional separation from the EU

A BURG is a group of EU member states pursuing a form of cooperation that is separate from the common policies that are pursued at the EU level. By this definition, the Eurozone, in which currently 19 of the 27 EU member states share a common currency, is not a BURG because those states are pursuing a common EU policy, the third stage of Economic and Monetary Union (EMU).[18] It is an instance of differentiated governance, but it is top-down rather than bottom-up in that the non-Eurozone states are opting-out or derogating from the common policy.[19] This is also true of many other common EU policies wherein certain member states exercise an opt-out. It should be noted however that sometimes a BURG will forge a common policy that is eventually adopted at EU-level. The Schengen Agreement of 1985 is a good example: it was a pact made by five of the then ten EU member states to work to abolish internal border controls. As the Schengen area expanded, the EU eventually endorsed the policy of a Europe-wide passport-free travel zone. Thus whereas the original

[17] See E Tannam, 'Brexit and the Future of British-Irish Relations' in F Fabbrini (ed), *The Law & Politics of Brexit. Vol. 2. The Withdrawal Agreement* (Oxford University Press 2020) 254.

[18] See further F Fabbrini, *Economic Governance in Europe: Comparative Paradoxes, Constitutional Challenges* (Oxford University Press 2016) 1.

[19] See also in this *Special Section* S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) European Papers www.europeanpapers.eu 867.

Schengen Five were arguably a BURG, *i.e.* distinct from the EU, this is no longer true, because the Schengen *acquis* has been incorporated into the EU treaties (save for five member states which have an opt-out or do not yet meet the criteria to join).[20]

Otherwise, the EU treaties are silent as regards the existence and *status* of the BURGs, with one exception – Benelux. As the oldest existing BURG, created in 1944, the Benelux is also the only regional caucus which is explicitly recognized in the EU treaties, as art. 350 TFEU (still) states that: "The provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by the application of the Treaties".[21] This provision, which was written into the EU treaties by the 1957 Treaty of Rome establishing the EEC, simply acknowledged the existence of the Benelux as a pre-EU BURG. There are no other provisions of the EU treaties which recognize the existence of individual BURGs or which permit or enable their creation; this absence underscores their institutional separation from the EU.

II.5. Geographical proximity

The final criterion that determines whether states comprise a BURG is geographical proximity. This is admittedly the least precise criterion to define a BURG, and in our view this is met when states participating to a regional group belong to the same geographical area of Europe: as such, the relevant states do not need to be adjacent (with contiguous land or sea borders) but they should be situated in the same general region within Europe. This criterion arises from our observation that, with one exception (the Arraiolos Group), each group is concentrated in a particular region of Europe, even if the cooperating member states are relatively dispersed geographically. For example, the members of New Hanseatic League are all located in Northern Europe, even though they are spread widely West to East (from Ireland to Estonia). Equally, the Weimar Triangle, which includes France, Germany and Poland, includes three bordering member states at the heart of the EU, which due to their landmass span from the Atlantic Ocean to the border with Russia and Belarus. Identifying a criterion of regional proximity excludes from our definition of BURGs forms of cooperation based on factors that are completely unrelated to region or geography. For this reason, this *Article* excludes the Arraiolos Group – the one exception noted above – which is an informal summit, begun in 2003, of the presidents of EU member states that are parliamentary or semi-presidential republics.

[20] See also in this *Special Section* J Silga, 'Differentiation in the EU Migration Policy: "The Fractured" Values of the EU' (2022) European Papers www.europeanpapers.eu 909.

[21] In addition to Benelux, art. 350 also recognizes the even older Belgium-Luxembourg Economic Union (BLEU), which dates back to 1921. For our purposes we consider that BLEU is not a separate BURG as it has effectively been subsumed by Benelux. M Vidal and J Wouters, 'The Trials and Tribulations of the Benelux' cit. 286.

With these five criteria in hand, we can identify thirteen groups of member states within the EU today that meet our definition of a BURG (see Table 1). To this potentially one could add a fourteenth group, Franco-Italian cooperation, which was launched on 26 November 2021 with the signing of the Quirinale Treaty by French President Emmanuel Macron and Italian Prime Minister Mario Draghi.[22] The Quirinale Treaty seeks to establish a more entrenched relationship between the two member states, including with institutional fora for coordination of common positions in EU affairs – and as such it is modeled on the Elysee Treaty of 1963 which established Franco-German cooperation. Nevertheless, the Quirinale Treaty still has to be ratified by the two nations, and it remains to be seen how it will operate in practice. So we are identifying it here only as a potential fourteenth BURG, leaving its real assessment to future research.

Grouping	Countries Involved	Est.	Purpose	Institutional Features
Benelux	Belgium, Luxembourg, Netherlands	1944	Politico-economic union	Customs Union (1944); Parliamentary Assembly (1955); Economic Union (1958); Benelux Court of Justice (1965); Benelux Union (2008)
Franco-German Cooperation	France, Germany	1963	Political cooperation	Élysée Treaty (1963); Aachen Treaty (2019); Franco-German Parliamentary Assembly
Iberian Summit	Portugal, Spain	1983	Political dialogue	Bilateral summit of prime ministers
Visegrád Group	Czechia, Hungary, Poland, Slovakia	1991	Political cooperation	Ministerial meetings and summits of leaders; Visegrad Fund (2000); Interparliamentary cooperation (2003)
Baltic Assembly	Estonia, Latvia, Lithuania	1991	Political cooperation	Baltic Assembly (1991); Baltic Council of Ministers (1994)
Weimar Triangle	France, Germany, Poland	1991	Political dialogue	Meetings of foreign ministers, occasional summits of leaders
Salzburg Forum	Austria, Bulgaria, Croatia, Czechia, Hungary, Poland, Romania, Slovakia, Slovenia	2000	Home affairs cooperation	Meetings of interior ministers (2x/yr.); Meetings of police chiefs; meetings on margins of EU
Nordic-Baltic Six	Denmark, Estonia, Finland, Latvia, Lithuania, Sweden	2004	Policy coordination	Ministerial meetings in proximity to EU meetings
Central European Defence Cooperation	Austria, Croatia, Czechia, Slovakia, Hungary, Slovenia (Poland: observer)	2010	Military collaboration, migration control	Meetings of defence ministers

[22] See Trattato tra la Repubblica italiana e la Repubblica francese per la cooperazione bilaterale rafforzata [2021].

Grouping	Countries Involved	Est.	Purpose	Institutional Features
EuroMed	Cyprus, France, Greece, Italy, Malta, Portugal, Spain, and since 2021 also Slovenia, and Croatia	2013	Political cooperation	Ministerial meetings; South EU Summit of national leaders
Slavkov/Austerlitz Triangle	Austria, Czechia, Slovakia	2015	Political cooperation	Summits of leaders
Three Seas Initiative	Austria, Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia	2016	Cooperation on North-South infrastructure, economics, energy, transport, business	Annual summits of national presidents; business forums
New Hanseatic League	Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Netherlands, Sweden	2018	Economic policy coordination	Meetings of finance ministers
French-Italian cooperation [?]	France, Italy	2021	Political cooperation	Quirinale Treaty (2021)

TABLE 1. Bottom-up regional groups in the European Union.

III. Comparing BURGs: Key variables

Having identified the list of existing intra-EU BURGs, based on the definition provided in the prior section, we now offer a classification of these forms of regional caucusing. The phenomenon of BURGS is, in fact, quite heterogenous, and the types of regional caucuses currently operational within the EU range across multiple dimensions. In particular, for analytical purposes we suggest it is helpful to differentiate BURGs according to these four variables: *i)* their time of establishment – with old regional groups pre-dating EU-membership and new regional groups post-dating EU membership; *ii)* their level of institutionalization, which ranges from very light to very sophisticated machineries; *iii)* their policy scope – with some regional groups dealing with sectoral-specific issues, and others dealing with a broader, general ambit; and finally *iv)* their degree of activity, which ranges from very active, with BURGs which are regularly summoned, to fairly inactive, with BURGs which are only episodically revived by the participating member states for specific purposes. Understanding the features of these regional groups is helpful to assess their impact on EU integration (which we do in the next section), hence a further elaboration of these four criteria is offered below.

III.1. Longevity, pre- or post-accession

BURGs can be classified depending on whether participating member states created these frameworks of cooperation before joining the EU, or after joining the EU, or when some were in the EU and others were not. Of the 13 existing groups we have identified

based on the definition of section II, four were created prior to their members joining the EU (Benelux, the Iberian Summit, and the Visegrad and the Baltic groups). However, Benelux may be described as a "pioneer", *i.e*. established before the EU, whereas the other three are "followers" in that their members acceded together to the already-existing EU.[23] The Benelux Customs Union (1944) foreshadowed and served as a working model for the EEC (1957) which it helped to found. As for the other three, a large part of their *raison d'être* was to help their members with preparation for EU accession in the intervening years after the BURGs' creation – 1983-1986 for Portugal and Spain, 1991-2004 for the states of the Baltic Assembly and the Visegrad Group. However, the cooperation among participating states within these BURGs has persisted and continued to evolve in the decades since they became member states of the EU.

Just three of our thirteen BURGs are hybrids, in that they were created by a mix of EU and non-EU states (the Weimar Triangle, Salzburg Forum, Central European Defence Cooperation). All three of these are in a way "bridges" between East and West. The Weimar Triangle (established in 1991) enabled a high-level dialogue between East (Poland) and West (France and Germany) just as the Cold War was ending, the Salzburg Forum (2000) enabled home affairs cooperation between Austria and several acceding CEE states, and Central European Defence Cooperation enabled military collaboration between five member states and pre-accession Croatia. Here too, the cooperation persisted after all participating states had acceded to the EU.

Finally, six BURGs were formed when all the participating states were already in the EU: The Franco-German cooperation, the Nordic-Baltic Six, EuroMed, the Three Seas Initiative, the Slavkov Triangle and the New Hanseatic League were created by states which were already members of the EU. With one exception (Franco-German cooperation), all of these are relatively recent creations, a fact which serves to highlight the extent of the tendency towards factionalism in the increasingly heterogeneous EU.

III.2. Institutional structure

The BURGs also vary in the extent to which they are institutionalized. At the extremes, they range from Benelux, a complex organization with its own intergovernmental council, committee of ministers, parliamentary assembly, court of justice and secretariat,[24] to the Nordic-Baltic Six, a group that has "no leader and no formal structures," but rather is "merely a loose, informal club whose members have a habit of consulting and coordinating with each other".[25] A BURG may be more or less institutionalized based on a number of factors: *a)* the number and complexity of its institutional structures; *b)* the formal legal status of its founding document – treaty, declaration, joint statement, etc. – if it has one;

[23] A Inotai, 'Correlations Between European Integration and Sub-Regional Cooperation' cit. 80.

[24] M Vidal and J Wouters, 'The Trials and Tribulations of the Benelux' cit. 283.

[25] P Kuusik and K Raik, 'The Nordic-Baltic Region in the EU: A Loose Club of Friends' (2018) Swedish Institute for European Policy Studies' European Policy Analysis 2.

and *c)* whether it has a secretariat, *i.e*. a dedicated civil service. Using these factors, we find that the 13 BURGs may be classified into three groups according to their level of institutionalization. Four of them are *highly institutionalized* (Baltic Assembly, Benelux, Franco-German duo, Visegrad Group), in that they have (quasi-) permanent institutional structures that go beyond intergovernmental meetings to also include *e.g*. interparliamentary cooperation. We find that five BURGs are *moderately institutionalized* (Central European Defence Cooperation, EuroMed 9, Iberian Summit, Salzburg Forum, Three Seas Initiative) in that while their cooperation is mostly confined to intergovernmental meetings, on this level their cooperation is relatively durable and robust. Finally, four BURGs are *minimally institutionalized* (New Hanseatic League, Nordic-Baltic 6, Slavkov Triangle, Weimar Triangle) in that their cooperation is relatively tenuous and somewhat *ad hoc*, with little or no institutional footprint.

Within the four highly institutionalized BURGs the architecture of regional cooperation goes beyond simple summitry, as it is grounded on more permanent institutional structures of cooperation, which involve also other domestic institutions beyond national governments. In particular, the Benelux has since 1955 a Parliamentary Assembly – technically the Benelux Interparliamentary Consultative Council, which is composed of 21 Dutch MPs (elected from the 2 houses of parliament), 7 Luxembourgish MPs (drawn from the unicameral Parliament) and 21 Belgian MPs (elected pro-quota by both the national/federal Parliament and the assemblies of the federated regions and communities).[26] The Parliamentary Assembly's seat rotates between the participating states every two years, but the body meets annually, with the task of advising the governments of the participating member states – which are also meeting at intergovernmental level in the Benelux Council of Ministers. Moreover, the Benelux also has a permanent secretariat, based in Brussels, as well as a Benelux court – established in 1965 and operational since 1974, which rules on requests for preliminary rulings from the Dutch, Belgian and Luxembourgish supreme courts regarding regulations which are common to the three countries and serves as a civil service tribunal for personnel of the Benelux Economic Union. Similarly, since 1991 the Baltic states have their own Baltic Assembly composed of 60 delegates, elected 20 each by the Parliaments of Estonia, Lithuania and Latvia, as well as the Baltic Council of Ministers which, together with a secretariat based in Riga, supports the organization. The Visegrad Group does not have a Parliamentary Assembly but it does feature interparliamentary cooperation in the form of regular meetings of parliamentary speakers and committees among its four members.[27] In addition, there is a Visegrad Fund

[26] For all the details about the Benelux Parliament, see www.beneluxparl.eu.

[27] K Borońska-Hryniewiecka and J Grinc, 'Actions Speak Louder Than Words? The Untapped Potential of V4 Parliaments in EU Affairs' (2021) East European Politics and Societies and Cultures 1; Polish Sejm, *Interparliamentary Cooperation of the Visegrad Group Countries* oide.sejm.gov.pl.

(established in 2000) which supports regional cooperation, with its own separate institutional structure, including a secretariat.

Similarly, Franco-German cooperation relies on an ever deeper system of bilateral governance, described by some as "the most institutionalized form of member state cooperation within a regional political organization".[28] While the Elysée Treaty of 1963 established the foundations for bilateral relations between these two founding EU member states, with regular summits at the level of heads of state and government, since 2003 a Franco-German Ministerial Council has been convening regularly twice a year – with the full cabinets of the two governments meeting jointly to discuss issues of common concern. Moreover, following the efforts by French President Macron to relaunch Franco-German cooperation, the Treaty of Aachen of 2019 has now established a Franco-German Parliamentary Assembly which, as foreseen in a follow-up inter-parliamentary agreement, is designed to "draft proposition on all questions of interest for Franco-German relations with the aim to go towards convergence of French and German law".[29] The Parliamentary Assembly, which is composed of 100 members – 50 chosen among their MPs by the German *Bundestag* and 50 by the French *Assemblée Nationale* – has now adopted its standing orders and started operating. In sum, as the overview above outlines, BURGs can sometimes be largely unstructured forms of inter-state cooperation, or they can become real unions within the EU, with proper executive, legislative, administrative, and sometimes even judicial structures of their own.

III.3. Policy scope

BURGs vary significantly in the extent of their policy concern, with some of them pursuing a rather specific task, focusing on pre-defined sectoral policies, and others instead covering multiple areas of cooperation between the participating member states. In particular, of the 13 existing BURGs we identified in the prior section, four – the Salzburg Forum, the Central European Defence Cooperation, the Three Seas Initiative and the Hanseatic League – pursue a limited remit, which focuses on the specific policy areas – namely, in the order of the four above-mentioned groups: Home affairs cooperation, military coordination, cooperation on energy, transport, infrastructure and business, and economy policy coordination in the context of EMU reform. By contrast, the other nine BURGs have a much broader remit. This is clearly true for the four highly institutionalized BURGs – Franco-German Cooperation, the Visegrad group, the Benelux and the Baltics – which focus on cooperation both on economic and political issues. Yet, this is also true for the other five BURGs that are not highly institutionalized. The Nordic-Baltic Six is a configuration that permits coordination across a wide range of policy areas, as it enables participating ministers or officials from these states to meet prior to or on the margins of important EU meetings (Council,

[28] U Krotz and L Schramm, 'An Old Couple in a New Setting: Franco-German Leadership in the Post-Brexit EU' (2021) Politics and Governance 48.

[29] Accord Parlamentaire Franco-Allemand [2019], art. 6.

COREPER). As for the others, meeting in a format of national leaders or foreign ministers (as in the EuroMed, Iberian Summit, Slavkov Triangle, Weimar Triangle) does permit a wide-ranging policy discussion on any topic of mutual interest, that can encompass high politics (diplomatic dialogue) and low (*e.g.* regional or local cross-border issues). For example, the Weimar Triangle, while mostly episodic in its operation (see below), focuses on security issues but within a broader scope of political dialogue. The EuroMed, while originally emerging (as EuroMed 7, before Croatia and Slovenia joined in 2021) as a bloc of southern EU member state responding to the Euro-Crisis, focused from the start on issues beyond EMU reform, to address essentially any topic on the EU agenda (including migration, respect for the rule of law, and Brexit). This variation among BURGs and their different policy scope clearly influences their relevance, with groups having a broader remit generally playing a larger role in the EU (see below section IV).

III.4. Frequency of meetings

As we explained in the Introduction, in this *Article* we are exclusively focusing on BURGs which are currently active within the EU. Nevertheless, active BURGs still can differ significantly in the intensity of their activity, so a final criterion to classify BURGs is the frequency with which BURGs are actually convened and operational. By this metric, four of the 13 BURGs identified in the prior section (the Weimar Triangle, the Salzburg Forum, the Central European Defence Cooperation, and the Three Seas Initiative) are clearly not very active. For instance, the Weimar Triangle, officially established in 1991, has met only erratically: the summit of foreign ministers, in October 2020, was the first to take place since 2016, and there has not been a trilateral summit of national leaders since 2011. This confirms the uncertain strategic weight that the participating member states, and particularly France, give to this BURG. Similarly, the Three Seas Initiative has so far produced limited output: even though the Initiative has organized an annual summit of national presidents (many of whom have limited constitutional powers), and on one occasion saw the participation of a US President (Donald Trump in 2017), in general the 12 participating member states appear to grant limited institutional relevance to the initiative, whose value seems therefore mostly to operate at a lower institutional level, as a business forum.

On the contrary, other BURGs appear to be much more active. In particular, the four BURGs which are endowed with a thick organizational structure (see above) – with both inter-governmental and inter-parliamentary cooperation, such as the Benelux, the Baltics, the Franco-German couple and the Visegrad Group – continue to actively engage with each other through the institutionalized forms foreseen by their partnership agreements. Nevertheless, also other BURGs which still rely on a much thinner institutional organization, appear to be much more relevant. This is the case of the EuroMed, which despite being exclusively a leaders' summit, has allowed heads of state and government of the Mediterranean EU member states to develop joint positions on issues of common concern. In all cases, it should be borne in mind that in addition to meetings in public, there may be many

more behind the scenes: ministers and officials from the BURGs are frequently in the habit of coordinating their position on the margins of meetings at the EU level.

IV. Explaining BURGs

What is the purpose of BURGs? Why are they created? This section seeks to answer this question by distinguishing between BURGs which serve exclusively a function to facilitate cooperation between participating states (*e.g.* Benelux, Baltics, Salzburg Forum), and BURGs which instead are designed as fora to develop common positions among the participating states, and set the agenda at EU level (Hansa, EuroMed, Franco-German, Visegrad). More specifically, regarding the purpose of the BURGs, we can identify a rough typology according to the different purposes that each of them serves. The list is non-exclusive, meaning that a BURG might fulfill multiple purposes at once, and the purposes it serves might change over time. We can identify four ideal-types of BURGs – what we call *integration vanguard*, *functional cooperator*, *policy coordinator*, and *resistance cell*. These kinds of BURGs emerged – broadly in this order – through the history of the European integration process.

IV.1. Integration vanguard

An *integration vanguard* is a group of states that pursues further integration among themselves with a view to promoting integration in the whole of the EU. The best examples of this are Benelux and Franco-German cooperation, although in different ways: Benelux, begun in 1944 before postwar European integration started, is a *model*, in that it established forms of institutional cooperation among the three countries, *e.g.* the common external tariff, that would later be adopted by the EU as a whole.[30] Franco-German cooperation is a *motor*, in that the two countries jointly initiate further integration with a view that it should be adopted by the EU as a whole, exercising a style of joint leadership that has been termed "embedded bilateralism".[31] This bilateral relationship was formalized in the Elysee Treaty of 1963, but it was prefigured in the 1950 Schuman plan, which was initially conceived by France and Germany and joined by Italy and the Benelux countries to form the six-nation ECSC. Benelux and the Franco-German couple persist as separate entities within the EU to this day. Moreover, both of them continue to renew and strengthen their cooperation, as seen in the 2008 treaty instituting a Benelux Union[32] and the Franco-German Aachen Treaty of 2019.[33]

[30] A Inotai, 'Correlations Between European Integration and Sub-Regional Cooperation' cit. 80.

[31] U Krotz and J Schild, *Shaping Europe: France, Germany, and Embedded Bilateralism from the Elysée Treaty to Twenty-First Century Politics* (Oxford University Press 2013) 1.

[32] M Vidal and J Wouters, 'The Trials and Tribulations of the Benelux' cit. 285.

[33] U Krotz and L Schramm, 'An Old Couple in a New Setting: Franco-German Leadership in the Post-Brexit EU' cit. 54.

IV.2. Functional cooperation

A second purpose of a BURG may be as a *functional cooperator*. In this case, the focus is on internal cooperation among the participating member states rather than coordinating positions *vis-à-vis* common policies at the EU level. The focus of cooperation may be on matters not just of "high politics" (*e.g.* diplomatic exchange, defence) but areas of "low politics" tied to practical cross-border and regional issues (*e.g.* energy, transport, tourism). Many of the BURGs that enabled cooperation of this kind were founded by states that at the time were not yet EU members but aspired to join – the Iberian Summit, the Visegrad Group, the Baltic Assembly, the Salzburg Forum (which also included Austria, by then a member state). Functional cooperation also seems to be the main purpose of some of the other BURGs created more recently, including Central European Defence Cooperation and the Three Seas Initiative. Of course, functional cooperation can co-exist with engagement at the EU level. The Salzburg Forum, which began as a forum mainly for internal cooperation in Justice and Home Affairs and to prepare its members for EU accession, is now also engaged in policy coordination at EU level, where its seven members (one quarter of EU member states) have the formal right of legislative initiative in certain Justice and Home Affairs matters (Art. 76 TFEU).[34]

IV.3. Policy coordination

The third purpose of a BURG is as a *policy coordinator* that is focused externally on the EU level, as opposed to on internal cooperation among the participating states. Perhaps the best example of this kind of BURG is the Nordic-Baltic Six (NB6), which is made up of the three Baltic states and the three Nordic EU member states (Denmark, Finland, Sweden). This group is a subset of a larger group, the Nordic-Baltic Eight (NB8) which also includes two non-EU states, Norway and Iceland.[35] While the NB8 is a complex institution involving extensive internal cooperation among these eight countries, the NB6 exists mainly to allow the six members of the NB8 that are in the EU to coordinate their policy positions in the Council/European Council, typically through ministerial meetings prior to Council meetings. Other examples of BURGs whose purpose is policy coordination is the EuroMed, made up since 2021 of the nine Mediterranean EU member states (Croatia, Cyprus, France, Greece, Italy, Malta, Portugal, Slovenia, Spain) and the New Hanseatic League (made up of the NB6 countries plus Ireland and the Netherlands).

Unlike an integration vanguard, a BURG acting as policy coordinator is not necessarily advancing the cause of EU integration in general, but rather the particular interests of a sub-group of member states. Indeed, different BURGs with competing policy agendas

[34] P Müller, 'Europeanization and Regional Cooperation Initiatives' cit. 28.

[35] V Kleinberga, 'Bowling Together' cit. 17; I Rūse, 'Nordic-Baltic Interaction in European Union Negotiations' cit. 229.

may clash with one another when negotiating EU policy outcomes in the Council/European Council. This kind of political dynamic emerged in the late 2010s in the years following the Brexit referendum (2016), when the EU was grappling with proposals for the reform of the EU's architecture of economic governance, such as the idea of a fiscal capacity for the Eurozone.[36] Such reforms were supported by the EuroMed which included many countries that had been most affected by the euro-crisis, who advocated greater solidarity in the form of shared debt. Northern member states – who no longer had the UK to be their ally in this debate – formed themselves in the New Hanseatic League to oppose these moves. The Franco-German duo tried to find a middle ground between the northern and southern positions, most notably with the "Meseberg declaration" of June 2018,[37] but this too failed to gain a consensus. The standoff between these different BURGs – each of which represented a different set of policy preferences for the EU – was eventually resolved in 2020 when the EU was hit hard by Covid-19, which necessitated the creation of a new Recovery Fund to address the economic consequences of the pandemic.[38] The most important impetus for the rescue package came from the Franco-German duo, whose joint proposal for a 500 billion recovery fund in May 2020 became the blueprint for the Recovery Fund "Next Generation EU" (NGEU).[39] The New Hanseatic League was divided on the issue and opposition was reduced to four member states – the so-called frugal four of Austria, Denmark, the Netherlands, and Sweden (an *ad hoc* grouping which is not, by our definition, a BURG) – and so NGEU was eventually adopted.[40] Even so, this dispute is a strong signal of the growing importance of the BURGs in EU politics.

IV.4. Resistance

Fourth and finally, there is the possibility that a BURG could act as a *resistance cell*. In this case, a group of member states would actively work together against the fundamental values of the EU. Admittedly, this typology of BURG is a sub-category of the previous group – namely regional caucuses that pursue the coordination of policy priorities at EU level among the participating member states. Nevertheless, in this context, policy coor-

[36] F Fabbrini, 'A Fiscal Capacity for the Eurozone: Constitutional Perspectives in Depth Analysis' (February 2019) study commissioned by the European Parliament Constitutional Affairs Committee www.europarl.europa.eu.

[37] B Eichengreen, 'The Euro after Meseberg' (2019) Review of World Economics 15.

[38] F Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (Oxford University Press 2020).

[39] U Krotz and L Schramm, 'Embedded Bilateralism, Integration Theory, and European Crisis Politics: France, Germany, and the Birth of the EU Corona Recovery Fund' (2022) Journal of Common Market Studies 526.

[40] See F Fabbrini, 'Europe's Economic and Monetary Union beyond Covid-19' (June 2021) report commissioned by the Department of Finance of Ireland / Presidency of the Eurogroup www.gov.ie.

dination is specifically directed towards frustrating the achievements of EU policy objectives, effectively evading or subverting EU norms.[41] As such, given its ultimate purpose, we treat this as a distinctive function of a BURG. The most prominent example of a BURG taking action of this kind – although one that is highly contested – is the Visegrad Group acting to thwart the implementation of the Common European Asylum System (CEAS),[42] and by extension the very foundations of the rule of law in the EU.[43] As is well known, in response to the migration crisis of 2015, the EU adopted a number of emergency measures which, in a spirit of solidarity between the member states, established among other things a temporary relocation mechanism of asylum seekers. However, even though these measures were legally binding, the Visegrad countries – acting in unison – refused to abide by the relocation mechanism, *de facto* sabotaging it.[44] While action by Poland, Hungary and the Czech Republic was ultimately found in 2019 to be a breach of EU law by the ECJ, the resistance coordinated by the Visegrad group profoundly shaped EU responses to the migration crisis and plans to reform the CEAS.

V. Conclusion: BURGs and differentiated integration

What do BURGs tell us about EU integration and differentiated governance? This *Article* has examined regional caucusing as an unexplored side of differentiated governance in Europe. In their recent book, *Ever Looser Union?*, Schimmelfennig and Winzen have examined in detail mechanisms of differentiated European integration, distinguishing between typologies of differentiation, explaining their drivers, and assessing their normative effects on EU integration. Nevertheless, by embracing a narrow definition of differentiation as a situation arising "when the legally valid rules of the EU, codified in EU treaties and EU legislation, exempt or exclude individual member states explicitly from specific rights or obligations of membership",[45] Schimmelfenning and Winzen have left out of their comprehensive analysis the phenomenon of BURGs. Indeed, by their own admission "there are other forms of flexibility such as [...] informal cooperation among group of states"[46] which must be researched further to obtain a clearer picture of all forms of differentiated integration in the EU. This *Article* has attempted to do just that, focusing on the phenomenon that arises when "groups of members [states] cooperate informally besides and beyond the institutional formats and legal rules of the EU".[47]

[41] M Dawson, 'Coping with Exit, Evasion, and Subversion in EU Law' (2020) German Law Journal 51.

[42] See also in this *Special Section* J Silga, 'Differentiation in the EU Migration Policy' cit. 909.

[43] See also in this *Special Section* R Uitz, 'The Rule of Law in the EU: Crisis, Differentiation, Conditionality' (2022) European Papers www.europeanpapers.eu 929.

[44] B De Witte and E Tsourdi, 'European Union: Slovak Republic and Hungary v. Council' (2018) CMLRev 1457.

[45] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 3-4.

[46] *Ibid*. 176.

[47] *Ibid*. 4.

To this end, this *Article* has first defined BURGs, conceptualizing the phenomenon of bottom-up regional groups as a case of institutionalized cooperation among caucuses of EU member states belonging to the same geographical region. Moreover, this *Article* has limited the scope of its analysis to currently active BURGs, leaving aside historical cases of interstate cooperation which were dissolved or absorbed into the EU structures. Based on this definition, this *Article* has identified 13 BURGs, and classified them on the basis of several criteria – including their longevity (whether they were established before or after EU membership), their institutional complexity (whether they have a thin organizational structure, based purely on executive intergovernmental cooperation, or rather a thick and sophisticated one, including also inter-parliamentary cooperation and judicial settlement of disputes), their policy scope (whether they have a narrow focus on specific tasks, or a broader mandate), and the frequency of their meetings and operations (whether regularly or infrequently).

This *Article* has then assessed BURGs, reflecting on their purposes. As such, we have distinguished between BURGs which serve purely as frameworks for functional cooperation, increasing the ability of participating states to solve cross-border issues or promote projects of common interest, from BURGs which instead fulfil a policy coordination function, hence increasing the abilities of their members to raise their voice in EU policy-making. A particular type of BURG we identified is that of vanguard of EU integration, with the Benelux and the Franco-German cooperation as examples of regional groups which provide, respectively, a model of integration on a small scale and a motor to develop further inter-state cooperation among all countries which are willing to participate. Nevertheless, our analysis has also pointed out the case of BURGs that serve as cells of resistance towards further European integration. In this case, member states caucusing among themselves promote their shared preferences at EU level but do so in order to evade or subvert EU laws which they dislike – a process dramatically visible in the Visegrad group's refusal to abide by EU emergency laws on the relocation of asylum seekers in the aftermath of the migration crisis.

This comprehensive survey of the BURGs, a hitherto unheralded form of differentiation within the EU, sheds new light on the question of whether differentiated governance should be evaluated positively or negatively from the normative stance of European integration.[48] While the recent literature tends to be cautiously supportive of differentiated integration,[49] our analysis draws attention to cases of differentiation that are not institutionally connected to the EU, and as such it goes beyond the standard debate over the

[48] C Lord, 'Utopia or Dystopia? Towards a Normative Analysis of Differentiated Integration' (2015) Journal of European Public Policy 783.

[49] See F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 179 (claiming that "DI has enabled the EU to move to a level and scope of European integration [...] that would have been impossible under the constraints of uniform integration"); E Hirsh Ballin and others, *European Variations as Key to Cooperation* (Springer 2020) 1.

relative costs and benefits of flexibility vs. uniformity in EU governance. We have observed that some BURGs have a positive effect on EU integration as a vanguard, and this is also historically true: the Schengen area started out as a BURG but it ceased to be one when its policy goals were adopted by the EU as a whole. In addition, some BURGs began as cooperation among pre-accession states, helping them to prepare to join the EU. BURGs can also have a largely neutral effect, such as when enable member states to coordinate their positions when engaging in policy debates at the EU level. The effect of BURGs may also be neutral when they serve as functional cooperation formats; these are significant, however, insofar as they demonstrate that it is possible for EU member states to participate in durable forms of institutionalized cooperation outside of the structures of the EU (not unlike the interstate compacts in the US federal system). However, it is also true that BURGs can have a negative effect on EU integration, and indeed promote disintegration (taking the form of the erosion of EU norms), by becoming cells of resistance, a forum in which recalcitrant member states can organize in defiance of EU laws. As such, this survey has revealed a wide array of potential effects of BURGs on EU integration – whether positive, neutral or negative. Be that as it may, BURGs remain a factor to be reckoned with in EU law and governance, and as such we hope this paper may have opened a further avenue for research on differentiation.

ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

THE EUROPEAN UNION IN CRISIS: WHAT SHOULD THE MEMBER STATES DO?

JEAN-CLAUDE PIRIS*

ABSTRACT: The European Union has suffered for many years from long-standing crises (of competitiveness, the euro, and democracy) which have only been exacerbated by more recent crises (of foreign and security policy, migration, climate change, and the rule of law). When considering the EU's options for the future, it is difficult to see how it can maintain its unity. The essential problem is that the aims given to the EU by its Member States in the EU Treaties cannot be achieved with the means it was given, which are ill-adapted to its number of members. The problem can be dated back to the "original sin" of the Nice Treaty, in which the then-15 Member States, despite their legal commitment to do so, did not adequately reform the EU's governance to prepare for the accession of 10 new Member States in 2004. In particular, they did not reform the Council's decision-making procedures, which require common agreement or unanimity on all major decisions, effectively giving each Member State an individual veto. The author recommends amending the EU Treaties to vastly cut back the number of decisions and areas subject to common agreement or unanimity in favour of the introduction of a collective veto of three to five States representing 10 to 15 per cent of the EU population and different thresholds of qualified majority voting. While differentiation is not key to resolving the EU's core problems, different forms of differentiation should be introduced to permit flexibility within the EU's system of governance.

KEYWORDS: Brexit – Council of the EU – crisis – differentiation – EU treaties – qualified majority voting.

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I. Introduction

Despite what many people think, the EU does not aim at an ever closer union between the Member States, but "between the peoples of Europe", which does not have the same meaning (see the preambles of both the TEU and the TFEU and art. 1 TEU). The EU aims at helping its Member States to bring prosperity and liberty to their respective peoples, while respecting the attachment of these peoples to their nation-states.

In times of crisis, the temptation of retreating behind national borders comes back. Today, national borders are partly re-established, and the rules for Schengen, unfair competition and fiscal discipline are suspended, while the EU is hit by serious crises.

What should be done? Is it possible to strengthen the EU without dividing its members further? Could the division be resolved with an increased use of *differentiation* in certain policy areas, permitting some Member States to be exempt from the common rules? And finally, should and could the Member States change the EU Treaties?

II. The persistence of serious crises

Eight years ago, I gave a speech on "The Five Crises in Europe",[1] which were enumerated as follows: *1)* the economic structural crisis, characterized by declining competitiveness, offshoring, unemployment, and demographic decline; *2)* the crisis of the euro, which is made difficult to solve by the asymmetry between the two branches of the Economic and Monetary Union (EMU) ("the Maastricht original sin"); *3)* the political crisis in some Member States, featuring growing inequalities and a loss of trust in the government and the establishment, leading to populism(s); *4)* the democratic malaise *vis-à-vis* the EU, which loses support because Europeans find its results insufficient and do not know its final aims and borders; and *5)* the relations between the UK and the EU. Today, none of these crises is solved, except the last one – but in a sad way. Moreover, other crises have hit the EU since then. The economic crisis was only half-solved, when the Covid pandemic provoked yet another crisis.

It is the responsibility of each Member State to manage its economic growth, as well as its competitiveness. Some are successful, others less so. On the other hand, EMU, is the EU's responsibility, but the Treaties do not confer on it the power to solve its fundamental asymmetry. Measures taken since 2008, most recently the Next Generation EU and the Recovery Fund, are big improvements, but are subject to legal criticism and are not sufficient. Many economists suggest the mutualisation of national debts, while avoiding the problem of moral hazard. But an EU controlling, even partly, national budgets and economic policies of the euro area states would raise an issue of democratic legitimacy. The EU's political legitimacy is not sufficient for that, given, on the one hand, the half-success/half-failure of the European Parliament, which was unavoidable given its half-powers and the rules of electing its members which ignore the principle of *one citizen/one*

[1] The lecture was titled 'The Five Crises in Europe and the Future of the EU' and was delivered at the King's College London on 28 October 2013.

vote and, on the other hand, the dominant role given by the Treaties to individual vetoes in the Council's decision-making since the creation of the European Economic Community (EEC) by six countries in 1957.

Moreover, in the meantime at least four other crises have hit the EU.

First, there is a concerning division among the 27 on foreign policy and defence policy, while their security is at risk, both internally (terrorism) and externally (Russian aggressions in Ukraine). On foreign policy, several Treaty reforms, including the establishment of a High Representative and a European External Action Service, did not give significant results, as the divisions on relations with Russia show. Some see the enlargement of the EU as being a "foreign policy tool", but it makes its decision-making more and more difficult, the inefficiency increasing with each accession. The enlargement policy is of course far from being only a *foreign* policy, as it deeply transforms the EU itself. On defence, the 27 are also divided: even if *America First* has proven to be more than just words, NATO is still necessary for EU's security. Moreover, can one have a defence policy without a foreign policy?

Second, the migratory crisis, which peaked in 2015, has structural causes and is a long-term problem. The violence in many third countries is one cause, but small and rich Europe, with its declining population, needs immigrants to sustain its economic growth (400,000 a year for Germany alone), and is thus attractive for the poorest in Africa and Asia, where there is strong demographic growth but insufficient economic growth.

Third is climate change. The *Green Deal* and the EU's commitment to reduce sharply its carbon emissions by 2030 and to reach climate neutrality by 2050 will have a strong impact on energy and on all economic sectors, with the need for new sensitive EU legislation and massive investments. This is a major issue in the long term. But will all Member States do their share of the work? Will the EU be able to help those with serious problems, such as Poland?

Fourth and finally, there is the rule of law. The above crises have provoked or accelerated divisions between Member States: rich and poor, North and South, East and West. But one of these divisions, in itself, has now become the most sensitive crisis in the EU, when the governments of some Member States, especially Hungary and Poland, already "illiberal", have begun backsliding and putting into question the very foundations of the EU – its values and the principle of the rule of law – as shown by the recent judgment of the Polish Constitutional Court.[2]

The rule of law is a matter of deep concern, as this principle is the cornerstone of the EU legal and political order. The creation of the EU was accompanied by a legal revolution. For the first time, states decided that their mutual commitments would always be respected. The rule of law is the *sine qua non* condition of the existence and credibility of the level playing field, the internal market and the EU itself. Its application is monitored and sanctioned. Up to now, Member States have played by the rules: the fines decided

[2] See Constitutional Tribunal of Poland judgment of 7 October 2021 n. K3/21.

by the European Court of Justice (ECJ) have been paid and its interpretation of EU law has been respected. Tribunals must be independent and impartial.[3] Otherwise, the EU would not be able to work anymore. This is an existential question. The institutions must (I would dare to say "finally") use legal means to stop this backsliding. All our friends from Hungary, Poland and elsewhere must understand that.

One cannot refuse some articles of the EU Treaties, or the exclusive interpretation of EU law by the ECJ, while remaining an EU member. Moreover, the EU values are at the heart of the identity of Europe. We, Europeans, are different, because our values and our conception of life in society are different. The prohibition of carrying weapons and capital punishment, the right to abortion or to homosexual marriage, to an independent justice system (see art. 47 of the Charter of Fundamental Rights of the EU), to social security for all, to a better protection of the poorest, the fight against climate change or against racism: all these values are part of our identity.

III. The feasibility of three suggested options for the future of Europe

A *first option* would be to redistribute the share of competences between the EU and its members – centralizing powers over economic and fiscal policy, perhaps also on migration policy and other policies – based on the argument that this would be the only solution to solve all the crises. This would be the dream of Euro-Federalists. However, it is unrealistic. Even a Treaty revision limited to correcting the *imbalance of the EMU*, arguably the most urgent task given that 19 countries share the same currency, is not politically possible in the short term. The difficulties are twofold: budgetary solidarity and political legitimacy. The so-called *frugal states,* and even some of the other euro area states, are opposed to debt mutualisation. Supported by their tax-payers/voters, they refuse to share their powers in these sensitive areas. Besides, the democratic legitimacy of the decisions taken at an EU level would have to be guaranteed. No doubt the future of EMU – and the Stability and Growth Pact's rules, which are now suspended until 2023 – will be continue to be the subject of major debate in the 18 months to come.

A *second option*, to hope for a Franco-German initiative in the short term, appears improbable. The views of the two countries regarding budgetary and economic questions remain quite far apart. Now that their respective elections are out of the way, it is possible that their leaders (Olof Scholz at the head of the SPD/Greens/FDP coalition and the re-elected Emmanuel Macron) might propose some strengthening of links within the euro area. They might suggest, for example, that those willing could approximate a few modest aspects of their budget or tax policies. Such differentiation would be legally possible

[3] Art. 47 of the Charter of Fundamental Rights of the EU [2012]; art. 6 of the European Convention on Human Rights [1950].

through an inter-governmental agreement, as it concerns matters within Member States' powers. This remains possible – and it would be a good political sign – but it is not probable.

A *third option* would be to create a new EU, composed of a *basic core* based on the single market, customs union and trade policy, and optional clubs for other policies.[4] All members would participate in the basic EU, using current Treaties and Institutions. The optional clubs would be for EMU and the so-called former Second and Third Pillars. The composition of the Parliament and the Council would vary depending on participating states and the clubs could use various procedures. However, with such an architecture, the unity of the EU would disappear.

IV. Some comments on the current political reality

This reality is that most Member States refuse to review the Treaties. Their position during the Conference on the Future of Europe made it clear. The key question to ask is, how will they then fulfil their existing Treaty commitments, such as that the EU "*shall* establish an economic and monetary union…" (art. 3(4) TEU), "*shall* constitute an area of freedom, security and justice" (art. 67(1) TFEU), "*shall* frame a common policy on asylum, immigration and external border control" (art. 67(2) TFEU)?

The answer is that the EU is at present simply unable to meet these commitments. These goals will remain unrealistic so long as the Council continues to muddle through with its obsolete decision-making rules. According to these rules, the representative of any one of the 27 has an individual right of veto, which means the legal power to prevent the EU to meet any of these commitments, even if all others agree to do it. But why and how did such a discrepancy arise between the ambitions imposed by the Member States on the EU and the insufficient means they gave it to fulfil these aims?

Here it might be useful to explain the history of what I have called the "Second Original Sin" of the Nice Treaty (after the first one in Maastricht). In the past, discussions between 10, 12 or 15 partners took time, but generally led to a consensus, given that the participants were not too many and were fairly homogeneous. However, it was foreseen that 10 rather heterogeneous countries would be joining the EU all in one go, the 15 members at that time decided that Treaty changes, on both the composition and the functioning of the institutions, would have to be made before that huge enlargement. Thus, in Amsterdam, in 1997, seven years before the 2004 enlargement, they agreed to prepare for Treaty change, in conformity with one of the 1993 Copenhagen criteria referred to in art. 49 TEU ("the Union's capacity to absorb new members"). They committed themselves to do so, not with political words, but by adopting primary law, democratically ratified in each of the 15: the "Protocol on the Institutions with the project of enlargement of the EU", a part of the Amsterdam Treaty: "[a]t least one year before the membership of the EU exceeds twenty, an intergovernmental conference shall be convened in order

[4] See JC Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).

to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions".

This commitment represented a compromise between two schools, the first one wanting an immediate enlargement (with the UK as its preeminent champion), and the more cautious second school favouring a pre-enlargement deepening of the EU by adapting its decision-making rules. The compromise was founded on a powerful trade-off: "yes" to the enlargement, but with the obligation to adapt the decision-making beforehand. The 15 agreed that a 25-member club could not work with the rules of a club of 15.

And then came the "Sin of Nice", in December 2000. After four days and three nights of negotiations, the 15 leaders failed to agree on the necessary reforms. Legally, in order to respect primary law, the sanction of this incapacity would have been to declare that their final decision on that enlargement would be taken as soon as the necessary reforms had been adopted. This might have made these reforms possible, given the strong leverage imposed by the impending enlargement, which was seen as a historic unification between Western and Central and Eastern Europe. But the 15, under pressure from the USA, decided that it was politically difficult for them to appear to be delaying that enlargement.

It was in this way that the 15 gave up the idea of reforming the EU's decision-making rules before the big enlargement. They adopted this weighty decision together with a beautiful and non-binding *Declaration on the future of the Union*, followed one year later by another Declaration adopted in Laeken. The Convention on the Future of Europe followed, chaired by Valery Giscard d'Estaing, which later produced a draft Treaty establishing a so-called *Constitution for Europe*.[5] The substance of this still-born treaty (killed by referendums in France and the Netherlands) was seen as largely containing unnecessary *window-dressing* by some, and on the contrary by others as being an unacceptable step towards a European federal state.

But the important fact is that this still-born Treaty still did not contain the operationally effective reforms which the EU would badly need in the future, especially regarding the possibility for any EU member (among 25 instead of 15) to veto any major decision in the Council. The same was true of the Lisbon Treaty that replaced the Constitution for Europe and entered into force in 2009.[6]

Politically, both the Nice and the Lisbon Treaties show that the utopian dream, that one day the EU could be transformed into a federal state, is either dead or to say the least in a long-term coma. But the problem goes further than that. Given the "Sin of Nice", even many of the aims of the current EU Treaties cannot be reached under its current decision-making rules.

Today, to modify one word of the Treaties, or to take any major decision, you need the agreement of 27 countries. The consequences of this are manifest. There is no

[5] JC Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press 2006).
[6] JC Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

leverage on the Member States to agree on any change to the Treaties, even while the EU is hit by several serious crises, none of which can be solved.

V. My personal suggestions

Which reforms would be needed? It is my conviction that the EU needs Treaty changes: it is unable, with its current decision-making rules, to fulfil its essential tasks. I know that Member States are not ready to open that discussion. I understand and respect that position and the reasons why they take it. Thus, this will not happen in the short term. However, one must not have illusions about the consequences.

Another EU enlargement might, one day, cover the six Balkan countries that are now candidates or potential candidates for accession. The current Slovenian Presidency of the Council even stated an aspiration that these countries could be admitted by 2030. This will of course not happen. The democratic and judicial structures of these states are weak and unstable. Their efforts to respect the rule of law and to fight corruption and criminality are not serious enough. But, if, and when, their situation improves, their accession would add further heterogeneity and *six new padlocks to the 27 existing ones* to any change to the EU Treaties.

For now, the EU must in any case exercise its five essential responsibilities. First, it must get its members, most urgently Hungary and Poland, to respect the rule of law.[7] Second, it must reform the economic side of the EMU[8], given that it is now clear that the NGEU, while welcome, was not the EU's "Hamiltonian moment". Third, it must exercise more effort and solidarity in the fight against climate warming, taking into account the results of the November 2021 Glasgow COP26. Fourth, it must surmount the divergences on migration policy, on the basis of the Pact on Migration and Asylum proposed by the Commission.[9] Fifth and finally, it must become a more credible actor on the international political scene, making better use of its trade and economic leverage.

For each of these five issues, the Treaties require unanimity or at least common agreement. Is differentiated governance the key?[10] Would the EU fulfil its tasks by adapting its decisions to each Member State, by using differentiation on economic union, on Schengen, on migration, on foreign policy, etc.? This cannot work. Up to now, the 20 year-old procedure allowing enhanced cooperation on a case-by-case basis was used just a handful of

[7] See also R Uitz, 'The Rule of Law in the EU: Crisis, Differentiation, Conditionality' (2022) European Papers www.europeanpapers.eu 929.

[8] See also S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) European Papers www.europeanpapers.eu 867; see also CA Petit, 'Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting-ins' (2022) European Papers www.europeanpapers.eu 889.

[9] See also J Silga, 'Differentiation in the EU Migration Policy: The "Fractured" Values of the EU' (2022) European Papers www.europeanpapers.eu 909.

[10] See also S Baroncelli, I Cooper, F Fabbrini, H Krunke and R Uitz, 'Introduction to the *Special Section*: Differentiated Governance in a Europe in Crises' (2022) European Papers www.europeanpapers.eu 857.

times, and never on major issues. For many Member States the fear of being relegated to a second-class status is still greater than of seeing the EU becoming less relevant. Moreover, no differentiation is conceivable for European values and the rule of law.

The number of cases where unanimity, common agreement or consensus are required in the two EU Treaties and their 37 Protocols is much bigger than people think. These include the following (and this is not even an exhaustive list): any change of the Treaties; citizens' rights; any decision or declaration on any issue concerning foreign and defence policies; the EU's multi-annual budget; EU own resources; any tax matter; a number of issues concerning EMU; the flexibility clause of art. 352; a number of aspects concerning health, protection of the environment and climate change, social policy, family law, and even the internal market; the area of freedom, security and justice, including particularly judicial cooperation, criminal matters and police cooperation; the EU's languages, seats, composition and nomination of the members of the EU institutions, and the status of the European Central Bank and of the ECJ, etc. Moreover, one should also add to this list two oft-used horizontal provisions that favour unanimous decision-making: art. 15(4) TEU states that, "[e]xcept when the Treaties provide otherwise, decisions of the European Council shall be taken by consensus." And art. 293(1) TFEU states that "[w]here, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend the proposal only by acting unanimously".

Now that I have set out just how pervasive a problem this is, I will make seven suggestions of how to change decision-making in the Council.

First, given the current number of members, keeping an individual veto for each of them should be reserved for a short list of actual vital decisions, because an individual veto is neither democratic, nor efficient. It legally allows representatives of a minority of less than 1 per cent of EU citizens to prevent representatives of a majority of 99 per cent or of one member out of 27, from taking any major decision. There are eight Member States which have each less than 1 per cent of the population of the EU and 13 with less than 2 per cent. Even some aspects of policies affecting the single market must be decided unanimously, as is the case for taxation, protection of the environment, energy policy, and social protection. It is true that there is a legal principle of "one state, one vote" in some classic international organisations, but the EU is not one of these. Its *raison d'être* is to adopt laws affecting the life of EU citizens. Thus, its citizens must be represented by a more democratic decision-making procedure. On the other hand, it is understandable that because the EU is still an international organisation, Member States may wish to keep the individual veto on a few decisions, for example: the composition of the Council, official languages, and decisions which might affect the heart of their vital sovereignty, such as on foreign and defence policies. I would add to that list the use of art. 352 TFEU (the "flexibility clause"), the revisions of the Treaties which would affect the issues just enumerated, and maybe a few other decisions, but all the while keeping the list short.

Second, for cases other than these vital decisions, the individual veto should be replaced by a collective veto, with a minimum of three to five Member States representing at least five to 10 per cent of the EU citizens. While short of unanimity, this would be a kind of "super-super qualified majority voting (QMV)" which would be a higher voting threshold than "super QMV" (art. 238(2) TFEU), discussed below. I know that many Member States would give a negative reaction to this suggestion. But the truth is that, on top of actual vital issues, on which individual vetoes are justified, there are dozens of cases, not vital for any Member State, that still allow individual vetoes. These are undemocratic, create cases of paralysis and opportunities for blackmail (as has happened in the past). They push the Commission to self-censure and introduce proposals which are too weak. They prevent the EU from attaining its tasks and objectives (see, on the legal aspect of this political issue, the Member States' obligations in art. 4(3) TEU).

Third, direct powers should be conferred on EU institutions in matters concerning the euro area, on the condition they are subject to legitimate democratic control. The EU is responsible for the EMU, not the Member States. The institutions should be accountable and under democratic control. This control could be exercised by a Euro Parliamentary Organ, composed both of representatives of the European Parliament and of the national parliaments of the euro area members.[11]

Fourth, precise obligations should be imposed on Member States to respect the EU's fundamental values as set out in art. 2 TEU, including the rule of law. It is incredible that candidates states must demonstrate that their respect for art. 2 TEU, which is a prerequisite to be a candidate country (see art. 49 TEU: "[a]ny European State which respects the values referred to in art. 2 and is committed to promoting them may apply to become a member of the Union") but the same obligation is not imposed on a permanent basis for existing Member States. This is already legally the case, but it should be made more precise. Such a reform of art. 2 TEU should be prepared and its ratification be made a *sine qua non* condition of remaining an EU Member State. If necessary, similar commitments might be made in another form by an intergovernmental agreement with appropriate EU links and follow-up.

Fifth, some of the *passerelles* of the Lisbon Treaty should be used. The Lisbon intergovernmental conference considered several cases in which it could be justifiable to pass from unanimity to QMV. Accordingly, the Treaty provides that the decision to use the *passerelles* is taken by a simplified procedure: unanimity, but no ratification. Except for two *passerelles* related to foreign policy or defence, the others concern the following policy areas: the protection of the environment and of human health (art. 192(2) TFEU, totally or partially), social policy (art. 153(2) TFEU, in particular the social protection of workers), family law with cross-border implications (art. 81(3) TFEU), the Multiannual Financial Framework (art. 312(2) TFEU), and rules on enhanced cooperation (art. 333 TFEU). After 14 years, these *passerelles* should be used.

[11] JC Piris, *The Future of Europe* cit. 127.

Sixth, the procedure of unanimity required in three articles of the TFEU which concern, directly or indirectly, the single market and the level playing field should be modified. For one, there is art. 115 TFEU on "issuing Directives for the approximation of such laws, regulations or administrative provisions of the Member States that directly (sic!) affect the establishment or functioning of the internal market". The two other cases concern the necessity to legislate on social security and social protection in order to permit the free movement of persons (art. 21(3) TFEU) and measures for family law with cross-border implications (art. 81(3) TFEU). A super QMV with the possibility of differentiation (see below) might be used in these cases, with the Commission agreement on a case-to-case basis.

Seventh, three articles which allow the European Council to intervene by consensus in legislative procedures should be modified. According to art. 15(1) TEU, the European Council "shall not exercise legislative functions". Despite that, these three TFEU provisions provide for such an exercise, creating thus an individual right of veto for all, whereas the normal legislative procedure requires QMV in the Council. These special procedures are nicknamed the *brakes procedures* (art. 48, art. 82(3) and art. 83(3) TFEU). It would be logical to eliminate the necessity of a consensus in the European Council in these cases, because it is contrary to the EU constitutional architecture.

Above, I stated my belief that differentiated governance is not the key to resolving the fundamental problems facing the EU. However, on the margin differentiation is an acceptable mechanism to allow diversity within the governance of the EU. Here are four suggestions of ways to encourage more differentiation between EU Member States.

First, one should examine the possibility of enlarging the use of a constructive abstention, on the model of the Common Foreign and Security Policy (CFSP) (art. 31(1) TEU). In cases of possible veto, a member abstaining may decide not to apply the decision, while accepting that others go ahead. One might consider cases in the field of the Area of freedom, security and justice and maybe even a few cases concerning the single market, among those dealing with social, energy or environment policies. However, the consent of the Commission should always be required, on a case-by-case basis, in order for the level playing field to be respected in the single market.

Second, consideration should be given to the use, in a few TFEU articles, of the procedure of "super QMV" in the Council, on the model of art. 238(2) TFEU. In some existing Treaty provisions, the voting threshold is defined as "representing Member States comprising at least 65 per cent of the population of the Union" – which is the same as ordinary QMV (art. 16(4) TEU) – but also requiring that it include "at least 72 per cent of the members of the Council". In EU-27, this threshold requires the agreement of 20 states rather than the 15 required under ordinary QMV. One should consider to which articles the use of that procedure could be extended. When used, it should open the right for members voting against the act to be allowed not to be bound by it, on a case-by-case basis, in the absence of the opposition of the Commission.

Third, encouragement should be given to use of the procedure of agreeing intergovernmental treaties between some Member States, in cases where they want to deepen their cooperation beyond EU powers. This is legally possible and may even add objectives to those of the EU Treaties, if compatible with them. Precedents exist, like Schengen, Prüm, and, more recently, several instruments strengthening the EMU.

Fourth, the Commission should be encouraged to be more flexible in its legislative proposals, and to propose temporary or even permanent opt outs to Member States having difficulties. In order to do that, the Commission should take account of the actual level of impact on the single market and not a theoretical or dogmatic one. This would be particularly helpful for the smallest Member States, when opt-outs offered to them would not significantly distort the level playing field in the EU single market.

The above four points concern internal differentiation, but what about external differentiation? Is the EU too strict when negotiating with third countries? Perhaps. But one should realise that it will never be easy for non-EU members to get flexibility where the single market is concerned. Agreements with third countries must respect EU primary law. Third countries cannot expect to get identical EU single market benefits without having similar obligations as EU members. Derogations from EU law must, also for them, be justified, temporary and proportional, in accordance with the case-law of the ECJ. The Commission follows these rules when negotiating with third countries, while trying not to impose unnecessary uniformity. In principle, it takes into account particularities, realities and size. Besides, the teleological jurisprudential interpretation of the Treaties by the ECJ differentiates between the effects of accession treaties and association treaties.

VI. Conclusion

Given the differences of wishes and needs between the 27 EU Member States, various ways to differentiate among them should be encouraged, through derogations, enhanced cooperation or intergovernmental treaties, as long as the level playing field in the single market is respected. It is true that differentiation is not a panacea, but, as Pierre Vimont wrote in 2018, "the merit of debating flexibility could well be in the end to underline that the usual way of handling European affairs may have reached its limits and that a new process for defining and implementing genuine reforms is necessary."[12] I have argued here that marginal differentiation is an acceptable mechanism to allow diversity within the governance of the EU. However, I have also stated my opinion that differentiated governance is not the key to resolving the fundamental problems facing the EU.

Well, the time for "a new process for defining and implementing genuine reforms" has come. The EU was given ambitious aims by its Member States, without being given the necessary means to achieve those aims. This is not fair, while the EU is sometimes

[12] P Vimont, 'Flexibility Is Not the Miracle Solution' (15 August 2018) Carnegie Europe carnegieeurope.eu.

criticised for its insufficient results. We have reached the end of this road. The Council's decision-making is obsolete. A radical reduction of the number of cases allowing individual vetoes, which are undemocratic and prevent the EU from acting, is necessary. Apart from vital issues, individual vetoes should be replaced by a collective vetoes, requiring the opposition of at least a few Member States and a minimal fraction of citizens. Such an option would be more realistic and less drastic than a division of the EU.

The Member States know how difficult it is for the EU to take decisions, with a governance ill-adapted to its membership. Of course, they know even better how difficult it would be, in the present political climate, to get the support of their countries' citizens to a significant EU reform. However, muddling through is not eternally durable. Insufficient EU results will unavoidably lead to a loss of support.

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